

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Washington, DC
June 12–13, 2017**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 12–13, 2017**

AGENDA

I. Opening Business

- A. Welcome and opening remarks
- B. Report on the March 2017 Judicial Conference session
- C. Report on the proposed amendments adopted by the Supreme Court and transmitted to Congress on April 27, 2017
 - Bankruptcy Rules 1001, 1006, 1015, 2002, 3002, 3007, 3012, 3015, 3015.1 (new), 4003, 5009, 7001, and 9009
 - Civil Rule 4(m)
 - Evidence Rules 803(16) and 902
- D. **ACTION:** The Committee will be asked to approve the minutes of the January 3, 2017 Committee meeting

II. Report of the Advisory Committee on Appellate Rules

- A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:
 - Rules 28.1 [*Cross-Appeals*] and 31 [*Serving and Filing Briefs*]
 - Form 4 [*Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis*]
 - Rules 8 [*Stay or Injunction Pending Appeal*], 11 [*Forwarding the Record*], and 39 [*Costs*] (proposed conforming amendments to the proposed amendments to Civil Rule 62)
 - Rule 29 [*Brief of an Amicus Curiae*]
 - Rule 25 [*Filing and Service*]
 - Rule 41 [*Mandate: Contents; Issuance and Effective Date; Stay*]
- B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:
 - Rules 3 [*Appeal as of Right—How Taken*] and 13 [*Appeals from the Tax Court*] (proposed amendments to address references to “mail” and “mailing”)

- Rules 26.1 [*Corporate Disclosure Statement*], 28 [*Briefs*], and 32 [*Form of Briefs, Appendices, and Other Papers*] (disclosure requirements)
- C. Information items
- Update on items considered and either retained for further study or removed from the docket

III. Report of the Advisory Committee on Bankruptcy Rules

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Rules and Official Forms published for public comment:
 - Rule 3002.1 [*Notice of Payment Changes*]
 - Rule 5005(a)(2) [*Electronic Filing and Signing*]
 - Bankruptcy Appellate Rules 8002 [*Time for Filing; Notice of Appeal*], 8006 [*Certifying a Direct Appeal to the Court of Appeals*], 8011 [*Filing and Services; Signature*], 8013 [*Motions; Intervention*], 8015 [*Form and Length of Briefs; Form of Appendices; and Other Papers*], 8016 [*Cross-Appeals*], 8017 [*Brief of Amicus Curiae*], 8022 [*Motion for Rehearing*], and new Rule 8018.1 [*District-Court Review of Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter*]
 - Official Forms 309F [*Notice of Chapter 11 Bankruptcy Case*], 417A [*Notice of Appeal and Statement of Election*], 417C [*Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements*], 425A [*Plan of Reorganization for Small Business Under Chapter 11*], 425B [*Disclosure Statement for Small Business Under Chapter 11*], 425C [*Monthly Operating Report for Small Business Under Chapter 11*], and 426 [*Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*]; and new Part VIII Appendix
- Rules and Official Forms not published for public comment (conforming amendments to the proposed amendments to Civil Rules 62 and 65.1, and Appellate Rules 8, 11, and 39):
 - Rule 7062 [*Stay of Proceedings to Enforce a Judgment*]
 - Rule 8007 [*Stay Pending Appeal; Bonds; Suspension of Proceedings*]
 - Rule 8010 [*Completing and Transmitting the Record*]
 - Rule 8021 [*Costs*]
 - Rule 9025 [*Security; Proceedings Against Sureties*]

- Official Forms 309G (For Individuals or Joint Debtors) [*Notice of Chapter 12 Bankruptcy Case*]; 309H (For Corporations or Partnerships) [*Notice of Chapter 12 Bankruptcy Case*], 309I [*Notice of Chapter 13 Bankruptcy Case*], and 410 [*Proof of Claim*]
- B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:
- Rule 4001 [*Obtaining Credit*]
 - Rules 2002 [*Notices*] and 9036 [*Notice by Electronic Transmission*], and Official Form 410 [*Proof of Claim*] (regarding electronic notice and service)
 - Rule 6007 (regarding notice of abandonment of estate property)
 - Rule 9037 [*Redaction*]
- C. Information items
- Recommendation to publish proposed amendment to Rule 2002(f)(7) and 2002(h) [*Notices*] in 2018
 - Reconsideration of proposed amendments to Rule 8023 [*Voluntary Dismissal*] that were published for comment in 2016

IV. Report of the Advisory Committee on Civil Rules

- A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:
- Rule 5 [*Serving and Filing Pleadings and Other Papers*]
 - Rule 23 [*Class Actions*]
 - Rule 62 [*Stay of Proceedings to Enforce a Judgment*]
 - Rule 65.1 [*Proceedings Against a Surety*]
- B. Information items
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 - Suggestion from the Administrative Conference of the United States regarding Social Security disability review cases
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 - Update on items considered and either retained for further study or removed from the docket

V. Report of the Advisory Committee on Criminal Rules

- A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:
- Rule 49 [*Serving and Filing Papers*] and conforming amendment to Rule 45 [*Additional Time After Certain Kinds of Service*]
 - Rule 12.4 [*Disclosure Statement*]
- B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:
- New Rule 16.1 [*Pretrial Discovery Conference and Modification*]
 - Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts [*The Answer and the Reply*] and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts [*The Answer and the Reply*]
- C. Information items
- Update on the work of the Cooperator Subcommittee and the Director's Task Force on Protecting Cooperators
 - Manual on Complex Criminal Litigation

VI. Report of the Advisory Committee on Evidence Rules

- A. **ACTION:** The Committee will be asked to approve that the following be published for public comment:
- Rule 807 [*Residual Exception*]
- B. Information items
- Consideration of a possible amendment to Rule 801 [*Definitions That Apply to This Article; Exclusions from Hearsay*]
 - Consideration of a possible amendment to Rule 606(b) [*Juror's Competency as a Witness—During an Inquiry into the Validity of a Verdict or Indictment*] (in response to a Supreme Court decision)
 - Consideration of a possible amendment to Rule 404(b) [*Character Evidence; Crimes or Other Acts—Crimes, Wrongs, or Other Acts*]
 - Symposium on Rule 702 [*Testimony by Expert Witnesses*] to be held in conjunction with fall meeting

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- A. Legislative update
- B. Coordination efforts and inter-committee work
- C. Next meeting

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

<p>Chair, Standing Committee</p>	<p>Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156</p>
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<p>Members, Standing Committee</p>	<p>Honorable Rod J. Rosenstein Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W. Washington, DC 20530</p> <p>Honorable Jesse Furman United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501</p> <p>Gregory G. Garre, Esq. Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304</p> <p>Daniel C. Girard, Esq. Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108</p> <p>Honorable Susan P. Graber United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204</p> <p>Honorable Frank Mays Hull United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303</p>

Effective: October 1, 2016
Standing Committee
Revised: May 25, 2017

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COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

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Effective: October 1, 2016
Committee Chairs and Reporters
Revised: May 25, 2017

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Associate Reporter, Advisory Committee on Civil Rules	Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	Professor Sara Sun Beale Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	Honorable William K. Sessions III United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
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Liaison for the Advisory Committee on Bankruptcy Rules	Judge Susan P. Graber <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i> Peter D. Keisler, Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge James C. Dever III <i>(Criminal)</i> Judge Solomon Oliver, Jr. <i>(Civil)</i> Judge Richard C. Wesley <i>(Standing)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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<p>Laural L. Hooper <i>(Criminal Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov</p>	<p>Timothy T. Lau <i>(Evidence Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov</p>

TAB 1

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TAB 1A

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2017 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) held its spring meeting at the Sandra Day O’Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

- | | |
|--|---|
| <p>Judge David G. Campbell, Chair
 Judge Jesse M. Furman
 Gregory G. Garre, Esq.
 Daniel C. Girard, Esq.
 Judge Susan P. Graber
 Judge Frank Mays Hull
 Peter D. Keisler, Esq.</p> | <p>Professor William K. Kelley
 Judge Amy St. Eve
 Professor Larry D. Thompson
 Judge Richard C. Wesley (by telephone)
 Chief Justice Robert P. Young
 Judge Jack Zouhary</p> |
|--|---|

The following attended on behalf of the advisory committees:

- | | |
|--|--|
| <p>Advisory Committee on Appellate Rules –
 Judge Neil M. Gorsuch, Chair
 Professor Gregory E. Maggs, Reporter</p> <p>Advisory Committee on Bankruptcy Rules –
 Judge Sandra Segal Ikuta, Chair
 Professor S. Elizabeth Gibson, Reporter
 Professor Michelle M. Harner,
 Associate Reporter</p> <p>Advisory Committee on Civil Rules –
 Judge John D. Bates, Chair
 Professor Edward H. Cooper, Reporter
 Professor Richard L. Marcus,
 Associate Reporter</p> | <p>Advisory Committee on Criminal Rules –
 Judge Donald W. Molloy, Chair
 Professor Sara Sun Beale, Reporter
 (by telephone)
 Professor Nancy J. King, Associate Reporter
 (by telephone)</p> <p>Advisory Committee on Evidence Rules –
 Judge William K. Sessions III, Chair
 Professor Daniel J. Capra, Reporter</p> |
|--|--|

Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget Healy (by telephone)	Attorney Advisor, RCSO
Hon. Jeremy D. Fogel	Director, Federal Judicial Center (FJC)
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Welcome and Opening Remarks

Judge Campbell called the meeting to order. He introduced the Standing Committee’s new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees’ spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee’s winter meeting is held during the first week of January, after the advisory committees’ fall meetings (which run from September through November) and the holidays, but before the reporters’ spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.

Report on Rules and Forms Effective December 1, 2016

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

*Report on September 2016 Judicial Conference Session,
Proposed Amendments Transmitted to the Supreme Court, and
Rules and Forms Published for Public Comment*

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

INTER-COMMITTEE WORK

Coordination Efforts

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term “supersedeas bond” also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

Five-Year Review of Committee Jurisdiction

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that “every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee’s responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee’s agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee’s current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

Action Item

Technical Amendment to Rule 4(m) – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval.**

Pilot Projects Working Group

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have at least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider

including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the “fourteen-month clock” is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district’s CM/ECF system. When a “case-closing event” occurs in CM/ECF, it can trigger another “CM/ECF case event” directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks’ offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a “before-and-after” comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether “within-court data [was] *more* helpful” than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the “self-selection bias” becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: “What are we comparing?”

Information Items

Rules Published for Public Comment – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee’s fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

Rule 30(b)(6) Subcommittee – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

Redacting Improper Filings: Rule 5.2 – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants’ privacy by permitting court filings to “include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.” The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A) – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law “does not” require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing “does” with “did” inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee’s June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

Service of Subpoenas: Rule 45(b)(1) – Under Rule 45(b)(1), a subpoena is served by “delivering a copy to the named person.” The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

Action Item

Technical Amendment to Rule 4(a)(4)(B)(iii) – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the “clean version” combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court’s order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC’s explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

Information Items

Judge Gorsuch presented the Appellate Rules Committee’s information items: (1) Appellate Rule 3(d)’s references to “mailing” in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1’s corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

Rule 3(d) – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to “mail,” and that the term “mail” appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term “send” in place of “mail,” but those discussions are preliminary. Judge Gorsuch noted that the term “mail” is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to “mailing” (e.g., “sending” and “delivering”) that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

Rule 8(b) – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term “supersedeas bond.”

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—“a bond, other security, a stipulation, or other undertaking”—the second clause mentions only two: “a bond or undertaking.” At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with “a bond, a stipulation, an undertaking, or other security,” and the second clause in the rule with the term “security,” to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to “stipulation,” which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)’s language create an obligation on the part of the other committees to similarly conform. For example, the word “stipulation” is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that “stipulators” be treated as “other security providers,” as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as “sureties or other security provider,” and twice as a “security provider,” and suggested a stylistic change from “surety” to “security provider.” Another member noticed that this would require amending the subsection’s title (“Proceeding Against a Surety”) as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term “bond or other security,” and the “surety” referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

Rule 26.1 and Corporate Disclosure Statements – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity’s involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits’ disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to “supplemental” filings to “later” filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to “file a statement identifying any organizational victim of the alleged criminal activity” absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

Class Action Settlement Objectors – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

Electronic Filing by Pro Se Litigants – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

Additional Issues – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

Action Items

Chapter 13 Official Plan Form and Related Rules Amendments – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out “compromise proposal.”

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommend publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, “A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim” The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word “an” before “equity security holder,” or inserting “an” before “unsecured creditor.” The Standing Committee agreed to remove “an.”

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of “an” from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101 – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004’s cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, “A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.” In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, “**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”

The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(l), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(l)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(l)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have “only a short time”—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

Information Items

Conforming Amendments to Rule 8011 – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year “gap period” between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee’s June 2017 meeting. No member objected to this proposal.

Noticing project and electronic noticing issues – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules’ noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

Coordination – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

Information Items

Fall Symposium – The fall 2016 symposium focused the Evidence Rules Committee’s working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government’s description of the evidence to be more specific than the “general nature,” and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of “independent of any propensity inference” and the noticing requirements.

Rule 807 (“Residual Exception”) – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807’s “residual exception” to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent “exceptional circumstances,” as well as streamline the court’s task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness “equivalent” to the circumstantial guarantees of the Rule 803 and 804 exceptions. This “equivalence standard” is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be “more probative” than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a “presumption of trustworthiness” could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

Rule 801(d)(1)(A) (Testifying Witness’s Prior Inconsistent Statement) – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for “e-hearsay.” Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled “Best Practices for Authenticating Digital Evidence,” was published by West Academic, and will be included as an appendix to its yearly publication.

Rule 702 (Testimony by Expert Witness) – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

Information Items

Section 2255 Rule 5 Subcommittee – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “may submit a reply . . . within a time fixed by the judge.” While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase “within a time fixed by the judge” was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one “capable of repetition, but evading review.” Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule’s intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

Rule 16 Subcommittee – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups’ suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups’ proposed standard for defining a “complex case” and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee’s initial impression, however, was that the problems associated with complex discovery in criminal cases “were attributable to inexperience or indifference” that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

Cooperator Subcommittee – The Criminal Rules Committee’s Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees’ conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

REPORT OF THE ADMINISTRATIVE OFFICE

Task Force on Protecting Cooperators

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

Legislative Report

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1B

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the lawpp. 2–3

2.
 - a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

 - b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8

3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

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

- Federal Rules of Appellate Procedurep. 3
- Federal Rules of Civil Procedure..... pp. 8-13
- Federal Rules of Criminal Procedure.....pp. 13–15
- Federal Rules of Evidencepp. 15–16
- Other Matterspp. 16–17

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

NOTICE

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

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: “No additional fee is required to file an amended notice.” The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that “[c]urrently, every district’s plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district.” The States’ Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court’s then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that “[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained.” *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee’s recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a “form chapter 13 plan,” whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee’s report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a “user’s manual” to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a “user’s manual” and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee’s agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand “[i]f the state law *did* not require an express demand” (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand.

Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing “does” with “did” created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee’s agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a “complex case” and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “*may* submit a reply . . . within a time period fixed by the judge” (emphasis added). The conflict involves the use of the word “*may*.” Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee’s suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee’s working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the “California rule,” under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

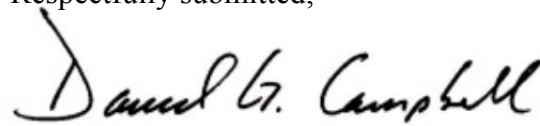
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Susan P. Graber	Sally Q. Yates
Frank M. Hull	Robert P. Young, Jr.
Peter D. Keisler	Jack Zouhary
William K. Kelley	

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

Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms

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

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TAB 2A

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

CHAIRS OF ADVISORY COMMITTEES

**DAVID G. CAMPBELL
CHAIR**

**MICHAEL A. CHAGARES
APPELLATE RULES**

**REBECCA A. WOMELDORF
SECRETARY**

**SANDRA SEGAL IKUTA
BANKRUPTCY RULES**

**JOHN D. BATES
CIVIL RULES**

**DONALD W. MOLLOY
CRIMINAL RULES**

**WILLIAM K. SESSIONS III
EVIDENCE RULES**

MEMORANDUM

**TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure**

**FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules**

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2017

I. Introduction

The Advisory Committee on the Appellate Rules met on May 2, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered six sets of proposed amendments that the Standing Committee published for public comment in August 2016, decided to propose two new sets of amendments for publication, and considered several additional items on its agenda.

Part II of this memorandum concerns the six sets of proposed amendments published for public comment. These proposed amendments would:

- (A) extend the time for filing reply briefs to 21 days under Appellate Rules 28.1 and 31;
- (B) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number;

- (C) conform Appellate Rules 8(a) & (b), 11(g), and 39(e) to the proposed revision of Civil Rule 62(b) by altering clauses that use the term “supersedeas bond”;
- (D) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge’s disqualification;
- (E) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5; and
- (F) address stays of the mandate under Appellate Rule 41.

As described below, in light of public comments, the Advisory Committee recommends no changes to the first two of these published proposals and recommends minor revisions of the other proposals.

Part III of this memorandum concerns the two new proposed sets of amendments that the Advisory Committee recommends publishing for public comment. These new amendments would:

- (A) change the terms “mail” and “mailing” to “send” and “sending” in Appellate Rules 3(d) and 13(c); and
- (B) require additional disclosures to aid judges in deciding whether to recuse themselves under Appellate Rule 26.1.

Part IV of this memorandum presents information about other matters the Advisory Committee is considering. The attached table of agenda items and draft minutes of the April meeting provide additional details of the Advisory Committee’s activities. The Advisory Committee will hold its next meeting in October or November 2017.

II. Action Items: Amendments Previously Published for Public Comment

In August 2016, the Standing Committee published six sets of proposed amendments for public comment. Based on the comments received, the Advisory Committee now makes the following recommendations for amendments to the Appellate Rules.

A. Rules 31(a)(1) & 28.1(f)(4)—Extension of time to file reply briefs

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 31(a)(1) and 28.1(f)(4). These rules currently provide only 14 days after service of the response to file a reply brief in appeals and cross-appeals. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 31(a)(1) and 28.1(f)(4). The Advisory Committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days.

The Advisory Committee received comments on the published proposal from the Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers. These comments both supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendments. The proposed amendments (with changes shown in lines 9 and 25) are as follows:

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

- (1) the appellant’s principal brief, within 40 days after the record is filed;
- (2) the appellee’s principal and response brief, within 30 days after the appellant’s principal brief is served;
- (3) the appellant’s response and reply brief, within 30 days after the appellee’s principal and response brief is served; and
- (4) the appellee’s reply brief, within ~~14~~21 days after the appellant’s response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief,

16 and the committee concluded that shortening the period from 17 days to 14 days
17 could adversely affect the preparation of useful reply briefs. Because time periods are
18 best measured in increments of 7 days, the period is extended to 21 days.

19

20 **Rule 31. Serving and Filing Briefs**

21

(a) Time to Serve and File a Brief.

22

(1) The appellant must serve and file a brief within 40 days after the record is
23 filed. The appellee must serve and file a brief within 30 days after the appellant’s
24 brief is served. The appellant may serve and file a reply brief within ~~14~~21 days
25 after service of the appellee’s brief but a reply brief must be filed at least 7 days
26 before argument, unless the court, for good cause, allows a later filing.

27

* * * * *

28

Committee Note

29

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14
30 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c),
31 attorneys were accustomed to a period of 17 days within which to file a reply brief,
32 and the committee concluded that shortening the period from 17 days to 14 days
33 could adversely affect the preparation of useful reply briefs. Because time periods are
34 best measured in increments of 7 days, the period is extended to 21 days.

B. Form 4—Removal of request for Social Security number digits

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed in forma pauperis must complete this Form. Question 12 of the Form currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee investigated the matter and reported that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question can be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the lack of need for obtaining the last four digits of social security numbers, the Advisory Committee recommended deleting this question.

Following publication of the proposal, the Advisory Committee received comments on the proposal from The World Privacy Forum and the National Association of Criminal Defense Lawyers. Both comments supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendment. The proposed amendment is as follows:

1 **Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma**
2 **Pauperis**

3 * * * * *

4 12. State the city and state of your legal residence.
5 Your daytime phone number: (____) _____
6 Your age: _____ Your years of schooling: _____
7 ~~Last four digits of your social-security number: _____~~

C. Rules 8(a) & (b), 11(g), & 39(e)—References to Supersedeas Bonds

In August 2016, the Standing Committee published for public comment proposed amendments to Rules 8(a) & (b), 11(g), and 39(e). These amendments conform the Appellate Rules to a proposed change to Civil Rule 62(b). Civil Rule 62(b) currently provides: “If an appeal is taken, the appellant may obtain a stay by supersedeas bond” The proposed amendments will eliminate the antiquated term “supersedeas” and allow an appellant to provide “a bond or other security.”

The Pennsylvania Bar Association submitted the only public comment on the proposal. It supported the proposed amendments without change “because they bring the [Appellate] rules into conformity with current practice.”

The Advisory Committee recommends no changes to the proposals to amend Rules 8(a), 11(g), and 39(e), but recommends revising the proposed amendments to Rule 8(b) in two ways. First, to make Rule 8(b) conform to proposed amendments with Civil Rule 65.1, the Advisory Committee recommends rephrasing the heading and the first sentence to refer only to “security” and “security provider” (and not mention specific types of security, such as a bond, stipulation, or other undertaking). The Advisory Committee agrees with the Civil Rules Advisory Committee that this phrasing is simpler and less limiting. Second, the Advisory Committee recommends revising the third sentence of Rule 8(b) by changing the word “mail” to “send.” This change will conform Rule 8(b) to the proposed amendments to Rule 25 that permit electronic filing and service. In addition, the Advisory Committee recommends modifying the Committee Note to explain these two revisions.

The proposed amendments (with revisions indicated by footnotes) are as follows:

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

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

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

5 * * * * *

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

8 * * * * *

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

12 * * * * *

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

15 **(b) Proceeding Against a Surety Security Provider.** If a party gives security in
16 the form of a bond, a stipulation, or other undertaking with one or more sureties
17 security providers, each ~~surety~~ provider submits to the jurisdiction of the district
18 court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any
19 papers affecting ~~the surety's~~ its liability on the security bond or undertaking may be
20 served.¹ On motion, a ~~surety's~~ security provider's liability may be enforced in the

¹ In the proposed amendments published for public comment, the first sentence of Rule 8(b) said: "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, a stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~ its liability on the security bond or undertaking may be served."

21 district court without the necessity of an independent action. The motion and any
22 notice that the district court prescribes may be served on the district clerk, who must
23 promptly ~~mail~~ send² a copy to each ~~surety~~ security provider whose address is known.

24 **Committee Note**³

25 The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the
26 amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party
27 to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to
28 enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by
29 providing a “bond or other security.” The term “security” in the amended
30 subdivision (b) includes but is not limited to the examples of security (i.e., “a bond,
31 a stipulation, or other undertaking”) formerly listed in subdivision (b). The word
32 “mail” is changed to “send” to avoid restricting the method of serving security
33 providers. Other Rules specify the permissible manners of service.

34
35 **Rule 11. Forwarding the Record**

36 * * * * *

37 **(g) Record for a Preliminary Motion in the Court of Appeals.** If, before the
38 record is forwarded, a party makes any of the following motions in the court of
39 appeals:

- 40 • for dismissal;
41 • for release;
42 • for a stay pending appeal;
43 • for additional security on the bond on appeal or on a ~~supersedeas bond~~ or
44 other security provided to obtain a stay of judgment; or

² The proposed amendment published for public comment did not change the word “mail.”

³ The Committee Note published for public comment included only the first two sentences. The last two sentences are new.

45 • for any other intermediate order—
46 the district clerk must send the court of appeals any parts of the record designated by
47 any party.

Committee Note

49 The amendment of subdivision (g) conforms this rule with the amendment of
50 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a
51 “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the
52 judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing
53 a “bond or other security.”



Rule 39. Costs

* * * * *

57 **(e) Costs on Appeal Taxable in the District Court.** The following costs on
58 appeal are taxable in the district court for the benefit of the party entitled to costs
59 under this rule:

- 60 (1) the preparation and transmission of the record;
- 61 (2) the reporter’s transcript, if needed to determine the appeal;
- 62 (3) premiums paid for a **supersedeas** bond or other ~~bond~~ security to preserve
63 rights pending appeal; and
- 64 (4) the fee for filing the notice of appeal.

Committee Note

66 The amendment of subdivisions (e)(3) conforms this rule with the amendment of
67 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a
68 “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the
69 judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing
70 a “bond or other security.”

D. Rule 29(a)—Limitations on Amicus Briefs filed by Party Consent

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 29(a). Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. These local rules conflict with Rule 29(a) because Rule 29(a) imposes no limit on the filing of a brief with party consent. The Advisory Committee decided that Rule 29(a) should be amended to allow courts to prohibit or strike the filing of an amicus brief. The proposed amendment accomplishes this result by adding an exception providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the Advisory Committee decided to revise its proposed amendment to Rule 29 for two reasons. First, other amendments to Rule 29 took effect in December 2016. These other amendments renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. As a result, the Advisory Committee now recommends moving the exception from the former subdivision (a) to the new subdivision (a)(2) and copying this exception into the new subdivision (b)(2). These changes do not alter the meaning or function of the exception. Second, the Advisory Committee recommends rephrasing the exception to improve its clarity. As revised, the exception would authorize a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief). The new word order makes the exception more chronological without changing the meaning or function of the proposed amendment. The revised proposal is as follows:

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs amicus filings during a court’s initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may prohibit

9 the filing of or strike an amicus brief that would result in a judge’s
10 disqualification.⁴

11 * * * * *

12 **(b) During Consideration of Whether to Grant Rehearing.**

13 **(1) Applicability.** This Rule 29(b) governs amicus filings during a court’s
14 consideration of whether to grant panel rehearing or rehearing en banc, unless a
15 local rule or order in a case provides otherwise.

16 **(2) When Permitted.** The United States or its officer or agency or a state may
17 file an amicus-curiae brief without the consent of the parties or leave of court. Any
18 other amicus curiae may file a brief only by leave of court, except that a court of
19 appeals may prohibit the filing of or strike an amicus brief that would result in a
20 judge’s disqualification.⁵

21 * * * * *

22 **Committee Note**

23 The amendment authorizes orders or local rules, such as those previously adopted
24 in some circuits, that prohibit the filing of an amicus brief if the brief would result
25 in a judge’s disqualification. The amendment does not alter or address the standards
26 for when an amicus brief requires a judge’s disqualification.

The Advisory Committee received six comments on the proposed amendment. Five of these comments oppose creating an exception that would allow a court of appeals to prohibit the filing of or strike an amicus brief filed by party consent. Associate Dean Alan B. Morrison of the George Washington University Law School, the Pennsylvania Bar Association, the Federal Bar Council, and Heather Dixon, Esq., assert in their comments that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further assert that the exception could

⁴ The proposed amendment published for public comment said “strike or prohibit the filing of” instead of “prohibit the filing of or strike.”

⁵ The proposal published for public comment did not include the amendments to this subdivision because the subdivision did not go into effect until December 2016.

be wasteful. An amicus curiae may pay an attorney to write a brief and a court then might strike the brief. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The Advisory Committee understands these considerations but has concluded that the exception is necessary given the existence of local rules that currently contradict Rule 29. The Committee has no information suggesting the local rules actually have caused any problems.

Second, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit comments that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” He explains: “It’s a ‘friend of the court brief,’ not a ‘friend brief.’” The Committee understands the criticism but recommends the change for consistency. Rule 29, as revised in December 2016, now uses the term “amicus-curiae brief” in two instances and the term “amicus brief” in six instances. The Committee believes that changing the two instances of “amicus-curiae brief” to “amicus brief” is the most straightforward solution to this problem.

E. Rule 25—Electronic Filing, Signatures, Service, and Proof of Service

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 25. The proposed amendment to subdivision (a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers non-electronically and also provides for exceptions for good cause and by local rule. The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures. The proposed amendment to subdivision (c)(2) addresses electronic service through the court’s electronic-filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other Advisory Committees, the Appellate Rules Advisory Committee recommends minor revisions of the proposed amendments for three reasons. First, amendments that became effective in December 2016 altered the text of subdivision (a)(2)(C), which addresses inmate filings. This change requires a slight relocation of the proposed amendment as shown below.

Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were

expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The Advisory Committee recommends replacing the language published for public comment with a new provision drafted jointly with the other Advisory Committees. This new provision would provide: “An authorized filing made through a person’s electronic-filing account, together with the person’s name on a signature block, constitutes the person’s signature.”

Third, a comment regarding punctuation revealed an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2). The intent was to indicate two methods of serving a paper, not three or four. But the language is ambiguous because the proposals use the word “by” four times. The Advisory Committee recommends addressing this ambiguity by separating the two methods of service using “(A)” and “(B).” The revised provision would provide: “Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court’s electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

As revised in these three ways, the proposal to amend Rule 25 is now as follows:

1 **Appellate Rule 25. Filing and Service**

2 **(a) Filing.**

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

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

6 **(A) Nonelectronic Filing.**

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

10 ~~(B)~~**(ii) A brief or appendix.** A brief or appendix not filed
11 electronically is timely filed, however, if on or before the last day for filing,
12 it is:

13 ~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other
14 class of mail that is at least as expeditious, postage prepaid; or

15 (ii) dispatched to a third-party commercial carrier for delivery to
16 the clerk within 3 days.

17 (iii) **Inmate Filing.**⁶ If an institution has a system designed for legal
18 mail, an inmate confined there must use that system to receive the benefit
19 of this Rule 25(a)(2)(A)(iii). A paper filed not filed electronically by an
20 inmate is timely if it is deposited in the institution’s internal mail system on
21 or before the last day for filing and:

22 (i) it is accompanied by: a declaration in compliance with 28
23 U.S.C. § 1746—or a notarized statement—setting out the date of
24 deposit and stating that first-class postage is being prepaid; or
25 evidence (such as a postmark or date stamp) showing that the
26 paper was so deposited and that postage was prepaid; or

27 (ii) the court of appeals exercises its discretion to permit the later
28 filing of a declaration or notarized statement that satisfies Rule
29 25(a)(2)(A)(iii).

30 (D) **Electronic filing.** A court of appeals may by local rule permit or
31 require papers to be filed, signed, or verified by electronic means that are
32 consistent with technical standards, if any, that the Judicial Conference of
33 the United States establishes. A local rule may require filing by electronic
34 means only if reasonable exceptions are allowed. A paper filed by electronic

⁶ The amendment to subdivision (a)(2)(C) as proposed for public comment said: “A paper filed not filed electronically by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.” The revision reflects the amendment to subdivision (a)(2)(C) that became effective in December 2016.

35 ~~means in compliance with a local rule constitutes a written paper for the~~
36 ~~purpose of applying these rules.~~

37 **(B) Electronic Filing and Signing.**

38 **(i) By a Represented Person—Required; Exceptions.** A person
39 represented by an attorney must file electronically, unless nonelectronic
40 filing is allowed by the court for good cause or is allowed or required by
41 local rule.

42 **(ii) Unrepresented Person—When Allowed or Required.** A person
43 not represented by an attorney:

- 44 • may file electronically only if allowed by court order or by local
- 45 rule; and
- 46 • may be required to file electronically only by court order, or by
- 47 a local rule that includes reasonable exceptions.

48 **(iii) Signing.** An authorized filing made through a person’s
49 electronic-filing account, together with the person’s name on a signature
50 block, constitutes the person’s signature.⁷

51 **(iv) Same as Written Paper.** A paper filed electronically is a written
52 paper for purposes of these rules.

53 (3) **Filing a Motion with a Judge.** If a motion requests relief that may be
54 granted by a single judge, the judge may permit the motion to be filed with the
55 judge; the judge must note the filing date on the motion and give it to the clerk.

56 (4) **Clerk’s Refusal of Documents.** The clerk must not refuse to accept for
57 filing any paper presented for that purpose solely because it is not presented in
58 proper form as required by these rules or by any local rule or practice.

⁷ The proposed amendment published for public comment said: “The user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.”

59 (5) **Privacy Protection.** An appeal in a case whose privacy protection was
60 governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil
61 Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the
62 same rule on appeal. In all other proceedings, privacy protection is governed
63 by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal
64 Procedure 49.1 governs when an extraordinary writ is sought in a criminal
65 case.

66 **(b) Service of All Papers Required.** Unless a rule requires service by the
67 clerk, a party must, at or before the time of filing a paper, serve a copy on the
68 other parties to the appeal or review. Service on a party represented by counsel
69 must be made on the party’s counsel.

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

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

72 (A) personal, including delivery to a responsible person at the office of
73 counsel;

74 (B) by mail; or

75 (C) by third-party commercial carrier for delivery within 3 days; ~~or~~

76 ~~(D) by electronic means, if the party being served consents in writing.~~

77 (2) ~~If authorized by local rule, a party may use the court’s transmission~~
78 ~~equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic
79 service of a paper may be made (A) by sending it to a registered user by filing
80 it with the court’s electronic-filing system or (B) by sending it by other
81 electronic means that the person to be served consented to in writing.⁸

⁸ The proposed amendment published for public comment said: “Electronic service may be made by sending a paper to a registered user by filing it with the court’s electronic-filing system or by using other electronic means that the person consented to in writing.”

82 (3) When reasonable considering such factors as the immediacy of the relief
83 sought, distance, and cost, service on a party person must be by a manner at
84 least as expeditious as the manner used to file the paper with the court.

85 (4) Service by mail or by commercial carrier is complete on mailing or
86 delivery to the carrier. Service by electronic means is complete on ~~transmission~~
87 filing or sending, unless the party person making service is notified that the
88 paper was not received by the party person served.

89 **(d) Proof of Service.**

90 (1) A paper presented for filing must contain either of the following if it was
91 served other than through the court's electronic-filing system:

92 (A) an acknowledgment of service by the person served; or

93 (B) proof of service consisting of a statement by the person who made
94 service certifying:

95 (i) the date and manner of service;

96 (ii) the names of the persons served; and

97 (iii) their mail or electronic addresses, facsimile numbers, or the
98 addresses of the places of delivery, as appropriate for the manner of
99 service.

100 (2) When a brief or appendix is filed by mailing or dispatch in accordance
101 with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date
102 and manner by which the document was mailed or dispatched to the clerk.

103 (3) Proof of service may appear on or be affixed to the papers filed.

104 **(e) Number of Copies.** When these rules require the filing or furnishing of a
105 number of copies, a court may require a different number by local rule or by order
106 in a particular case.

107

Committee Note

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

The Advisory Committee received public comments that criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. These comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically. The Advisory Committee considered these arguments at its October 2016 and Spring 2017 meetings but decided not to change the proposed amendment. The Advisory Committee remains concerned about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.

One public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which addresses filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 published for public comment. The Committee will study the proposal as a new matter.

F. Rule 41—Stays of the mandate

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. The Standing Committee received five public comments about the proposed amendments to Rule 41. In light of these comments, the Advisory Committee recommends two revisions.

First, the Advisory Committee recommends revising subdivision (b) by deleting the previously proposed sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Comments submitted by Judge Jon O. Newman and Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit argue that the sentence is problematic because courts might wish to extend the time for good cause

even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc. The Advisory Committee agrees with these comments. The Advisory Committee believes that the new requirement that a court can extend a stay only “by order” provides sufficient protection against improper extensions.

Second, the Advisory Committee recommends revising subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The National Association of Criminal Defense Lawyers (NACDL) has argued that the proposed amendments do not address a gap in the current rules. The comment explains: “Where a Justice [of the Supreme Court] has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert. petition has been extended.” The Advisory Committee agrees with this suggestion and has added new clause in subdivision (d)(2) that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

As revised in these two ways, the proposal to amend Rule 41 is now as follows:

1 **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

2 (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate
3 consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and
4 any direction about costs.

5 (b) **When Issued.** The court’s mandate must issue 7 days after the time to file a
6 petition for rehearing expires, or 7 days after entry of an order denying a timely
7 petition for panel rehearing, petition for rehearing en banc, or motion for stay of
8 mandate, whichever is later. The court may shorten or extend the time by order.⁹

9 (c) **Effective Date.** The mandate is effective when issued.

10 (d) **Staying the Mandate Pending a Petition for Certiorari.**

11 ~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition~~
12 ~~for panel rehearing, petition for rehearing en banc, or motion for stay of~~

⁹ The amendment published for public comment contained this additional sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).”

13 ~~mandate, stays the mandate until disposition of the petition or motion, unless~~
14 ~~the court orders otherwise.~~

15 ~~(2) **Pending Petition for Certiorari.**~~

16 ~~(A) (1)~~ A party may move to stay the mandate pending the filing of a
17 petition for a writ of certiorari in the Supreme Court. The motion must be
18 served on all parties and must show that the ~~certiorari~~ petition would present
19 a substantial question and that there is good cause for a stay.

20 ~~(B) (2)~~ The stay must not exceed 90 days, unless

21 ~~(i)~~ the period is extended for good cause;

22 ~~(ii)~~ the period for filing a timely petition is extended, in which case the
23 stay will continue for the extended period;¹⁰ or

24 ~~(iii)~~ unless the party who obtained the stay files a petition for the writ
25 and so notifies the circuit clerk in writing within the period of the stay. ~~In~~
26 ~~that case,~~ in which case the stay continues until the Supreme Court's final
27 disposition.

28 ~~(C) (3)~~ The court may require a bond or other security as a condition to
29 granting or continuing a stay of the mandate.

30 ~~(D) (4)~~ The court of appeals must issue the mandate immediately on
31 receiving ~~when~~ a copy of a Supreme Court order denying the petition for writ
32 ~~of certiorari is filed,~~ unless extraordinary circumstances exist.

¹⁰ This clause is new. It was not part of the proposed amendments published for public comment.

33 **Committee Note**

34 **Subdivision (b).**¹¹ Subdivision (b) is revised to clarify that an order is required
35 for a stay of the mandate and to specify the standard for such stays.

36 Before 1998, the Rule referred to a court’s ability to shorten or enlarge the time
37 for the mandate’s issuance “by order.” The phrase “by order” was deleted as part of
38 the 1998 restyling of the Rule. Though the change appears to have been intended as
39 merely stylistic, it has caused uncertainty concerning whether a court of appeals can
40 stay its mandate through mere inaction or whether such a stay requires an order.
41 There are good reasons to require an affirmative act by the court. Litigants—
42 particularly those not well versed in appellate procedure—may overlook the need to
43 check that the court of appeals has issued its mandate in due course after handing
44 down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of
45 notice of a stay was one of the factors that contributed to the Court’s holding that
46 staying the mandate was an abuse of discretion. Requiring stays of the mandate to
47 be accomplished by court order will provide notice to litigants and can also facilitate
48 review of the stay.

49 **Subdivision (d).** Two changes are made in subdivision (d).

50 Subdivision (d)(1)—which formerly addressed stays of the mandate upon the
51 timely filing of a motion to stay the mandate or a petition for panel or en banc
52 rehearing—has been deleted and the rest of subdivision (d) has been renumbered
53 accordingly. In instances where such a petition or motion is timely filed, subdivision
54 (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an
55 order denying the petition or motion. Thus, it seems redundant to state (as

¹¹ This portion of the Committee Note has been revised to remove discussion of the formerly proposed sentence allowing a court to delay issuance of the mandate only in exceptional circumstances.

56 subdivision (d)(1) did) that timely filing of such a petition or motion stays the
57 mandate until disposition of the petition or motion. The deletion of subdivision
58 (d)(1) is intended to streamline the Rule; no substantive change is intended.

59 Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that
60 a mandate stayed pending a petition for certiorari must issue immediately once the
61 court of appeals receives a copy of the Supreme Court’s order denying certiorari,
62 unless the court of appeals finds that extraordinary circumstances justify a further
63 stay. Without deciding whether the prior version of Rule 41 provided authority for
64 a further stay of the mandate after denial of certiorari, the Supreme Court ruled that
65 any such authority could be exercised only in “extraordinary circumstances.” *Ryan*
66 *v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision
67 (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari,
68 and also makes explicit that such a stay is permissible only in extraordinary
69 circumstances. Such a stay cannot occur through mere inaction but rather requires
70 an order.

71 The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme
72 Court’s order is replaced by a reference to the court of appeals’ *receipt* of a copy of
73 the Supreme Court’s order. The filing of the copy and its receipt by the court of
74 appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that “filing
75 is not timely unless the clerk receives the papers within the time fixed for filing”), but
76 “upon receiving a copy” is more specific and, hence, clearer.

77 Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate
78 for a party to file a petition for certiorari, and a Justice of the Supreme Court
79 subsequently extends the time for filing the petition, the stay automatically continues
80 for the extended period.¹²

¹² This sentence is new. It was not included Committee Note published for public comments in August 2016.

III. Action Items: New Amendments Proposed for Publication

The Advisory Committee recommends that the Standing Committee publish two new sets of proposed amendments for public comment. The amendments concern the use of the word “mail” in Rules 3(d) and 13(c) and corporate disclosures under Rule 26.1.

A. Rules 3(d) & 13(c)—Changing “Mail” to “Send”

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.¹³ In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether other Rules that require parties to “mail” documents also should be amended. Following its study of all the rules that use the word “mail,” the Advisory Committee recommends changes to Rules 3(d) and 13(c).

Rule 3(d) concerns the clerk’s service of the notice of appeal. The Advisory Committee concluded that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown below. First, in lines 5 and 18, the words “mailing” and “mails” should be replaced with “sending” and “sends” to make electronic filing and service possible. Second, as indicated in lines 8-9, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case “either by personal service or by mail addressed to the defendant” should be deleted. These changes will eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending a copy to each party’s counsel of record—excluding the appellant’s—or, if a party is proceeding pro se, to the party’s last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, ~~either by personal service or by mail addressed to~~

¹³ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), <http://www.uscourts.gov/file/20163/download>.

9 ~~the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the
10 docket entries—and any later docket entries—to the clerk of the court of appeals
11 named in the notice. The district clerk must note, on each copy, the date when the
12 notice of appeal was filed.

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

16 (3) The district clerk’s failure to serve notice does not affect the validity of the
17 appeal. The clerk must note on the docket the names of the parties to whom the clerk
18 ~~mails~~ sends copies, with the date of ~~mailing~~ sending. Service is sufficient despite the
19 death of a party or the party’s counsel.

20 Committee Note

21 Amendments to Subdivision (d) change the words “mailing” and “mails” to
22 “sending” and “sends” to make electronic service possible. Other rules determine
23 when a party or the clerk may or must send a notice electronically or non-
24 electronically.

Rule 13 concerns appeals from the Tax Court. This rule uses the word “mail” in both its first and second sentences. Changing the reference in the first sentence as shown in the discussion draft below would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the Advisory Committee does not recommend a change to the second sentence.

1 **Rule 13. Appeals From the Tax Court**

2 **(a) Appeal as of Right.**

3 * * * * *

4 **(2) Notice of Appeal; How Filed.** The notice of appeal may be filed either at
5 the Tax Court clerk’s office in the District of Columbia or by ~~mail~~ ~~addressed~~

6 sending it to the clerk. If sent by mail the notice is considered filed on the
7 postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and
8 the applicable regulations.

9 * * * * *

10 ADVISORY COMMITTEE NOTE

11 The amendment to subdivision (a)(2) will allow an appellant to send a notice of
12 appeal to the Tax Court clerk by means other than mail. Other rules determine when
13 a party must send a notice electronically or non-electronically.

Four other Rules also use the term “mail.” Rules 8 and 25 are addressed in Part II.C. and II.D. of this memorandum above. Rule 4(c) concerns appeals by inmates confined in an institution. As amended in December 2016, Rule 4(c) provides in part: “If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1).” Rule 4(c)(1) specifies the rules for when mail deposited by inmates is timely. Rule 4(c) does not appear to require any changes. The Rule does not require filing by mail but instead establishes principles that apply when inmates use an institution’s system for legal mail (which they may continue to do notwithstanding the changes to Rule 25). Rule 26, as amended in 2016, specifies rules for computing and extending time. Subdivision (a)(4)(C) defines the term “last day” as follows:

Unless a different time is set by a statute, local rule, or court order, the last day ends:
. . . (C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by
mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the
post office, third-party commercial carrier, or prison mailing system

Although this provision uses the words “mail” and “mailing,” it does not require revision. The Rule specifies the method for calculating time when mail is used. It does not specify when mail may or may not be used.

B. Disclosure Requirements under Rule 26.1

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party’s related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require.

At its October 2016 meeting, the Advisory Committee tabled consideration of proposed amendments to Rule 26.1(a) and 29(c), which would have required disclosures concerning publicly held entities other than corporations and concerning judges and witnesses in prior proceedings. The Committee determined that the burdens imposed by those additional disclosure requirements outweighed the benefits.

The Advisory Committee, however, proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words “In a criminal case” and the reference to “Rule 26.1(a)” instead of Criminal Rule 12.4(a)(1).

The Advisory Committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor’s creditors. *See, e.g., Meyers Law Grp., P.C. v. Diversified Realty Servs., Inc.*, 647 F. App’x 736, 738 (9th Cir. 2016) (adversary proceeding in bankruptcy of Greg James Ventures LLC).

The Advisory Committee considered requiring additional disclosures in bankruptcy cases, including disclosure of (a) each committee of creditors, (b) the parties to any adversary proceeding, and (c) any active participants in a contested matter. But in consultation with representatives of the Bankruptcy Rules Advisory Committee, the Advisory Committee decided not to require these disclosures. Requiring disclosure of each committee of creditors would be over-inclusive because the members of a committee of creditors would not necessarily have any interest in a particular appeal. Disclosure of parties to any adversary proceeding and active participants in a contested matter is unnecessary because appellate judges do not need the names of other adversaries and other participants in contested matters if those matters are not before the court.

Current subdivision (b) addresses supplemental filings. The Advisory Committee considered amending this subdivision to make it conform to proposed amendments to Criminal Rule 12.4(b) published for public comment in August 2016. The Criminal Rules Advisory Committee, however, has informed the Advisory Committee that it intends to scale back its proposed revision of Criminal Rule 12.4(b) and recommends no changes to the Appellate Rules.

The Advisory Committee recommends moving current subdivisions (b) and (c) to the end of Rule 26.1 by designating them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements.

The proposed amendments to Rule 26.1 are as follows:

1 **Rule 26.1 Corporate Disclosure Statement**

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

6 **(b) Organizational Victim in a Criminal Case.** In a criminal case, unless the
7 government shows good cause, it must file a statement identifying any organizational
8 victim of the alleged criminal activity. If the organizational victim is a corporation,
9 the statement must also disclose the information required by Rule 26.1(a) to the
10 extent it can be obtained through due diligence.

11 **(c) Bankruptcy Proceedings.** In a bankruptcy proceeding, the debtor, the trustee,
12 or, if neither is a party, the appellant must file a statement that identifies each debtor
13 not named in the caption. If the debtor is a corporation, the statement must also
14 identify any parent corporation and any publicly held corporation that holds 10
15 percent or more of its stock, or must state that there is no such corporation.

16 **(d) Intervenors.** A person who wants to intervene must file a statement that
17 discloses the information required by Rule 26.1.

18 ~~(b)~~**(e) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a)
19 statement with the principal brief or upon filing a motion, response, petition, or
20 answer in the court of appeals, whichever occurs first, unless a local rule requires
21 earlier filing. Even if the statement has already been filed, the party's principal brief
22 must include the statement before the table of contents. A party must supplement its

23 statement whenever the information that must be disclosed under Rule 26.1(a) changes.

24 (e)(f) **Number of Copies.** If the Rule 26.1(a) statement is filed before the
25 principal brief, or if a supplemental statement is filed, the party must file an original
26 and 3 copies unless the court requires a different number by local rule or by order in
27 a particular case.

28 COMMITTEE NOTE

29 The new subdivision (b) follows amendments to Criminal Rule 12.4(a)(2). It
30 requires disclosure of organizational victims in criminal cases because a judge might
31 have an interest in one of the victims. But the disclosure requirement is relaxed in
32 situations in which disclosure would be overly burdensome to the government. For
33 example, thousands of corporations might be the victims of a criminal antitrust
34 violation, and the government may have great difficulty identifying all of them. The
35 new subdivision (c) requires disclosure of the name of all of the debtors in
36 bankruptcy proceedings. The names of the debtors are not always included in the
37 caption in appeals of adversary proceedings. The new subdivision (d) requires
38 intervenors to make the same disclosures as parties. Subdivisions (e) and (f) now
39 apply to all of the disclosure requirements.

Changing Rule 26.1's heading from "Corporate Disclosure Statement" to "Disclosure Statement" will require conforming amendments to Rules 28(a)(1) and 32(f). References to "corporate disclosure statement" must be changed to "disclosure statement." The following proposed drafts show the required changes in lines 4 and 16.

1 **Rule 28. Briefs**

2 (a) **Appellant's Brief.** The appellant's brief must contain, under appropriate
3 headings and in the order indicated:

4 (1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

5 * * * * *

6 Committee Note

7 The phrase “corporate disclosure statement” is changed to “disclosure statement”
8 to reflect the revision of the title of Rule 26.1.

9 _____
10 **Rule 32. Form of Briefs, Appendices, and Other Papers**

11 * * * * *

12 **(f) Items Excluded from Length.** In computing any length limit, headings,
13 footnotes, and quotations count toward the limit but the following items do not:

- 14 • the cover page;
- 15 • a ~~corporate~~ disclosure statement;
- 16 • a table of contents;
- 17 • a table of citations;
- 18 • a statement regarding oral argument;
- 19 • an addendum containing statutes, rules, or regulations;
- 20 • certificates of counsel;
- 21 • the signature block;
- 22 • the proof of service; and
- 23 • any item specifically excluded by these rules or by local rule.

24 * * * * *

25 Committee Note

26 The phrase “corporate disclosure statement” is changed to “disclosure statement”
27 to reflect the revision of the title of Rule 26.1.

For the reasons explained above, the Advisory Committee recommends that the Standing Committee publish for public comment the proposed amendments to Rules 26.1 and the conforming changes to Rules 27, 28, and 32.

IV. Information Items

At its May 2017 meeting, the Advisory Committee considered four additional items. Item 16-AP-C concerned a proposal to amend Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as “published” decisions. The Advisory Committee determined that the proposed revisions were unnecessary because these orders are already available on Pacer and in commercial databases. Item 16-AP-D concerned a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). The Advisory Committee removed this item from its agenda because the Civil Rules Advisory Committee had decided not to pursue the proposal. Item 17-AP-A concerned a proposal to amend Rules 4 and 27 to address certain types of subpoenas. The Advisory Committee removed this item from its agenda because the proposed amendments appeared to rest on a misunderstanding of the cited Rules. Item 17-AP-B concerned a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. The Advisory Committee discussed the matter at length but decided against pursuing it. Members of the Advisory Committee expressed concern about adding more technical rules that attorneys might have difficulty following and about directing counsel on matters of advocacy.

The Advisory Committee continues to study possible ways to reduce the cost and increase the speed of federal appellate litigation. At the spring 2017 meeting, the Advisory Committee discussed the collateral order doctrine, a list of suggestions submitted by the American Academy of Appellate Lawyers (AAAL), and a proposal to provide properly formatted word-processing templates of briefs and other documents. Although the Advisory Committee did not develop any specific proposals at the May 2017 meeting, the Advisory Committee’s work on the subject of increasing the speed and efficiency of appellate litigation will continue.

Enclosures:

1. Draft Minutes from the May 2, 2017 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Revised Text of Proposed Amendments Published in August 2016
4. Text of New Items Proposed for Publication

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TAB 2B

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

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

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

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

6 * * * * *

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

10 * * * * *

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

¹ New material is underlined; matter to be omitted is lined through.

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15 * * * * *

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

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

32 send a copy to each ~~surety~~security
33 provider whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.” The word “mail” is changed to “send” to avoid restricting the method of serving security providers. Other Rules specify the permissible manners of service.

Changes Made After Publication and Comment

- The heading and first sentence of subdivision (b) are changed to refer only to “security” and “security provider” and do not mention specific types of security (such as a bond, stipulation, or other undertaking) or specific types of security providers (such as a surety).
- In the third sentence of subdivision (b), the word “mail” is changed to “send.”

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Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 8 into conformity with current practice.

1 **Rule 11. Forwarding the Record**

2 * * * * *

3 **(g) Record for a Preliminary Motion in the Court of**

4 **Appeals.** If, before the record is forwarded, a party
5 makes any of the following motions in the court of
6 appeals:

- 7 • for dismissal;
- 8 • for release;
- 9 • for a stay pending appeal;
- 10 • for additional security on the bond on appeal or
- 11 on a supersedeas bond or other security provided
- 12 to obtain a stay of judgment; or
- 13 • for any other intermediate order—

14 the district clerk must send the court of appeals any
15 parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 11 into conformity with current practice.

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

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

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

7 **(A) Nonelectronic Filing.**

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

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

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17 is timely filed, however, if on or
18 before the last day for filing, it is:
19 ~~(i)~~ mailed to the clerk by ~~First-~~
20 ~~Class Mail~~first-class mail,
21 or other class of mail that is
22 at least as expeditious,
23 postage prepaid; or
24 ~~(ii)~~ dispatched to a third-party
25 commercial carrier for
26 delivery to the clerk within
27 3 days.
28 ~~(C)(iii)~~ **Inmate filing.** If an institution
29 has a system designed for legal
30 mail, an inmate confined there
31 must use that system to receive
32 the benefit of this
33 Rule 25(a)(2)(C)~~(A)~~(iii). A

34 paper ~~filed~~not filed electronically
35 by an inmate is timely if it is
36 deposited in the institution's
37 internal mail system on or before
38 the last day for filing and:
39 (i) it is accompanied by: ~~a~~
40 declaration in compliance
41 with 28 U.S.C. § 1746—or
42 a notarized statement—
43 setting out the date of
44 deposit and stating that
45 first-class postage is being
46 prepaid; or ~~evidence~~ (such
47 as a postmark or date
48 stamp) showing that the
49 paper was so deposited and
50 that postage was prepaid; or

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51 (ii) the court of appeals
52 exercises its discretion to
53 permit the later filing of a
54 declaration or notarized
55 statement that satisfies
56 Rule 25(a)(2)(C)(i)(A)(iii).

57 ~~(D) **Electronic filing.** A court of appeals may~~
58 ~~by local rule permit or require papers to be~~
59 ~~filed, signed, or verified by electronic~~
60 ~~means that are consistent with technical~~
61 ~~standards, if any, that the Judicial~~
62 ~~Conference of the United States establishes.~~
63 ~~A local rule may require filing by electronic~~
64 ~~means only if reasonable exceptions are~~
65 ~~allowed. A paper filed by electronic means~~
66 ~~in compliance with a local rule constitutes a~~

67 ~~written paper for the purpose of applying~~
68 ~~these rules.~~

69 **(B) Electronic Filing and Signing.**

70 **(i) By a Represented Person—**

71 **Required; Exceptions. A**

72 person represented by an.

73 attorney must file electronically,

74 unless nonelectronic filing is

75 allowed by the court for good

76 cause or is allowed or required

77 by local rule.

78 **(ii) Unrepresented Person—When**

79 **Allowed or Required. A person**

80 not represented by an attorney:

81 • may file electronically only if

82 allowed by court order or by

83 local rule; and

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84 • may be required to file
85 electronically only by court
86 order, or by a local rule that
87 includes _____ reasonable
88 exceptions.

89 (iii) **Signing.** An authorized filing
90 made through a person's
91 electronic-filing _____ account,
92 together with the person's name
93 on a signature block, constitutes
94 the person's signature.

95 (iv) **Same as Written Paper.** A
96 paper filed electronically is a
97 written paper for purposes of
98 these rules.

99 (3) **Filing a Motion with a Judge.** If a motion
100 requests relief that may be granted by a single

101 judge, the judge may permit the motion to be
 102 filed with the judge; the judge must note the
 103 filing date on the motion and give it to the clerk.

104 (4) **Clerk’s Refusal of Documents.** The clerk must
 105 not refuse to accept for filing any paper
 106 presented for that purpose solely because it is not
 107 presented in proper form as required by these
 108 rules or by any local rule or practice.

109 (5) **Privacy Protection.** An appeal in a case whose
 110 privacy protection was governed by Federal Rule
 111 of Bankruptcy Procedure 9037, Federal Rule of
 112 Civil Procedure 5.2, or Federal Rule of Criminal
 113 Procedure 49.1 is governed by the same rule on
 114 appeal. In all other proceedings, privacy
 115 protection is governed by Federal Rule of Civil
 116 Procedure 5.2, except that Federal Rule of

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117 Criminal Procedure 49.1 governs when an
118 extraordinary writ is sought in a criminal case.

119 **(b) Service of All Papers Required.** Unless a rule
120 requires service by the clerk, a party must, at or before
121 the time of filing a paper, serve a copy on the other
122 parties to the appeal or review. Service on a party
123 represented by counsel must be made on the party's
124 counsel.

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

126 (1) ~~Service~~Nonelectronic service may be any of the
127 following:

128 (A) personal, including delivery to a
129 responsible person at the office of counsel;

130 (B) by mail; or

131 (C) by third-party commercial carrier for
132 delivery within 3 days; ~~or~~.

133 ~~(D) by electronic means, if the party being~~
134 ~~served consents in writing.~~

135 (2) ~~If authorized by local rule, a party may use the~~
136 ~~court's transmission equipment to make~~
137 ~~electronic service under Rule 25(e)(1)(D)~~
138 Electronic service of a paper may be made (A)
139 by sending it to a registered user by filing it with
140 the court's electronic-filing system or (B) by
141 sending it by other electronic means that the
142 person to be served consented to in writing.

143 (3) When reasonable considering such factors as the
144 immediacy of the relief sought, distance, and
145 cost, service on a party must be by a manner at
146 least as expeditious as the manner used to file the
147 paper with the court.

148 (4) Service by mail or by commercial carrier is
149 complete on mailing or delivery to the carrier.

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150 Service by electronic means is complete on
151 ~~transmission~~filing, unless the party making
152 service is notified that the paper was not received
153 by the party served.

154 **(d) Proof of Service.**

155 (1) A paper presented for filing other than through
156 the court's electronic-filing system must contain
157 either of the following:

158 (A) an acknowledgment of service by the
159 person served; or

160 (B) proof of service consisting of a statement
161 by the person who made service certifying:

162 (i) the date and manner of service;

163 (ii) the names of the persons served; and

164 (iii) their mail or electronic addresses,
165 facsimile numbers, or the addresses of

166 the places of delivery, as appropriate
167 for the manner of service.

168 (2) When a brief or appendix is filed by mailing or
169 dispatch in accordance with
170 Rule 25(a)(2)(B)(2)(A)(ii), the proof of service
171 must also state the date and manner by which the
172 document was mailed or dispatched to the clerk.

173 (3) Proof of service may appear on or be affixed to
174 the papers filed.

175 (e) **Number of Copies.** When these rules require the
176 filing or furnishing of a number of copies, a court may
177 require a different number by local rule or by order in
178 a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes

exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Changes Made After Publication and Comment

- In subdivision (a)(2)(C), the location of the proposed additional words “not filed electronically” are moved because of amendments to this subdivision that became effective in December 2016.
- Subdivision (a)(2)(B)(iii) is rewritten to change the standard for what constitutes a signature.
- Subdivision 25(c)(2) is rephrased for clarity.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—In proposed rule 25(c)(2), a comma is needed after “user”; a comma is needed after “system”; and the word “served” should be inserted after “person.”

Ms. Cheryl L. Siler, Aderant CompuLaw (AP-2016-0002-0009)—Subdivision 25(c)(2) should be revised to be uniform with proposed Civil Rule (5)(b)(2).

Mr. Michael Rosman (AP-2016-0002-0010)—Subdivision 25(a)(2)(B)(iii) does not define “user name” or “password.” A person filing a paper might not yet be an attorney of record. The subdivision does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties.

Heather Dixon, Esq. (AP-2016-0002-0014)—The signature provision should be revised to make it clear that the attorney’s user name and password are not to be included in the signature block.

New York City Bar Association (AP-2016-0002-0017)—Rule 25(a)(2)(B)(iii) could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed.

Sai (AP-2016-0002-0018)—The amendments should (1) remove the presumptive prohibition on pro se use of electronic filing and instead grant presumptive access; (2) treat pro se status as a rebuttably presumed good cause for nonelectronic filing; (3) require courts to allow pro se access on par with attorney filers; (4) permit individualized prohibitions for good cause, e.g., for vexatious litigants; (5) change and conform the “signature” paragraph with Federal Rule of Civil Procedure 5.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The elimination of the requirement of a certificate of service for electronically served documents should be made. The proposed rule on filing by unrepresented parties is satisfactory. The proposed amendment overlooks an important change applicable to

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filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification.

* * * * *

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court’s consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge’s disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

Changes Made After Publication and Comment

- The word order of the proposed exception allowing a court to “prohibit the filing of or strike” an amicus brief was changed for stylistic purposes.
- The placement of the proposed exception was moved from subdivision (a) to subdivision (a)(2) because of amendments that took effect in December 2016.
- The proposed exception in subdivision (a)(2) was also added to the new subdivision (b)(2) created by amendments that took effect in December 2016.
- The phrase “amicus-curiae brief” is shortened to “amicus brief” in subdivision (b)(2) for consistency with other subdivisions.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—The word “curiae” should not be deleted. It’s a “friend of the court brief,” not a “friend brief.”

Associate Dean Alan B. Morrison (AP-2016-0002-0003)—The likelihood of a strategic attempt to file an amicus brief that would cause the recusal of a judge is very small. The parties typically do not know the identity of the judges on the panel until shortly before the deadline for filing, and they also typically do not know the judge's recusal policies. The possible benefits of the rule do not outweigh its costs. Preventing the recusal of a judge might require all the money and effort put into an amicus brief to be wasted.

The Pennsylvania Bar Association (AP-2016-0002-0012)—Neither the amicus nor its counsel have any idea whether the filing of the brief would trigger recusal of a judge who ultimately would be assigned to the case. It seems unreasonable under such circumstances to prohibit or strike the amicus brief, instead of simply allowing the judge to recuse.

Federal Bar Council (AP-2016-0002-0013)—The changes may be unnecessary. Several of the local rules only address amicus briefs filed at the stage of rehearing or rehearing en banc. The new subdivision (b) of Rule 29 now addresses such filings. The Advisory Committee should wait until the courts of appeals have had sufficient experience with the new Appellate Rule 29(b) to assess whether it adequately addresses the problem of amicus briefs that might cause recusals.

Heather Dixon, Esq. (AP-2016-0002-0014)—The subdivision should be rewritten to say that once a panel of judges has been assigned to a case, amicus curiae briefing

that would result in recusal of an assigned judge will only be permitted where the amicus curiae brief would (a) provide the court with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the court's decision and (ii) has not been made known to the court by the parties' briefing.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be rewritten to emphasize that the only reasons for striking brief are interests in case-processing or a substantiated concern about judge-shopping.

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1 **Rule 39. Costs**

2 * * * * *

3 **(e) Costs on Appeal Taxable in the District Court.** The
4 following costs on appeal are taxable in the district
5 court for the benefit of the party entitled to costs under
6 this rule:

- 7 (1) the preparation and transmission of the record;
8 (2) the reporter’s transcript, if needed to determine
9 the appeal;
10 (3) premiums paid for a ~~supersedeas~~ bond or other
11 ~~bond~~security to preserve rights pending appeal;
12 and
13 (4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments to Rule 39 bring the rules into conformity with current practice.

1 **Rule 41. Mandate: Contents; Issuance and Effective**
2 **Date; Stay**

3 **(a) Contents.** Unless the court directs that a formal
4 mandate issue, the mandate consists of a certified
5 copy of the judgment, a copy of the court’s opinion, if
6 any, and any direction about costs.

7 **(b) When Issued.** The court’s mandate must issue 7 days
8 after the time to file a petition for rehearing expires, or
9 7 days after entry of an order denying a timely petition
10 for panel rehearing, petition for rehearing en banc, or
11 motion for stay of mandate, whichever is later. The
12 court may shorten or extend the time by order.

13 **(c) Effective Date.** The mandate is effective when
14 issued.

15 **(d) Staying the Mandate Pending a Petition for**
16 **Certiorari.**

1 ~~(1) **On Petition for Rehearing or Motion.** The~~
2 ~~timely filing of a petition for panel rehearing,~~
3 ~~petition for rehearing en banc, or motion for stay~~
4 ~~of mandate, stays the mandate until disposition~~
5 ~~of the petition or motion, unless the court orders~~
6 ~~otherwise.~~

7 ~~(2) **Pending Petition for Certiorari.**~~

8 ~~(A)~~(1) A party may move to stay the mandate pending
9 the filing of a petition for a writ of certiorari in
10 the Supreme Court. The motion must be served
11 on all parties and must show that the ~~certiorari~~
12 petition would present a substantial question and
13 that there is good cause for a stay.

14 ~~(B)~~(2) The stay must not exceed 90 days, unless

15 (i) the period is extended for good cause;

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1 (ii) the period for filing a timely petition is
2 extended, in which case the stay will
3 continue for the extended period; or

4 (iii) unless the party who obtained the stay files
5 a petition for the writ and so notifies the
6 circuit clerk in writing within the period of
7 the stay. In that case, the stay continues
8 until the Supreme Court's final disposition.

9 ~~(C)~~—(3) The court may require a bond or other security
10 as a condition to granting or continuing a stay of
11 the mandate.

12 ~~(D)~~—(4) The court of appeals must issue the mandate
13 immediately ~~when~~ receiving a copy of a
14 Supreme Court order denying the petition ~~for~~
15 ~~writ of certiorari is filed,~~ unless extraordinary
16 circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court’s ability to shorten or enlarge the time for the mandate’s issuance “by order.” The phrase “by order” was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court’s holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a

petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in “extraordinary circumstances.” *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court’s order is replaced by a reference to the court of appeals’ *receipt* of a copy of the Supreme Court’s order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that “filing is not timely unless the clerk receives the papers within the time

fixed for filing”), but “upon receiving a copy” is more specific and, hence, clearer.

Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Changes Made After Publication and Comment

- In subdivision (b), the proposed additional sentence is deleted. The proposed sentence would have provided that a court may extend the time when the mandate must issue only in extraordinary circumstances.
- A new clause is added to subdivision (d)(2) that extends a stay automatically if the time for filing a certiorari petition is extended. None.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—A court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. For example, when a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or

because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as “extraordinary circumstances.”

Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit (AP-2016-0002-0006)—All the active judges of the U.S. Court of Appeals for the Second Circuit and all the senior judges who have had the opportunity to review Judge Newman’s comment endorse his call for reconsideration of Rule 41(b).

Zachary Shemtob, New York City Bar Association (AP-2016-0002-0006)—We agree with the comments submitted by Judge Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b).

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The “extraordinary circumstances” standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in capital cases.

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1 **Form 4. Affidavit Accompanying Motion for**

2 **Permission to Appeal in Forma Pauperis**

3 * * * * *

4 12. State the city and state of your legal residence.

5 Your daytime phone number: (____) _____

6 Your age: _____ Your years of schooling: _____

7 ~~Last four digits of your social security number: _____~~

Changes Made After Publication and Comment

None.

Summary of Public Comments

Pam Dixon, World Privacy Forum (AP-2016-0002-0008)—The proposed amendment should be made. Collection and maintenance of any personally identifiable information (such as a SSN, whether whole or partial) creates a concern about personal privacy. A social security number does a poor job of identification and authentication. The consensus of clerks of court is that the last four digits of a SSN serve no purpose and could be eliminated.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be made.

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TAB 2C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE***

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

2 * * * * *

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

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

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

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16 named in the notice. The district clerk must
17 note, on each copy, the date when the notice of
18 appeal was filed.

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

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

30 * * * * *

Committee Note

Amendments to Subdivision (d) change the words “mailing” and “mails” to “sending” and “sends” to make electronic service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

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1 **Rule 13. Appeals From the Tax Court**

2 **(a) Appeal as of Right.**

3 * * * * *

4 **(2) Notice of Appeal; How Filed.** The notice of
5 appeal may be filed either at the Tax Court
6 clerk's office in the District of Columbia or by
7 ~~mail addressed~~ sending it to the clerk. If sent by
8 mail the notice is considered filed on the
9 postmark date, subject to § 7502 of the Internal
10 Revenue Code, as amended, and the applicable
11 regulations.

12 * * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

1

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1 **Rule 26.1 ~~Corporate~~ Disclosure Statement**2 (a) ~~Who Must File~~ **Nongovernmental Corporate Party.**

3 Any nongovernmental corporate party to a proceeding
4 in a court of appeals must file a statement that
5 identifies any parent corporation and any publicly
6 held corporation that owns 10% or more of its stock or
7 states that there is no such corporation.

8 **(b) Organizational Victim in a Criminal Case. In a**
9 **criminal case, unless the government shows good**
10 **cause, it must file a statement identifying any**
11 **organizational victim of the alleged criminal activity.**
12 **If the organizational victim is a corporation, the**
13 **statement must also disclose the information required**
14 **by Rule 26.1(a) to the extent it can be obtained**
15 **through due diligence.**

16 **(c) Bankruptcy Proceedings. In a bankruptcy**
17 **proceeding, the debtor, the trustee, or, if neither is a**

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18 party, the appellant must file a statement that
19 identifies each debtor not named in the caption. If the
20 debtor is a corporation, the statement must also
21 identify any parent corporation and any publicly held
22 corporation that holds 10 percent or more of its stock,
23 or must state that there is no such corporation.

24 (d) **Intervenors.** A person who wants to intervene must
25 file a statement that discloses the information required
26 by Rule 26.1.

27 ~~(b)~~(e) **Time for Filing; Supplemental Filing.** A party
28 must file the Rule 26.1~~(a)~~ statement with the principal
29 brief or upon filing a motion, response, petition, or
30 answer in the court of appeals, whichever occurs first,
31 unless a local rule requires earlier filing. Even if the
32 statement has already been filed, the party's principal
33 brief must include the statement before the table of
34 contents. A party must supplement its statement

35 whenever the information that must be disclosed
36 under Rule 26.1~~(a)~~ changes.

37 ~~(e)~~**(f) Number of Copies.** If the Rule 26.1(a) statement is
38 filed before the principal brief, or if a supplemental
39 statement is filed, the party must file an original and 3
40 copies unless the court requires a different number by
41 local rule or by order in a particular case.

Committee Note

The new subdivision (b) follows amendments to Criminal Rule 12.4(a)(2). It requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. The new subdivision (c) requires disclosure of the name of all of the debtors in bankruptcy proceedings. The names of the debtors are not always included in the caption in appeals of adversary proceedings. The new subdivision (d) requires intervenors to make the same disclosures as parties. Subdivisions (e) and (f) now apply to all of the disclosure requirements.

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1 **Rule 28. Briefs**

2 **(a) Appellant’s Brief.** The appellant’s brief must contain,
3 under appropriate headings and in the order indicated:

- 4 (1) a ~~corporate~~ disclosure statement if required by
5 Rule 26.1;

6 * * * * *

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of the title of Rule 26.1.

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1 **Rule 32. Form of Briefs, Appendices, and Other Papers**

2 **(f) Items Excluded from Length.** In computing any
3 length limit, headings, footnotes, and quotations count
4 toward the limit but the following items do not:

- 5 • the cover page;
- 6 • a ~~corporate~~ disclosure statement;
- 7 • a table of contents;
- 8 • a table of citations;
- 9 • a statement regarding oral argument;
- 10 • an addendum containing statutes, rules, or
11 regulations;
- 12 • certificates of counsel;
- 13 • the signature block;
- 14 • the proof of service; and
- 15 • any item specifically excluded by these
16 rules or by local rule.

17 * * * * *

10 FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of the title of Rule 26.1.

TAB 2D

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**Advisory Committee on Appellate Rules
Table of Agenda Items —May 2017**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 06/17 for submission to Standing Committee
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

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TAB 2E

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**DRAFT Minutes of the Spring 2017 Meeting of the
Advisory Committee on the Appellate Rules**

May 2, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, May 2, 2017, at 9:30 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Professor Stephen E. Sachs. Acting Solicitor General Jeffrey B. Hall was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq. Justice Judith L. French and Neal Katyal, Esq., participated by telephone. Kevin C. Newsom, Esq., was absent.

Also present were: Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure, participated by video conference. The following persons participated by telephone: Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Elisabeth A. Shumaker, former Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He expressed congratulations to Justice Neal Gorsuch, the past chair of the Advisory Committee, on his appointment to the Supreme Court, and thanked him for his leadership, his wisdom, and all of his contributions as chair. He thanked Rebecca Womeldorf and her staff for organizing the meeting. He also thanked former attorney member Gregory Katsas and former clerk representative Betsy Shumaker, who have completed their service on the Committee. He also noted that this would be the final meeting for attorney members Neal Katyal and Kevin Newsom and liaison member

Gregory Garre, whose terms of service are expiring, and expressed his gratitude for their many contributions to the Committee.

II. Approval of Minutes

A motion to approve the draft minutes of the October 2016 meeting of the Advisory Committee was made, seconded, and approved.

III. Action Items

A. Item 12-AP-D (Rules 8, 11, and 39)

Mr. Byron presented Item 12-AP-D, which concerns the proposed amendments to Appellate Rules 8, 11, and 39 that were published for public comment in August 2016. The amendments eliminate references to "supersedeas bonds" so that the Appellate Rules will conform to a proposed amendment to Civil Rule 62(a). Materials concerning the item begin at page 82 of the Agenda Book.

The reporter reminded the Advisory Committee that Rule 8(b) corresponds to Civil Rule 65.1. He then informed the Advisory Committee that the Civil Rules Advisory Committee has approved a version of Civil Rule 65.1 that uses only the generic terms "security" and "security provider," and does not mention examples of specific types of security (e.g., bonds) or security providers (e.g., sureties). The Advisory Committee then discussed and approved a revised version of Rule 8(b), shown on page 84 of the Agenda Book, that follows the same approach as Civil Rule 65.1.

Mr. Byron suggested amending the Committee Note to make clear that the term "security" in the draft of Rule 8(b) includes but is not limited to the types of security previously listed expressly in Rule 8(b), namely, bonds, stipulations, and undertakings. The Committee approved this suggestion. The Committee also approved changing the word "mail" to "send" in line 11 of the draft on page 84.

The Advisory Committee decided to recommend that the Standing Committee approve (1) the amended version of Rule 8, (2) the amended Committee Note, and (3) the versions of Rules 11 and 39 that were published in August 2016.

B. Item 11-AP-D (Rule 25)

The reporter presented Item 11-AP-D, which concerns the proposed amendments to Appellate Rule 25 that were published for public comment in August 2016. The amendments

address electronic filing, service, and signatures. Materials concerning the item begin at page 112 of the Agenda Book. The Advisory Committee then discussed issues concerning three subdivisions:

Rule 25(a)(2)(B)(iii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(iii) and its counterparts in the Civil, Criminal, and Bankruptcy Rules. The Advisory Committee then approved the revised version of Rule 25(a)(2)(B)(iii) that appears on page 113 of the Agenda Book, which accords with revisions recommended by the other Advisory Committees.

Rule 25(c)(2). The reporter explained that a public comment had revealed that the published version of Rule 25(c)(2) was difficult to understand. The Committee then approved the proposed revision that appears on page 115 of the Agenda Book. The reporter agreed to coordinate this change with the Bankruptcy Rules Advisory Committee, which is considering a very similar rule.

Rule 25(a)(2)(B)(ii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. The Advisory Committee previously had considered but rejected these objections at its October 2016 meeting. The Advisory Committee decided not to recommend changes to the published version of this subdivision.

The reporter explained that one public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which concerns filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 that were published for public comment. The reporter and Mr. Letter agreed to study the proposal as a new matter and report back to the Committee at its next meeting.

The Advisory Committee decided to recommend that the Standing Committee approve the proposed amendments to Rule 25, with the revisions discussed above.

C. Item 15-AP-C (Rules 28.1 and 31)

Judge Chagares presented Item 15-AP-C, which concerns the proposed amendments to Appellate Rules 28.1 and 31 that were published for public comment in August 2016. The amendments would extend the time for filing reply briefs to 21 days. Materials concerning the item begin at page 214 of the Agenda Book.

The reporter explained that all public comments had supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approved the proposed amendments as published.

D. Item 14-AP-D (Rule 29)

Judge Chagares presented Item 14-AP-D, which concerns the proposed amendments to Appellate Rule 29 that were published for public comment in August 2016. The amendments would authorize courts by order or rule to strike or prohibit the filing of amicus briefs that would disqualify a judge. Materials concerning the item begin at page 224 of the Agenda Book.

Judge Chagares began by explaining that Rule 29 had been revised and renumbered for other reasons in December 2016. As a result, the changes proposed for public comment will now have to be made to the new subdivision (a)(2), instead of the old subdivision (a). The discussion draft on page 224 shows the change.

Judge Chagares then identified three issues for consideration: (1) whether the Advisory Committee should approved the proposed changes to subdivision (a)(2); (2) whether subdivision (a)(2) should be reworded; and (3) whether subdivision (b)(2) should also be amended.

A judge member said that the proposed change to subdivision (a)(2) is well grounded and well thought out. He asserted that the changes proposed to subdivision (a)(2) should also apply to the new subdivision (b)(2), which concerns amicus briefs on rehearing. He further suggested that the phrase "may strike or prohibit the filing of" should be reworded to say "may prohibit the filing of or strike" because putting the words in that order was more chronological. The Advisory Committee agreed.

A judge member asked whether it was necessary to allow a court to strike a brief filed during the rehearing stage because a brief can be filed only with leave.

Mr. Letter supported the published amendment but noted that it authorized non-uniform rules. An academic member discussed the Federal Bar Council's argument that existing local rules on the subject might not be inconsistent with the current Rule 29(a)(2). A judge member, however, said that the Advisory Committee needed to act because some local rules are now inconsistent.

An attorney member asked whether local rules might allow a court to prohibit a government amicus brief. A judge member said that he did not think that local rules could authorize a court to strike a government brief. No one knew of a situation in which a local rule had been applied to the government.

The Advisory Committee considered Judge Newman's comment arguing that "amicus-curiae brief" should not be changed to "amicus brief" in subdivision (a)(2). While the Committee sees the argument for this position, it observed that the December 2016 amendments had already changed "amicus-curiae brief" to "amicus brief" in other subdivisions of Rule 29. The proposed change was therefore necessary for consistency.

Following this discussion, the Advisory Committee approved the following four changes to the amendments published in August 2016. First, in light of the December 2016 revision of Rule 29, the amendments originally proposed for former subdivision (a) will be made to subdivision (a)(2). Second, the word order of the amendment in subdivision (a)(2) will be changed to "except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification." Third, the same "except" clause will be added to the end of subdivision (b)(2). Fourth, in subdivision (b)(2), the term "amicus-curiae brief" will be changed to "amicus brief."

E. Item 13-AP-H (Rule 41)

Judge Kavanaugh presented Item 13-AP-H, which concerns the proposed amendments to the Appellate Rule 41 that were published for public comment in August 2016. The amendments address stays of the mandate. Materials concerning the item begin at page 268 of the Agenda Book.

Judge Kavanaugh first discussed the comments of Judge Newman and the comments on behalf of the Second Circuit. These comments opposed the proposal to add a sentence to Rule 41(b) saying: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The comments asserted that courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc.

Two judge members of the Advisory Committee expressed agreement with Judge Newman's comments. An academic member asked whether the standard in Rule 41(b) should be changed to "good cause." A judge member responded that a court would be unlikely to extend issuance of the mandate absent good cause. A judge member said that the original proposal to require exceptional circumstances arose from a concern that judges were delaying the mandate because they did not like the result of a case. Mr. Letter agreed that this was the original concern. A judge member said that adding the proposed words "by order" in the previous sentence of proposed Rule 41(b) would discourage extending the mandate for improper purposes. Another judge member agreed. Following this discussion, the Advisory Committee decided to recommend that the Standing Committee remove the proposed last sentence of Rule 41(b).

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would not allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

A judge member commented that the proposal addresses a situation that sometimes arises. Mr. Letter thought it was a good idea and that there would be no downside to adding the language. An attorney member also thought that it would be a good idea.

A judge member asked whether the wording was appropriate. Another judge member said that the language does not fully address the problem. He explained that the stay should be entered automatically if a circuit justice has extended the time for filing a petition. He said that the Advisory Committee ought to make the rule self-executing. The Advisory Committee agreed with this position. It will consider by email an amended proposal to achieve the desired result.

F. Item 15-AP-E (Form 4)

Judge Chagares presented Item 15-AP-E, which concerns a proposed amendment to Form 4 that was published for public comment in August 2016. The amendment would delete a question that asks applicants for leave to proceed in forma pauperis to provide the last four digits of their social security numbers. Materials concerning the item begin at page 330 of the Agenda Book. Judge Chagares explained that all public comments supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approve the proposal as previously published.

G. Items 08-AP-A, 11-AP-C, and 15-AP-D (Rule 3, et al.)

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on 353-356 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

H. Item 08-AP-R (Rule 26.1)

Judge Chagares presented Item 08-AP-R which concerns the disclosures required by Rule 26.1. Materials concerning the item begin at page 360 of the Agenda Book. The reporter reviewed the previous decisions by the Advisory Committee and then raised the pending issues identified in his memorandum.

The Advisory Committee agreed to change the title of Rule 26.1 from "Corporate Disclosure Statement" to "Disclosure Statement" as shown in the discussion draft on page 362 of the Agenda Book. An attorney member recommended searching the Appellate Rules for cross-references to Rule 26.1 that might need to be changed.

The Advisory Committee next considered the proposed amendments to Rule 26.1(b). The reporter reminded the Advisory Committee that these amendments were designed to conform to proposed amendments to Criminal Rule 12.4(b). The reporter told the Advisory Committee that the reporter for the Criminal Rules Advisory Committee had informed him the Criminal Rules Advisory Committee had trimmed back the published version of Rule 12.4 so that it would simply track the current Civil Rule. Because of this change of direction, the reporter for the Criminal Rules Advisory Committee has recommended that no changes are needed in the Appellate Rules or other rules. The Advisory Committee therefore decided not to amend the title of Rule 26.1(b) or the text of Rule 26.1(b)'s last sentence.

A judge member suggested that Rule 26.1(b) should be moved to the end of Rule 26.1 so that it would clearly apply to all of the disclosure requirements in Rule 26.1, and not just to Rule 26.1(a). This proposal would also require revising the lettering of the subdivision and changing the reference to "Rule 26.1(a)" to "this Rule." The Advisory Committee agreed with this suggestion and the reporter agreed to prepare a draft.

The reporter next asked the Advisory Committee members if they wished to discuss the proposals for creating new subdivisions (d) and (f) to address organizational victims and intervenors. The Advisory Committee approved the drafts of these provisions on page 363 of the Agenda Book at its October 2016 meeting. A judge member said that he saw no reason not to adopt the changes. The Advisory Committee agreed.

The Advisory Committee then discussed the revised proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The reporter and Judge Chagares described their conversations about the issue with representatives from the Bankruptcy Rules Advisory Committee. Judge Campbell suggested changing line 2 to say ". . . if neither the debtor nor the trustee is a party" The Advisory Committee approved the proposal to create subdivision (d) and asked the reporter to confer with the Style Consultants.

III. Discussion Items

A. Item 16-AP-C (Rules 32.1 and 35)

The reporter presented Item 16-AP-C, a new proposal to require courts to designate orders granting or denying rehearing as "published" decisions so that they would be easier to locate. Materials concerning the proposal begin at page 398 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

B. Item 16-AP-D (Rule 28(j))

Judge Chagares presented Item 16-AP-D, a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). Materials concerning the proposal begin at page 408 of the Agenda Book. The reporter informed the Advisory Committee that the Civil Rules Advisory Committee had decided to remove the item from its agenda. The Appellate Rules Advisory Committee therefore also agreed to remove this item from its agenda.

C. Item 17-AP-A (Rules 4 and 27)

The reporter presented Item 17-AP-A, a new proposal that concerns subpoenas. Materials concerning the proposal begin at page 414 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

D. Item 17-AP-B (Rule 28)

Judge Chagares introduced Item 17-AP-B, a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. Materials concerning the proposal begin at page 420 of the Agenda Book. The proponent of the proposal, Style Consultant Bryan Garner, spoke to the Advisory Committee by telephone.

Mr. Garner explained that the precise question to be decided on appeal is the most important matter for an appellate court, but the wording of the question presented is often poorly phrased. He said that the manner of stating a question is not just a matter of presentation. On the contrary, it is a subject that directly affects the administration of justice. Mr. Garner asserted that the question presented should be moved to the front of the brief. He said that the fact that judges often don't pay attention is evidence that questions are not presented well. He said it was important to include examples of how to state the question presented in the Appellate Rules. He also said that the Rule could be made precatory rather than mandatory by including the words "preferably" or "preferably should," in proposed subdivisions (a)(1) and (a)(1)(D) on page 425 of the Agenda Book.

A judge member asked Mr. Garner if he thought that questions should never start with "whether." Mr. Garner said yes, explaining that the single sentence fragment necessarily precludes any discussion of the facts.

A judge member expressed concern that lawyers have difficulty complying with technical rules. He also said that a party could use the proposed technique of stating the question presented under the current Rules. He felt that it was a question of advocacy. He did not think it was possible to make lawyers better advocates by changing the Appellate Rules.

Another judge thought that it would make sense to move the statement of the question presented up to the front of the brief. He also thought Mr. Garner was correct in asserting that many issue statements are poor and could be improved.

Mr. Letter said that if judges found the proposal useful, then he would support it. An attorney member agreed that the Rules should impose a word limit on the statement of the question presented.

A judge member identified a different problem in many briefs. He said that it is often difficult to determine which issues have to be decided if others are decided (e.g., "If we agree on issue #1, do we have to reach issue #2?").

An attorney member agreed that the statement of the questions presented are often a problem. But he did not think that the proposed codification would help.

Two judge members thought that moving the statement of the question presented to the front of the brief would not be beneficial.

Following this discussion, the consensus was that the Advisory Committee should not go forward with the proposal. The Committee will remove it from the Table of Agenda Items.

IV. Improving Efficiency in Federal Appellate Litigation

The Committee next considered suggestions for improving efficiency in federal appellate litigation.

A. Collateral Order Doctrine

Professor Stephen E. Sachs presented his extensively researched memorandum on the Collateral Order Doctrine, which starts on page 432 of the Agenda Book. He first discussed the difficulty that appellate courts have in balancing factors to determine whether an order is

appealable. He suggested that to improve the situation, it might be possible to come up with a list of orders that are automatically appealable. But before going forward, he said that it might be valuable to obtain empirical evidence about these orders.

A judge member was concerned that the empirical study would be a very large undertaking. Mr. Letter said that he and a former Advisory Committee member, Mr. Katsas, previously investigated a similar proposal. They found that coming up with an improved rule was too difficult because the circumstances varied so much. But he said that their lack of success was not a good reason not to look into the matter.

Two judge members agreed that Rule 23(f) is not popular. Professor Sachs elaborated further on how it might be possible to list some orders that are definitely appealable and some that are not, but otherwise leave the multi-factor test in place. Mr. Byron was worried that this might be difficult.

Two judge members expressed doubt about whether more resources should be devoted to this project. Another judge said that he did not think that changing the rule would make the appellate system more efficient. He further observed that proposed federal legislation may address this topic.

Following this discussion, the Advisory Committee decided not to include the matter on its agenda.

B. Suggestions of the American Academy of Appellate Lawyers

Judge Chagares presented the suggestions of the American Academy of Appellate Lawyers (AAAL), which appear in a memorandum beginning on page 474 of the Agenda Book.

After summarizing the memorandum, Judge Chagares asked the Advisory Committee about the proposal regarding pre-argument focus letters. A judge member said that such letters are often a good idea, but the proposal is not a good topic for a Rule. A judge member said that increased use of focus letters might be suggested to appellate judges as a good practice without changing the Appellate Rules.

An academic member next discussed the proposal concerning judicial notice. He said that there was already a rule on judicial notice, and perhaps judges were just misapplying the rules. An attorney member agreed with the AAAL that some bad practices existed, but did not think that the Appellate Rules needed to address them.

A judge member said that reply briefs are abused. But he did not think a satisfactory rule could be proposed.

Following the discussion, the Advisory Committee decided not to add any of the AALS's suggestions to its agenda at this time.

C. Suggestion Regarding Appellate Rule 47

Professor Sachs finally discussed the possibility of a rule requiring Circuit Courts to post on their website templates of briefs that comply with local rules. He suggested that litigants could download the templates and add the content of the brief. The templates would have all the proper word-processing formatting. The former clerk representative said that the Tenth Circuit does not have templates but they send litigants a checklist. She also said that they make one sample brief available. The current clerk representative said that the Third Circuit's practice is the same. She also worried about the inflexibility of templates. She was also concerned about phone calls from people complaining that the template might not work.

Professor Sachs said that if there was an error in the template, there would be a safe harbor rule. So if there was a problem, the lawyer would be safe. But Professor Sachs said that the proposal only makes sense if clerks often reject briefs. Mr. Letter said that many briefs filed in federal circuits are bounced for not being compliant.

VI. Concluding Remarks

The Administrative Office law clerk reported that she is working on a memorandum regarding Rule 7. Mr. Letter and Mr. Katyal reported that they are working on a memorandum regarding a problem that may arise when a party makes an interlocutory appeal of only one issue in a case that involved multiple appellate issues. Professor Sachs and the reporter said that they would investigate new language from Rule 41(d).

Judge Chagares thanked all of the members of the Advisory Committee and the staff of the Administrative Office. He noted the Committee will miss Mr. Katyal, Mr. Garre, and others who are completing their service.

The meeting of the Advisory Committee adjourned at 12:30 p.m.

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TAB 3

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TAB 3A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

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BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 22, 2017

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Nashville, Tennessee, on April 6, 2017. The draft minutes of that meeting are attached.

At the meeting the Committee considered comments that were submitted in response to the publication in August 2016 of one proposed new rule and proposed amendments to ten existing rules, as well as amendments to seven Official Forms and a new appendix. The majority of these rule and form amendments were proposed to conform to recent and proposed amendments to the civil and appellate rules and forms. After making some changes in response to comments, the Committee gave final approval to all but one of the published rules and to the published forms.

The Committee also approved conforming amendments to six rules that had not been published for comment. These amendments track the wording of proposed amendments to the civil and appellate rules regarding electronic filing, service, and signatures and the posting of security for stays of judgment.

The Committee considered new suggestions for rule amendments and voted to seek the publication of proposed amendments to five rules and an Official Form this summer.

Finally, following the spring meeting, the Committee voted by an email poll to approve without publication amendments to three Official Forms to conform to an amendment to Rule 3015 that was recently adopted by the Supreme Court and is scheduled to take effect on December 1, 2017.

The action items presented by the Committee are discussed below in Part II, organized as follows:

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2016—

- Rule 3002.1(b) and (e);
- Rule 5005(a)(2);
- Rules 8002(b) and (c), 8011(a)(2)(C), 8013, 8015, 8016, 8017, 8022, Official Forms 417A and 417C, and new Part VIII Appendix;
- Rules 8002(a), 8006, and new Rule 8018.1;
- Official Form 309F;
- Official Forms 25A, 25B, 25C, and 26; and

(A2) Conforming changes proposed without publication—

- Rule 8011(a), (c), (d), and (e);
- Rules 7062, 8007, 8010, 8021, and 9025;
- Official Forms 309G, 309H, and 309I.

B. Items for Publication

- Rule 4001(c)
- Rules 2002(g) and 9036 and Official Form 410;
- Rule 6007(b);
- Rule 9037(h).

Part III of this report consists of two information items regarding (i) the Committee's intent to seek the publication of amendments to Rule 2002(f)(7) and (h) in 2018, and (ii) the Committee's decision to reconsider a proposed amendment to Rule 8023 that was published for comment in 2016.

II. Action Items

A. Items for Final Approval

A1. Rules published for comment in August 2016.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2016 and are discussed below. Bankruptcy Appendix A includes the rules and forms that are in this group.

Action Item 1. Rule 3002.1(b) and (e) (Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence). This rule applies with respect to home mortgage claims in chapter 13 cases. It imposes noticing requirements on the creditor in order to enable the debtor or trustee to make mortgage payments in the correct amount while the bankruptcy case is pending. The published amendments to subdivisions (b) and (e) do three things: they (i) create flexibility regarding a notice of payment change for home equity lines of credit; (ii) create a procedure for objecting to a notice of payment change; and (iii) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.

Three comments were submitted in response to the publication. They were submitted by Aderant CompuLaw (BK-2016-0003-0006); the National Conference of Bankruptcy Judges (“NCBJ”) (BK-2016-0003-0007); and the Pennsylvania Bar Association (BK-2016-0003-0008). The Bar Association stated that it supports adoption of the amendments to Rule 3002.1(b) and (e). The other two commenters expressed support for these amendments but made some wording suggestions.

The NCBJ comment made stylistic suggestions, in response to which the Committee divided subdivision (b) into two paragraphs with separate captions and changed the word “that” to “who” in the first sentence of (b)(2).

Aderant noted the impact of Rule 9006(f) on the timing provisions of the proposed amendment to subdivision (b). It pointed out that if a notice of a payment change is served by mail, Rule 9006(f) would give an objector three extra days to file a motion that would keep the change from going into effect. As a result, a timely objection could be filed on or after the effective date of the payment change. For example, if the notice were served by mail 21 days before the payment due date, under the rule an objector would have 24 days to file its motion, thereby permitting a motion designed to stop the change to be filed three days after the change went into effect. Aderant suggested that to avoid this confusion, the rule should require a motion that would stop the payment change from taking effect to be filed “by the day prior to the date

the new amount is due.” The Committee made revisions, using slightly different language, in response to this suggestion.

With those changes and additional ones suggested by the style consultants, the Committee unanimously approved the amendments to Rule 3002.1(b) and (e).

Action Item 2. Rule 5005(a)(2) (Electronic Filing and Signing). Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee’s suggestion that the advisory committees work collaboratively on electronic filing and service issues, the Committee worked with the Civil, Criminal, and Appellate Advisory Committees on matters relating to Rule 5005(a)(2). Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically applies in adversary proceedings unless Rule 7005 is amended to provide otherwise. The Bankruptcy Rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). Because Rule 7005 incorporates any amendments to Civil Rule 5(d)(3), and Rule 5005(a)(2) should be consistent with Rule 7005, the Committee proposed amending Rule 5005(a)(2) in a similar manner.

The amendments to Rule 5005(a)(2) that were published for public comment in August 2016 were consistent, to the greatest extent possible, with the proposed amendments to Civil Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used by the Bankruptcy Rules and the Bankruptcy Code.¹

The Committee received six public comments on the proposed amendments to Rule 5005(a)(2). Notably, the majority of these comments concerned the language of Rule 5005(a)(2)(C), which, as published, read:

(C) *Signing.* The user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.²

¹ The civil rule uses the term “person,” which under § 101(41) of the Bankruptcy Code includes an “individual, partnership, and corporation.” Because only human beings may proceed without an attorney, the proposed bankruptcy rule uses the term “individual” rather than “person.” Where the civil rule refers to “a person proceeding with an attorney,” the bankruptcy rule uses the term “entity,” which under § 101(15) of the Bankruptcy Code includes estates, trusts, governmental units, and United States trustees, as well as persons.

² Comments addressing the signature provision were submitted by Carolyn Buffington (BK-2016-0003-0005), NCBJ (BK-2016-0003-0007), the Pennsylvania Bar Association (BK-2016-0003-0008), Heather Dixon (BK-2016-0003-0010), and the New York City Bar Association (BK-2016-0003-0011).

Several comments suggested that this language is confusing and does not clearly state who can file the document, who can sign the document, or the information required on the signature block. The other advisory committees received similar comments on their proposed amendments akin to the language of Rule 5005(a)(2)(C). In addition, our Committee received one comment (also submitted to the other advisory committees) from an individual named Sai (BK-2016-0003-0012) who opposed the default rule that pro se parties cannot file electronically. We received another comment—from the New York City Bar Association—that requested that the following language, which appears in the Committee Note to the proposed amendments to Civil Rule 5, be added to the Committee Note to Rule 5005(a)(2):

Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

At the spring meeting, the Committee considered all of these comments and a suggested revision to Rule 5005(a)(2)(C) that the reporters to the various advisory committees had discussed and that the other committees would consider at their spring meetings. The Committee voted unanimously to approve the following language for the provision:

(C) *Signing.* A filing made through a person’s electronic-filing account, together with the person’s name on a signature block, constitutes the person’s signature.

The Committee decided against inserting the word “authorized” before the word “filing” (a change adopted by some of the other advisory committees) because Rule 5005(a)(2)(C) does not indicate who would authorize the filing or how the authorization would be accomplished. Rather than introduce such ambiguity into this provision, the Committee decided to revise the Committee Note to indicate that the filing must comply with court rules, which may specify when someone may file a document electronically using someone else’s CM/ECF credentials. The following language was approved for inclusion in the Committee Note:

A filing made through a person’s electronic-filing account, together with the person’s name on a signature block, constitutes the person’s signature. A person’s electronic-filing account means an account established by the court for use of the court’s electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court. The filing also must comply with the rules of the court governing electronic filing.

The Committee also accepted the New York City Bar Association’s suggestion that the Committee Note include the language from the civil rule’s Committee Note about ensuring access to courts.

Along with the other advisory committees, our Committee chose not to adopt a default rule permitting electronic filing by pro se litigants. In reaching this conclusion, the Committee examined other potential default rules, including one that would mandate electronic filing by pro se litigants and one that would allow pro se litigants to elect to file either electronically or manually, both subject to certain exceptions and qualifications. It decided that, on balance, it was preferable to maintain the proposed language of the electronic filing and service rules, which would allow a pro se party to request permission to file electronically and allow courts to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

Action Item 3. Proposed amendments to the bankruptcy appellate rules and forms to conform to recent and proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”). Part VIII of the Bankruptcy Rules (Appeals) was completely revised in 2014 to conform as closely as possible to parallel FRAP provisions. Rather than incorporating FRAP provisions by reference, the Part VIII rules largely track the language of FRAP.

A large set of FRAP amendments went into effect on December 1, 2016. With one exception, the Part VIII amendments included in this action item were proposed to bring the Bankruptcy Rules into conformity with the relevant FRAP provisions that were amended. One other amendment, discussed below, was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

Three comments were submitted in response to the publication of these rules, forms, and appendix. One commenter—the NCBJ—stated that it supports all of the published bankruptcy appellate rules (BK-2016-0003-0007). It did not comment on the forms or appendix. The other two comments were submitted by the Pennsylvania Bar Association (BK-2016-0003-0008) and attorney Heather Dixon (BK-2016-0003-0009). The Bar Association expressed support for all of the published appellate rules, form, and appendix, except as noted below. Ms. Dixon proposed alternative language for Rule 8017.

The Committee unanimously approved all of these rules, forms, and appendix as published.

A. Rules 8002(c), 8011(a)(2)(C), and Official Form 417A (inmate filing provisions). Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the former provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the

institution's internal mail system on or before the last day for filing and several other specified requirements are satisfied. The 2016 FRAP amendments were made to clarify certain issues that have produced conflicts in the case law. They (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit. The Committee's proposed amendments to Rules 8002(c) and 8011(a)(2)(C) track these changes.

To implement the FRAP amendments, a new appellate form was adopted to provide a suggested form for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Committee has recommended that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. As a Director's Form rather than an Official Form, its use would not be mandatory, just as will be true for Appellate Form 7. In addition, the Committee published an amendment to Official Form 417A (Notice of Appeal and Statement of Election), similar to the amendment to Appellate Forms 1 and 5, that will alert inmate filers to the existence of Director's Form 4170.

No comments were submitted that specifically addressed these proposed amendments.

B. Rule 8002(b) (timeliness of tolling motions). Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of postjudgment motions that toll the time for filing an appeal. Prior to amendment, the appellate rule provided that the motion must be “timely file[d]” in order to have a tolling effect. The 2016 amendment to Rule 4(a)(4) resolved a circuit split on the question whether a tolling motion filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the amendment added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016, and no comments were submitted specifically addressing this provision.

C. Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the page limits set out in those rules were retained. The amendments employed a conversion ratio of 260 words per page. The previous ratio was 280 words per page.

The FRAP amendments also reduced the word limits of Rule 32 for briefs to reflect the 260 words-per-page ratio. The 14,000-word limit for a party's principal brief became a 13,000-word limit; the limit for a reply brief changed from 7,000 to 6,500 words. The 2016 amendments correspondingly reduced the word limits set by Rule 28.1 for cross-appeals.

Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) was amended to reflect the changed length limits. Finally, a new appendix was adopted that collects all the FRAP length limits in one chart.

The Committee proposed parallel amendments to Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing), along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)). In addition, it proposed an appendix to Part VIII, which is similar to the FRAP appendix.

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.

D. Rule 8017 (amicus filings). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs that are permitted.

Our Committee proposed a parallel amendment to Rule 8017. The proposed amendment designates the existing rule as subdivision (a) and governs amicus briefs during a court's initial consideration of a case on the merits. It adds a new subdivision (b), which governs amicus briefs when a district court or bankruptcy appellate panel (BAP) considers whether to grant rehearing. The latter subdivision could be overridden by a local rule or order in a case.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a). It would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. Our Committee proposed and published a similar amendment to Rule 8017 in order to maintain consistency between the two sets of rules.

In response to publication, two comments were submitted that addressed the proposed amendment to Rule 8017(a) regarding the striking of amicus briefs to avoid a judge's

disqualification. Both the Pennsylvania Bar Association and attorney Heather Dixon incorporated comments that they had submitted in response to publication of the parallel amendments to Appellate Rule 29. The Bar Association stated that it opposed this amendment in both sets of rules because amicus briefs are usually filed before an appeal is assigned to a panel of judges and thus the amicus and its counsel would have no way of knowing whether recusal would later be required. The Association suggested that under those circumstances the better course would be for the judge to recuse. Striking of the amicus brief might be appropriate, the Association commented, if it appeared that the brief was filed for the purpose of obtaining a recusal, but the proposed provision is not so limited. The Association further stated that when an amicus retains counsel for the purpose of prompting a recusal of a judge, the lawyer could be disqualified instead.

Ms. Dixon expressed opposition to the wording of the Appellate Rule 29/Bankruptcy Rule 8017 amendments as published. She proposed a revision of Rule 29(a) and (b) that would eliminate the filing of amicus briefs with the consent of all parties, would not require the amicus brief to accompany a motion for leave to file, and would specify the circumstances under which it would be permissible to file an amicus brief that would cause a judge's recusal.

The Committee voted unanimously to approve Rule 8017 as published, subject to reconsideration if the Appellate Rules Committee concluded that changes to the Appellate Rule 29(a) amendment should be made.³ The Committee concluded that Ms. Dixon's proposal represented a more fundamental change in the rule than either advisory committee had in mind when it proposed an amendment to address the narrow situation of authorizing the denial of amicus participation, despite the consent of all parties, when recusal would otherwise result. As for the Pennsylvania Bar Association's concern about the potential unfairness of striking amicus briefs, members noted that, because the proposed rule is permissive, an appellate court could weigh competing considerations in deciding whether recusal, lawyer disqualification, or striking the brief would be appropriate in a particular case.

Action Item 4. **Additional amendments to the bankruptcy appellate rules.** In addition to the conforming amendments to Part VIII rules discussed in the previous action item, three additional bankruptcy appellate rule amendments and a new bankruptcy appellate rule were published last summer in response to a suggestion and comments that the Committee had received.

In response to publication, no comments were submitted specifically addressing these amendments. Following discussion of them at the spring meeting, the Committee voted unanimously to seek final approval of all of them as published, except for Rule 8023, which was

³ The Committee was subsequently informed that the Appellate Rules Committee voted not to make any changes to its proposed amendment in response to the comments. It did, however, make some stylistic changes and added to subdivision (b), in addition to (a), the proposed provision regarding amicus briefs that may cause a judge's disqualification. Our Committee made similar changes.

sent back to a subcommittee for further consideration. Rule 8023 is discussed as an information item in Part III of this report.

A. Rule 8002(a) (separate document requirement). In response to the August 2012 publication of the proposed revision of the Part VIII rules, Judge Christopher M. Klein (Bankr. E.D. Cal.), commented that it would be useful for Rule 8002 to have a provision similar to Appellate Rule 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). He noted that the provision would help clarify timing issues presented by the separate-document requirement.

Appellate Rule 4(a)(7) specifies when a judgment or order is entered for purposes of Rule 4(a) (Appeal in a Civil Case). It provides that, if Civil Rule 58(a) does not require a separate document, the judgment or order is entered when it is entered in the civil docket under Civil Rule 79(a). If Rule 58(a) does require a separate document, the judgment or order is entered when it is entered in the civil docket and either (1) the judgment or order is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first. The rule was amended in 2002 to resolve several circuit splits that arose out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is “entered” interacted with the requirement in Civil Rule 58 that, to be “effective,” a judgment must be set forth on a separate document.

The Bankruptcy Rules have adopted Civil Rule 58 and its separate document requirement only for adversary proceedings. Rule 7058 was added in 2009, making Civil Rule 58 applicable in adversary proceedings. At the same time, Rule 9021 was amended to provide that a “judgment or order is effective when entered under Rule 5003 [Records Kept by the Clerk].” The latter rule applies to contested matters and does not require a separate document.

The Committee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision similar to Appellate Rule 4(a)(7). The proposed amendment adds a new subdivision (a)(5) defining entry of judgment. As proposed for amendment, it would clarify that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

B. Rule 8006(c) (court statement on merits of certification). The Committee published another amendment suggested by Judge Klein in response to the 2012 publication of the Part VIII amendments. Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct

appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or BAP. Judge Klein suggested that a provision be added to Rule 8006(c) that would be a counterpart to Rule 8006(e)(2). The latter provision authorizes a party to file a short supplemental statement regarding the merits of certification within 14 days after the court certifies a case for direct appeal on its own motion. Judge Klein suggested that the bankruptcy court should have a similar opportunity to comment when the parties certify the appeal.

At the fall 2013 meeting, the Committee concluded that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Committee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The authorization would be permissive, however, so a court would not be required to file a statement. A new subdivision (c)(2) would authorize such supplemental statements by the court.

C. New Rule 8018.1 (district court review of a judgment that the bankruptcy court lacked constitutional authority to enter). The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment. This procedure is consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014).

In response to *Stern v. Marshall*, 564 U.S. 462 (2011), Professor Alan Resnick submitted Suggestion 12-BK-H, which proposed a rule amendment to address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. Adopting a procedure that some districts have authorized by local rule, the proposed rule would allow the district court to review the judgment as if the bankruptcy court had treated the proceeding as non-core under 28 U.S.C. § 157(c)(1).⁴ This procedure would eliminate the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

In *Arkison* the Supreme Court held that *Stern* claims can be treated as non-core under § 157(c)(1). The Court explained that "because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to

⁴ Section 157(c)(1) provides as follows:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.” While the case before the Court “did not proceed in precisely that fashion,” the Court nevertheless affirmed. *Id.* at 2174. It concluded that the petitioner had received the equivalent of the review it was entitled to—*de novo* review—because the district court had reviewed the bankruptcy court’s entry of summary judgment *de novo* and had “conclude[ed] in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law.” *Id.* at 2174.

The decision made clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the proposed rule authorizes. Moreover, *Arkison* shows the Court’s acceptance of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court’s review as being tantamount to review of a non-core proceeding. *See also Stern*, 564 U.S. at 471-72 (noting without criticism that “[b]ecause the District Court concluded that Vickie’s counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court’s judgment as ‘proposed[,] rather than final,’ and engage in an ‘independent review’ of the record”).

The Committee discussed at the spring 2016 meeting whether to include provisions in the rule regarding the time for filing objections and responses to the bankruptcy court’s proposed findings and conclusions and addressing whether parties could choose to rely on their appellate briefs instead. In the end, the Committee was persuaded by district judge members that the rule does not need to spell out procedural details for the conduct of the proceeding once the judge determines that the bankruptcy court judgment should be treated as proposed findings of fact and conclusions of law. The complexity of cases addressed by this rule will vary, and the rule should allow flexibility for the conduct of each case. The district judge, in consultation with the parties, can decide in a given case whether the appellate briefs suffice to present the issues for which *de novo* review is sought or whether they should be supplemented with specific objections and responses.

Action Item 5. Official Form 309F (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships). In August 2016, an amendment to Official Form 309F was published for public comment. The proposed amendment would change the instruction on the form concerning the deadline in a chapter 11 case for seeking an exception to the discharge of a debt owed by a corporate or partnership debtor. The amendment was proposed in response to recent case law that raises questions about whether the current instruction reflects an accurate interpretation of § 1141(d)(6)(A) of the Bankruptcy Code. Specifically, it is unclear whether a creditor seeking to have its debt excepted from discharge under that provision must take action pursuant to § 523(c) in the bankruptcy case and, if § 523(c) does apply, whether it applies to the “persons” referred to in § 1141(d)(6)(A) or only to domestic governmental units.

In recognition of ambiguities in the wording of § 1141(d)(6)(A), the amendment would revise line 8 of the form as follows:

If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A).

Two comments were submitted in response to the publication of this amendment. One was from the Pennsylvania Bar Association (BK-2016-0003-0008). It supported adoption of the amendment.

The other comment was submitted by Judge Laurel Isicoff (Bankr. S.D. Fla.) (BK-2016-0003-0003). She stated that because no amendment to line 11 of the form was being proposed, “using different language [in lines 8 and 11] creates confusion for the recipient of the notice, who might believe that the deadline in paragraph 8 does not apply to the complaint referred to in paragraph 11.” Line 11 of the form currently provides as follows:

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk’s office by the deadline.

Line 8 of Form 309F, which was proposed for amendment, addresses “Exception to discharge deadline,” whereas line 11 addresses “Discharge of debts.” In proposing the amendment to line 8, the Committee overlooked the overlapping language in line 11. As a result, the form continues to make a statement (“you must start a judicial proceeding . . . by the deadline”) that is an incorrect statement of the law under some interpretations of § 1141(d)(6)(A).

The Committee voted unanimously to amend the last sentence of line 11 in a manner similar to the amendment to line 8:

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the

discharge ~~under 11 U.S.C. § 1141(d)(6)(A)~~ and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

It also voted to revise the Committee Note to reflect this additional amendment.

Action Item 6. Official Forms 25A, 25B, 25C, 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations, and Profitability). When engaged in the Committee's Forms Modernization Project that began in 2008, the Committee deferred consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. After reviewing each of these forms extensively and revising and renumbering them, the Committee obtained approval to publish the proposed forms in August 2016.

The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under § 1107(a) of the Bankruptcy Code (which incorporates, among other things § 704(a)(8)). The revised forms incorporate stylistic and formatting changes to conform to the general structure of the modernized forms. The Committee believes that these changes make all three forms easier to read and use.

In addition, in reviewing the forms, the Committee identified several places where Official Forms 25A and 25B were inconsistent with the Bankruptcy Code or required additional information to provide a full explanation of the debtor's disclosure obligations. The Committee made the necessary changes, along with parallel changes to the Committee Notes. The Committee Notes also explicitly state that the plan of reorganization and the disclosure statement set forth in each form are sample documents and are not required forms in small business cases.

The Committee's working group sought and received significant input from the Executive Office for U.S. Trustees on Official Form 425C, which is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. As explained in the Committee Note to Official Form 425C, the form is rearranged to eliminate duplicative sections and to further explain the kinds of information required by the form. It also clarifies that the person completing the form on behalf of the debtor must answer all questions, unless otherwise provided, and it provides a checkbox to indicate if the report is an amended filing.

Form 26 (renumbered as Official Form 426) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest. In reviewing Form 26, the Committee determined that certain changes would help to clarify the information requested by the form. These changes involve

better defining the nondebtor entities for which a debtor must provide information, as well as modifying the exhibits that describe the kinds of information that a debtor must disclose. The Committee Note to Official Form 426 explains the scope of each exhibit and the justifications for the kinds of information requested by each exhibit.

The modified exhibits to Official Form 426 eliminate the requirement that the debtor provide a valuation estimate for the nondebtor entity. In lieu of a valuation, the modified exhibits focus on the information required by existing Exhibit B (retitled as Exhibit A)—i.e., the nondebtor entity's most recent balance sheet, income statement, cash flow statement, and statement of changes in shareholders' or partners' equity (and a summary of the footnotes to those financial statements). The revised form does not change the information concerning the nondebtor entity's business description in current Exhibit C, except to require the debtor to put that information in retitled Exhibit B. The revised form then adds new Exhibits C, D, and E. These new exhibits focus on intercompany claims, tax allocations, and the payment of claims or administrative expenses that would otherwise have been payable by a debtor.

The Committee received three comments in response to the forms' publication in August 2016. Two of these comments—from the NCBJ and the Pennsylvania Bar Association—offered limited suggestions, with one expressly supporting the proposed revisions. The other comment was submitted by Bankruptcy Judge Neil W. Bason (C.D. Cal.) (BK-2016-003-0013), who made a number of thoughtful comments. They were generally directed at either further clarifying or explaining the forms or called for additional information to be included.

In response to Judge Bason's comments, the Committee made three changes to Official Form 425A. (i) The caption on the plan was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals. (ii) A reference to a claims reserve, if any, was added to the list of potential information items to be discussed in Article 7 (Means for Implementation of Plan). (iii) Section 8.08 (Retention of Jurisdiction) was added to address the post-effective date jurisdiction of the bankruptcy court.

The Committee also made three responsive changes to Official Form 425B. (i) The caption on the disclosure statement was changed to follow the form for nonindividual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals. (ii) The column in Part III.C.1 (Classes of secured claims) for disclosing the insider status of creditors holding secured claims was deleted. (iii) A cross-reference to Part IV.A.3 was added to the introductory language in Part IV.A (Who May Vote or Object).

With these changes to Official Forms 425A and 425B, the Committee gave unanimous approval to those forms, as well as to Official Forms 425C and 426.

(A2) Conforming changes proposed for approval without publication.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule and form amendments that are discussed below. The reasons for seeking approval without publication are discussed for each action item. Bankruptcy Appendix A includes the rules and forms that are in this group.

Action Item 7. Rule 8011(a), (c), (d), and (e) (Filing and Service; Signature). At the January Standing Committee meeting, the Committee informed the Standing Committee that it had initially overlooked the need to amend Rule 8011 at the same time as it made changes in coordination with the other advisory committees' proposed amendments regarding electronic filing, service, and signatures. In order that conforming amendments to Rule 8011 can be approved to go into effect at the same time as the amendments to Rule 5005(a) and the parallel provisions of the civil, criminal, and appellate rules, the Committee seeks approval of these amendments without publication. The text of the proposed amendments to Rule 8011, which includes the published amendments regarding inmate filing that are discussed at Action Item 2, is set out in Appendix A.

At the spring meeting, the Committee considered the comments that were submitted in response to the publication of Rule 5005(a) and the parallel rules, and it approved responsive changes that generally conform to the proposed amendments to Rule 5005 and Civil Rule 5, Criminal Rule 49, and Appellate Rule 25. The proposed amendments, however, differ in wording from the parallel civil, criminal, and appellate rules in a few respects. First, as is the case with Rule 5005(a)(2)(C), the provision regarding electronic signatures is not limited to "authorized" filings. Second, maintaining a difference in the existing rules, Rule 8011(c)(3) provides that electronic service is "complete upon filing or sending, unless the person making service *receives notice* that the document was not received by the person served." This differs from Civil Rule 5(b)(2)(E)'s and Criminal Rule 49(a)(3)(A)'s references to "the filer or sender⁵ *learn[ing]* that the document was not received" and Appellate Rule 25(c)(4)'s reference to "the person making service [*being*] *notified* that the paper was not received." Finally, Rule 8011 generally follows the organization of Appellate Rule 25, which differs from the organization of Civil Rule 5 and proposed Criminal Rule 49.

The Committee unanimously approved the amendments to Rule 8011 as set out in Appendix A.

Action Item 8. Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record), 8021 (Costs), and 9025 (Security: Proceedings Against Sureties). The Committee seeks approval of amendments to these rules to conform in part to proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1

⁵ The criminal rule says "the serving party" rather than "the filer or sender."

(Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and broaden and modernize the terminology “supersedeas bond” and “surety.” The Appellate Rules Committee has also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

If the amendments are approved, Civil Rule 62 would no longer refer to a “supersedeas bond.” Instead, the rule would use the more expansive terms “bond or other security.” This amendment is proposed in order to make clear that security in a form other than a bond may be used. Consistent with that change, Civil Rule 65.1 would be amended to refer to “other security providers.”

Bankruptcy Rule 7062 does not need to be amended to adopt the changed terminology because it provides that Civil Rule 62 “applies in adversary proceedings.” Thus any amendment to Rule 62 automatically applies in bankruptcy adversary proceedings. Rule 9025 does, however, need to be amended to be consistent with amended Rules 62 and 7062. The Committee also seeks approval of amendments to Rule 8007, 8010, and 8021 to conform to the terminology changes proposed for Appellate Rules 8, 11, and 39. The texts of the proposed amendments are included in Appendix A.

In addition to changing the terminology of Civil Rule 62, the published amendments to that rule would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The Committee Note explains this change as follows:

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

If no exception is made to Rule 7062’s incorporation of Civil Rule 62, this change will apply to bankruptcy adversary proceedings, thereby lengthening to 30 days the period of the automatic stay of judgment.

The Committee voted unanimously to amend Rule 7062 to retain the current 14-day duration of the automatic stay of judgment. Such a change is needed to keep Rule 7062 consistent with other Bankruptcy Rules that govern post-judgment motions and the time for appeal. When the Civil Rules were amended to provide 28 days for post-judgment motions, the Bankruptcy Rules were not similarly amended. Bankruptcy Rules 7052, 9015, and 9023 provide for a 14-day period for seeking a renewed motion for judgment as a matter of law, an amendment of findings, or a new trial. Similarly, Rule 8002 provides for a 14-day period for filing a notice of appeal. These shorter periods have been retained because expedition is frequently important in bankruptcy cases.

To accomplish this departure from Rule 62's time period, the Committee voted to add the following carve-out to Rule 7062's incorporation of Rule 62: "except that proceedings to enforce a judgment are stayed for 14 days after its entry."

Because these amendments are being proposed to (i) adopt terminology changes that will automatically apply in bankruptcy adversary proceedings and (ii) maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the Committee seeks approval of these amendments without publication.

Action Item 9. Official Forms 309G, 309H, and 309I (Notice of Bankruptcy Case). The Committee seeks approval of minor amendments to each of these notices of the filing of a chapter 12 or chapter 13 case to conform to a pending amendment to Rule 3015 that is scheduled to take effect on December 1, 2017.

Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. An amendment to Rule 3015(d) recently adopted by the Supreme Court eliminates the authorization for a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change was made in conjunction with the adoption of rule amendments specifying formatting, labeling, and organizational requirements for chapter 13 plans.

After the spring meeting, it was called to the Committee's attention that this rule change required conforming changes to be made to these three Official Forms. Currently the forms suggest in several places at line 9 that that a summary of the plan may be enclosed. In light of the amendment to Rule 3015(d), the Committee voted by email to strike the language "a summary of the plan" in Forms 309G, 309H, and 309I. Because this amendment is made to conform to a rule change, the Committee seeks approval without publication and suggests an effective date for the amended forms of December 1, 2017.

B. Items for Publication

The Committee recommends that the following rule amendments be published for public comment in August 2017. The rules in this group appear in Bankruptcy Appendix B.

Action Item 10. Rule 4001(c) (Obtaining Credit). The Advisory Committee received a suggestion from Bankruptcy Judge A. Benjamin Goldgar (N.D. Ill.) (Suggestion 16-BK-D) concerning Bankruptcy Rule 4001(c) and its application to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. It requires a motion, in accordance with Rule 9014 (governing contested matters), that contains specific disclosures and information. The suggestion posited that many of the required disclosures are unnecessary in and unduly burdensome for most chapter 13 cases, and they should be made inapplicable in chapter 13.

In reorganization cases, a request to obtain postpetition credit impacts the bankruptcy estate and creditors. For this reason, the Bankruptcy Code and the Bankruptcy Rules contain detailed provisions governing when such credit is permissible. Section 364 of the Bankruptcy Code sets forth the circumstances under which the trustee or debtor in possession may obtain postpetition credit in- and outside of the ordinary course of business. Rule 4001(c), in turn, governs the process for the trustee or debtor in possession to request approval of postpetition credit outside of the ordinary course of business.

Rule 4001(c) states in part:

(B) *Contents.* The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2).

The rule then continues to outline eleven different elements of postpetition financing that must be explained in both the motion and concise statement—e.g., the granting of a lien or adequate protection or the determination of “the validity, enforceability, priority, or amount of” a prepetition claim.

Section 364 of the Bankruptcy Code does not permit a debtor to request authority to obtain postpetition credit. As noted above, § 364 speaks only of the “trustee,” which incorporates a debtor in possession under §§ 1203 and 1107 of the Bankruptcy Code. Nevertheless, § 1304(a) of the Bankruptcy Code provides, “A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.” That section also grants such a chapter 13 debtor the ability to incur postpetition credit on the terms and subject to the conditions of a trustee under § 364. Section 1304 does not, however, address a chapter 13 debtor who is not engaged in business and wants to obtain postpetition credit to, for example, purchase a car. As a result, courts are divided on whether a chapter 13 debtor not engaged in business is either required or permitted to seek authority to incur postpetition credit.

The Committee reviewed the history of Rule 4001(c), which showed that the provision was designed to address issues particular to chapter 11 cases. Most members agreed that, regardless of whether a motion was required under § 364 in all chapter 13 cases, Rule 4001(c) did not readily address issues pertinent to chapter 13 cases. They also recognized the burdens, time, and cost imposed by the rule in the chapter 13 context, which was addressed in the suggestion as well. Several members raised the point that, because of these factors, many courts have adopted local rules or issued orders to address requests for credit in chapter 13 cases. Members also discussed the potential implications of any change to limit or tailor the requirements of Rule 4001(c) to chapter 13 cases. On balance, the Committee decided to propose an amendment excluding chapter 13 cases from Rule 4001(c). Members emphasized that a decision to carve out chapter 13 cases did not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit, and a sentence so stating was added to the Committee Note. If such a motion is required or permissible, Rule 9013 (Motions: Form and Service) would govern, perhaps supplemented by complementary local rules. If not, no rule is necessary.

Accordingly, the Committee voted unanimously to propose for publication an amendment creating a new Rule 4001(c)(4) that makes subdivision (c) inapplicable to chapter 13 cases.

Action Item 11. Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim). Over the years, the Committee has been asked to review noticing issues in bankruptcy cases—both the mode of noticing and service (other than service of process) and the parties entitled to receive such notices or service. These issues are important in the federal bankruptcy system, but they are also complex. The Bankruptcy Rules contain approximately 145 rules addressing noticing or service issues, and many of those rules include multiple subparts with different requirements. Unlike many civil or criminal matters, a single bankruptcy case may involve hundreds of parties, and the Bankruptcy Rules require the clerk (or some other party as the court may direct) to notice or serve certain

papers on all of these parties on numerous occasions. In addition, many courts have adopted local rules to address noticing and service issues in bankruptcy cases.

At its fall 2015 meeting, the Committee approved a work plan to study noticing issues generally in federal bankruptcy cases. At its spring 2016 meeting, the Committee determined that the ongoing electronic filing, notice, and service initiatives by the federal rules advisory committees could mitigate many of the general concerns regarding the extent and cost of required noticing in bankruptcy cases, and therefore the Committee decided to defer undertaking an extensive overhaul of bankruptcy noticing provisions. Nevertheless, the Committee decided to review and evaluate the specific suggestions regarding noticing issues in bankruptcy cases that had been submitted to the Committee.

Based on its preliminary review, the Committee decided to focus first on a specific suggestion regarding providing electronic noticing and service to businesses, financial institutions, and other non-individual parties that hold claims or other rights against the debtor. These parties may receive numerous notices and papers in multiple bankruptcy cases; therefore, permitting electronic noticing and service on such parties would generate significant cost savings and other efficiencies. The Committee began exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered users of CM/ECF to opt into electronic noticing and service in bankruptcy cases. The Committee noted that it must ensure that any such amendment is consistent with § 342(e) and (f) of the Bankruptcy Code, which give certain creditors the right to designate a particular service address.

As discussed under Action Item 2, the Committee, in coordination with the other advisory committees, has proposed an amendment to Rule 5005(a) that addresses electronic filing. That rule, however, does not address noticing and service. Instead, Rule 7005 addresses those issues for adversary proceedings by making Civil Rule 5 applicable,⁶ and, as discussed under Action Item 7, Rule 8011 addresses those issues for bankruptcy appeals.

The Committee has now turned its attention to Rule 9036, which allows the clerk to send notices electronically if the recipient provides written consent. The clerk often facilitates this written consent through the registered user agreement associated with the court's electronic-filing system. This consent, however, does not authorize anyone other than the clerk to notice or serve by electronic means, and it does not capture parties who are not registered users.

The Committee decided that it must proceed cautiously in considering an expansion of authority to notice or serve electronically. The Bankruptcy Code and the Bankruptcy Rules are an integrated set of principles that have served the bankruptcy system well for many years. Courts and parties generally understand the rules, as well as their rights and obligations under the rules. Moreover, many courts and practitioners have structured their noticing practices to

⁶ Rule 9014(b) makes Civil Rule 5(b) applicable to contested matters.

comply with the existing rules, and any changes to the parties to be served or the methods of service could require significant revisions to those practices.

In this context, the Committee discussed the systems used by parties to receive and track notices and other papers from the court and other parties in bankruptcy cases. Although lawyers have generally implemented systems to receive and monitor electronic notices, many creditors have established systems based on mail receipt. Such a system allows the creditor to identify a particular mailing address and person to receive notices and other papers, which may ease the burdens associated with tracking and responding to such documents. In fact, § 342 of the Bankruptcy Code enables a creditor to request notice at a specified address in a particular chapter 7 or 13 case or all such cases before that court. The Committee gave significant consideration to the fact that creditors may have relied on this section of the Bankruptcy Code in establishing their internal procedures, as well as the fact that the Bankruptcy Rules must account for the rights of parties under the Bankruptcy Code.

Based on the Committee's research and its prior deliberations, it decided at the spring 2017 meeting that some enhanced use of electronic notice and service appears warranted. It discussed mandating electronic notice and service for all parties (other than pro se individuals), but it concluded that such an approach potentially conflicts with Code § 342 and could prove very disruptive, given courts' and parties' established practices and procedures. Phasing in electronic noticing and service would allow courts and parties to adjust to the new procedures while allowing both to start utilizing certain of the anticipated time and cost savings associated with electronic notice and service. Such an approach also would allow the Committee to monitor and evaluate the advantages and disadvantages to the increased use of electronic delivery.

The Committee previously discussed using the proof of claim form—Official Form 410—to allow parties to opt into, or out of, electronic notice and service. The proof of claim form is one of the forms frequently used by non-registered users in bankruptcy cases, including the large filers discussed above. It is filed both electronically and manually, so it would capture most creditors who participate in bankruptcy cases. The proof of claim form also already requests that the creditor provide an email address. As such, adding language to apprise the creditor of its ability to opt into, or out of, electronic notice and service would flow somewhat naturally from the existing form.

The Committee considered whether to suggest an “opt-in” or “opt-out” approach. An opt-in approach is akin to the written consent required currently under the rules for a party to receive papers electronically. It would require the party to take an extra step to acknowledge that it agrees to receive notices and papers electronically. It also is a more gradual move toward electronic notice and service. An opt-out approach arguably would be more inclusive, bringing more parties into electronic notice and service. It also may be administratively easier to implement. But an opt-out approach is arguably inconsistent with the plain language of § 342 of the Bankruptcy Code. Under either approach, the language on the proof of claim form could

explain the consequences of the choice. The Committee chose to proceed with an opt-in approach by adding a checkbox to the proof of claim form for choosing receipt of all notices and papers by email.

The Committee recognized that a change to the proof of claim form alone likely is not sufficient to implement electronic notice and service on registered users and consenting parties by the clerk and other parties serving papers in bankruptcy cases. As discussed above, Rule 5005 does not address service, and Rule 9036 (as well as registered user agreements) limit the use of electronic notice and service to the clerk or such other person as directed by the court.

To address these limitations and supplement any change to the proof of claim form (as well as the pending amendment to Civil Rule 5(b)), the Committee voted to propose a targeted amendment to Rule 2002(g) to allow for email, as well as mailing addresses, and then an accompanying, more general amendment to Rule 9036. The Rule 2002(g) amendment would expand the references to mail to include other means of delivery and delete “mailing” before “address,” thereby allowing a creditor to receive notices by email. The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court’s electronic filing system and to other persons by electronic means that the person consented to in writing. The texts of these amendments and the amendment to Official Form 410 are included in Appendix B.

The Committee voted unanimously to seek the publication of these amendments for public comment this summer.

Action Item 12. Rule 6007(b) (Motion to Abandon Property). The Committee received a suggestion from Bankruptcy Judge A. Benjamin Goldgar (16-BK-C) concerning the process for abandoning estate property under § 554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent treatment afforded notices to abandon property filed by the bankruptcy trustee and motions to compel the trustee to abandon property filed by parties in interest. Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest’s motion to compel abandonment.

Section 554(a) of the Bankruptcy Code authorizes the trustee, after notice and hearing, to “abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” Section 554(b) provides that “[o]n the request of a party in interest and after notice and hearing, the court may order the trustee to abandon any property of the estate” that could be abandoned under subsection (a). Courts interpreting these two subsections have determined, among other things, that only the trustee or debtor in possession has authority to abandon property of the estate and that a hearing is not mandatory under either subsection if the notice or motion provides sufficient information concerning the proposed abandonment, is properly served, and neither the trustee, debtor, nor any other party in interest

objects to the notice or motion. Consequently, the content and service of a notice to abandon, or a motion to compel the abandonment of, estate property is critically important to the resolution of the matter.

Bankruptcy Rule 6007 addresses the service of abandonment papers. Subdivision (a) of the rule applies only to trustee notices to abandon property, and it is detailed, providing:

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

Subsection (b), on the other hand, applies to motions to compel abandonment, and it states only, “A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.”

Several courts have observed the different nature of the two subdivisions of Rule 6007.⁷ In addition, at least one court and *Collier on Bankruptcy* have noted the potential confusion created by the Committee Note to the rule,⁸ which provides, “*Subdivision (b)* implements § 554(b) which specifies that a party in interest may request an order that the trustee abandon property. The rule specifies that the request be by motion and, pursuant to the Bankruptcy Code, lists the parties who should receive notice.”⁹

Given the different nature of the two subdivisions of Rule 6007, courts have developed different approaches to assessing the adequacy of service by a party in interest of its motion to compel abandonment under Rule 6007(b). These approaches generally include reading subdivision (b) as incorporating the service requirements of subdivision (a); using the service

⁷ See, e.g., *In re HIE of Effingham, LLC*, 2014 WL 1304641 at *5 (S.D. Ill. Mar. 28, 2014) (noting the different service standards set forth in Rule 6007(a) and (b) and observing that Rule 6007(b) “is silent on the issue of whom is to be given notice of such motions”). See also *Dunlap v. Independence Bank*, 2007 WL 2827649 (W.D. Ky. 2007); *In re Caron*, 50 B.R. 27 (Bankr.N.D.Ga.1984).

⁸ See *HIE of Effingham*, 2014 WL 1304641 at *5 (citing COLLIER ON BANKRUPTCY ¶ 6007.02[2][B]).

⁹ FED. R. BANKR. P. 6007(b), 1983 Committee Note.

requirements imposed by Rules 9013 (Motions: Form and Service) and 9014 (Contested Matters) for motions filed in the bankruptcy case; or specifying by order or local rule the parties required to be served under Rule 6007(b).

Courts reading subdivisions (a) and (b) of Rule 6007 as creating parallel noticing requirements reason that the purpose of service under the two subdivisions is identical and that little, if any, reason exists to treat them differently. Other courts reach a similar result by invoking Rule 9013 and directing the movant to serve all parties in interest. Courts generally require service on all creditors, indenture trustees, committees, and the United States trustee, i.e., the same parties entitled to notices of intent to abandon under Rule 6007(a). But an argument also exists that under the plain language of Rules 6007(b) and 9013, absent a court order or local rule to the contrary, service of the party in interest's motion to compel abandonment on only the trustee or debtor in possession is sufficient.

In considering whether to propose a clarifying amendment, the Committee first discussed whether parties and courts need additional guidance under Rule 6007(b), given that Rule 9013 governs as a general matter motions filed in bankruptcy cases. Although some members believed that the existing language of the rules was adequate, others found ambiguity and some confusion in the abandonment process under Rule 6007(b). Members considered the important implications for the estate when a third party seeks to compel abandonment of estate property, and they debated whether providing notice only to the trustee or debtor in possession was sufficient. Members also observed differences in how courts proceed once a motion to compel abandonment is granted—e.g., whether the trustee must file a notice to abandon property or, rather, the abandonment process is complete upon entry of the order granting the motion to compel. On balance, the Committee determined that the language of Rule 6007(b) should be clarified to identify the parties to be served with the motion and notice of the motion, as well as the fact that the entry of an order granting a motion to compel abandonment completes the abandonment process.

The Committee voted unanimously to seek publication for public comment of a proposed amendment to Rule 6007(b) that largely tracks the language of Rule 6007(a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.¹⁰

Action Item 13. Rule 9037(h) (Motion to Redact a Previously Filed Document). In response to a suggestion (14-BK-B) submitted by the Committee on Court Administration and Case Management (“CACM”), the Committee is proposing an amendment to Rule 9037 (Privacy Protections for Filings Made with the Court). The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. In order to allow other advisory committees to consider whether they wanted to propose similar

¹⁰ Because of the desire to track the language of Rule 6007(a) in subdivision (b), the Committee chose not to adopt the changes suggested by the style consultants.

amendments to their parallel rules, the Committee has held the proposed amendment in abeyance since it approved it for publication at the spring 2016 meeting. Because the other advisory committees have now determined not to pursue similar amendments, the Committee seeks approval for publication of Rule 9037(h) this summer.

In its suggestion, CACM expressed the need for a uniform national procedure for belatedly redacting personal identifiers in documents that were filed in bankruptcy courts without complying with Rule 9037(a)'s protection of social security numbers, financial account numbers, birth dates, and names of minor children. The suggestion consisted of two parts. First, CACM suggested that Bankruptcy Rule 5010 (Reopening Cases) be amended to reflect the recently adopted judiciary policy that a closed bankruptcy case does not have to be reopened in order for the court to order the redaction of information described in Rule 9037. Second, CACM suggested that Rule 9037 be amended to require that notice be given to affected individuals of a request to redact a previously filed document. Such an amendment would reflect the Judicial Conference's recent addition of § 325.70 to the privacy policy, which states in part that "the court should require the . . . party [requesting redaction] to promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

The Committee decided that any amendments that might be proposed should be made exclusively to Rule 9037 and not to Rule 5010. With the assistance of our clerk representative, the Committee gathered information about bankruptcy courts' current practices for the redaction of previously filed documents. The Committee was particularly interested in learning the various ways in which courts are attempting to accommodate the need to inform individuals that belated redaction of personal identifiers is being sought without drawing attention to the public availability of the unredacted documents.

In considering the proposed amendment, the Committee assumed the availability of court technology that allows the filing of a motion to redact to trigger the immediate restriction of access to the filed document that is to be redacted. An attorney member of the Committee reported that her local court's electronic filing system has that capacity, and a clerk representative confirmed the existence of that capability. The Committee thought that being able to restrict access to the motion and the unredacted document would be important in preventing the filing of the motion from highlighting the existence of the unredacted document on file. The Committee also concluded that the rule itself should not specify the precise technological methods to be used, since they will likely evolve over time.

The Committee took note of the existence of services that maintain and make available to subscribers parallel dockets for all the bankruptcy courts. The existence of these dockets outside the control of the courts means that an unredacted document can continue to be accessible despite a belated redaction and the court's restriction of access to the unredacted document in the court's files. The Subcommittee concluded that resolution of this problem is outside the scope of

rulemaking authority and that the proposed rule should address only documents within the courts' control. Knowledge of the existence of these services, however, did lead the Committee to conclude that, following a successful motion to redact, access to the motion and the unredacted document should remain restricted. The Committee also informed CACM of the potential impact that these unofficial dockets have on the effectiveness of courts' belated redaction of filed documents.

The Committee concluded that there is no need to set out in a rule the Judicial Conference policy that closed cases do not have to be reopened in order to redact a filed document. The proposed Committee Note, however, does explain that the prescribed procedures apply to both open and closed cases.

The Committee also decided that the rule should not attempt to prescribe a procedure for redacting large numbers of cases at a time. Instead, as the Committee Note explains, those procedures are left up to individual court discretion.

At the spring 2017 meeting, the Committee approved some stylistic changes to the proposed amendment and voted unanimously to seek approval of Rule 9037(h) for public comment.

III. Information Items

A. Amendments to Rule 2002(f)(7) and (h)—Noticing in Chapter 13 Cases. At the spring meeting the Committee voted to propose two amendments to Rule 2002 (Notices) that would, in one instance, expand the notice requirements for chapter 13 cases and, in another, reduce the number of parties entitled to receive certain notices in such cases. The Committee does not seek approval for publication of these amendments now, but instead is holding them in abeyance until after a pending amendment to Rule 3002—which will require a further amendment to Rule 2002(h)—takes effect on December 1, 2017.

Rule 2002(f)(7) currently requires the clerk, or someone else designated by the clerk, to give notice to the debtor and all creditors of the “entry of an order confirming a chapter 9, 11, or 12 plan.” Noticeably absent from the list is an order confirming a chapter 13 plan. The Committee received a suggestion (12-BK-B) from Matthew T. Loughney (Chair, Bankruptcy Noticing Working Group), that such notice also be given in chapter 13 cases. As he explained, “There is not a rule specifically addressing the notice of entry of an order confirming a chapter 13 plan, and no reason is identified in the Committee note for this omission.”

Additional research revealed that in 1988 the Committee's reporter proposed an amendment to Rule 2002(f) that would have made the rule applicable to confirmation of a plan under any chapter, but the Committee, without explanation in the minutes, rejected that amendment. Ascertaining no reason currently for the exclusion of chapter 13 plans and agreeing

with Mr. Loughney that “it would be helpful to have a rule that specifically addresses this notice in chapter 13 cases in order that it be made clear who should receive it,” the Committee voted unanimously to seek publication for public comment of the proposed amendment in 2018.

Rule 2002(h) provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the court) to give “the debtor, the trustee, all creditors and indenture trustees” at least 21 days’ notice by mail of certain matters in bankruptcy cases. But Rule 2002(h) allows a court to limit notice in a chapter 7 case to, among others, creditors who hold claims for which proofs of claim have been filed. Bankruptcy Judge Scott W. Dales (W.D. Mich.) submitted a suggestion (12-BK-M) that this exception also be made applicable to chapter 13 cases. He noted the time and cost associated with providing extensive notice in chapter 13 cases and lawyers’ desire to mitigate these expenses to the extent possible. He stated, “For practical reasons I have been receptive to [the lawyers’] arguments, but have felt constrained by the Bankruptcy Rules as presently drafted to require notice that in many instances increases expense without increasing participation or improving decisions on the merits.”

In considering the proposed amendment, the Committee concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in chapter 13, as well as chapter 7, cases supports an amendment. Members pointed out that even creditors that do not file timely proofs of claim will still be required to receive notice of the filing of the case and the date of the meeting of creditors (which notice also includes relevant deadlines); notice of the confirmation hearing; and, if the proposed amendment to Rule 2002(f)(7) is approved, notice of the confirmation order. Because an amendment to Rule 3002 that was recently adopted by the Supreme Court will change the deadline for filing a proof of claim, the time provisions of Rule 2002(f)(7) will also need to be amended. The Committee therefore decided that publication of both of these chapter 13 noticing provisions should be delayed until 2018, when they, along with the timing changes, can be proposed as a package.

B. Rule 8023 (Voluntary Dismissal). The Committee proposed an amendment to bankruptcy appellate Rule 8023 that would add a cross-reference to Rule 9019 (Compromise and Arbitration) to provide a reminder that when a dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The Committee proposed the amendment in response to a comment submitted by the NCBJ when the revised Part VIII rules were published for comment. The proposed amendment to Rule 8023 was published for public comment in August 2016. No comments were submitted in response to that publication.

At the spring 2017 meeting, the Committee’s new Department of Justice representative raised a concern about the amendment. Although Rule 9019 is generally interpreted to require court approval of a settlement only when a trustee or debtor in possession is a party to the settlement, the Department of Justice was concerned that the rule might suggest that no voluntary

dismissals of bankruptcy appeals in the district court or BAP could be taken without bankruptcy court approval, thus prompting the frequent raising of the issue. Other Committee members expressed concern that the reference to Rule 9019 could require district and BAP clerks to make a legal determination about whether Rule 9019 applied to a particular voluntary dismissal and, if so, whether the bankruptcy court had jurisdiction to consider the settlement while the appeal remained pending. A question was also raised about whether the existing rule, which does not state that it is subject to Rule 9019, has caused any problems.

After a full discussion, the Committee decided to send the Rule 8023 amendment back to a subcommittee for further consideration. It will be taken up again at the fall 2017 meeting.

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APPENDIX A

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Appendix A

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 3002.1 Notice Relating to Claims Secured by**
2 **Security Interest in the Debtor’s Principal**
3 **Residence**

4 * * * * *

5 (b) NOTICE OF PAYMENT CHANGES;
6 OBJECTION.

7 (1) Notice. The holder of the claim shall file
8 and serve on the debtor, debtor’s counsel, and the
9 trustee a notice of any change in the payment amount,
10 including any change that results from an interest_rate
11 or escrow_account adjustment, no later than 21 days
12 before a payment in the new amount is due. If the
13 claim arises from a home-equity line of credit, this
14 requirement may be modified by court order.

¹ New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 (2) Objection. A party in interest who objects
16 to the payment change may file a motion to determine
17 whether the change is required to maintain payments
18 in accordance with § 1322(b)(5) of the Code. If no
19 motion is filed by the day before the new amount is
20 due, the change goes into effect, unless the court
21 orders otherwise.

22 * * * * *

23 (e) DETERMINATION OF FEES, EXPENSES, OR
24 CHARGES. On motion of a party in interest~~the debtor or~~
25 ~~trustee~~ filed within one year after service of a notice under
26 subdivision (c) of this rule, the court shall, after notice and
27 hearing, determine whether payment of any claimed fee,
28 expense, or charge is required by the underlying agreement
29 and applicable bankruptcy law to cure a default or maintain
30 payments in accordance with § 1322(b)(5) of the Code.

31 * * * * *

Committee Note

Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, what is now subdivision (b)(2) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under subdivision (b)(1). The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed on or before the day before the change is to take effect, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b)(2), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

Changes Made After Publication and Comment

- Subdivision (b) was divided into two paragraphs with separate captions.
- Subdivision (b)(2) was revised to require a motion that stops the payment change from taking effect to be filed “by the day before the date the new amount is due.”
- Stylistic changes were also made.

Summary of Public Comments

Aderant CompuLaw (BK-2016-0003-0006)—Because of the impact of Rule 9006(f) on the timing provisions of the proposed amendment to subdivision (b), a motion objecting to a notice served by mail could be timely even if filed after the effective date of the payment change. The rule should be changed to require any objection that seeks to prevent implementation of the payment change to be filed by the day before the new payment amount is due.

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—The word “that” following “party in interest” in subdivision (b) should be changed to “who,” and a

paragraph break should be inserted in subdivision (b) preceding “A party in interest.”

Pennsylvania Bar Association (BK-2016-0003-0008)—
The Bar Association stated that it supports adoption of the amendments to Rule 3002.1(b) and (e).

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1 **Rule 5005. Filing and Transmittal of Papers**

2 (a) FILING.

3 * * * * *

4 (2) Electronic Filing and Signing by Electronic
5 Means.

6 (A) By a Represented Entity—Generally
7 Required; Exceptions. ~~A court may by local rule~~
8 ~~permit or require documents to be filed, signed,~~
9 ~~or verified by electronic means that are~~
10 ~~consistent with technical standards, if any, that~~
11 ~~the Judicial Conference of the United States~~
12 ~~establishes. A local rule may require filing by~~
13 ~~electronic means only if reasonable exceptions~~
14 ~~are allowed. An entity represented by an~~
15 ~~attorney shall file electronically, unless~~
16 ~~nonelectronic filing is allowed by the court for~~
17 ~~good cause or is allowed or required by local rule~~

18 (B) By an Unrepresented Individual—
19 When Allowed or Required. An individual not
20 represented by an attorney:

21 (i) may file electronically only if
22 allowed by court order or by local rule; and

23 (ii) may be required to file
24 electronically only by court order, or by a
25 local rule that includes reasonable
26 exceptions.

27 (C) Signing. A filing made through a
28 person’s electronic-filing account, together with
29 the person’s name on a signature block,
30 constitutes the person’s signature.

31 (D) Same as a Written Paper. A paper
32 document filed electronically by electronic means
33 in compliance with a local rule constitutes is a
34 written paper for the purposes of applying these

35 rules, the Federal Rules of Civil Procedure made
36 applicable by these rules, and § 107 of the Code.

37 * * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with

electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court. The filing also must comply with the rules of the court governing electronic filing.

Changes Made After Publication and Comment

- Subdivision (a)(2)(C) was revised to clarify the requirements for an electronic signature and what information must appear on the signature block.
- Language was added to the end of the second paragraph of the Committee Note concerning orders and local rules on pro se filings.

Summary of Public Comments

Comments addressing the lack of clarity of the signature provision were submitted by **Carolyn Buffington (BK-2016-0003-0005)**, **National Conference of Bankruptcy Judges (BK-2016-0003-0007)**, **the Pennsylvania Bar Association (BK-2016-0003-0008)**, **Heather Dixon (BK-2016-0003-0010)**, and **the New York City Bar Association (BK-2016-0003-0011)**.

New York City Bar Association (BK-2016-0003-0011)—The following language, which appears in the Committee Note to the proposed amendments to Civil Rule 5, should be added to the Committee Note to Rule 5005(a)(2): “Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.”

Sai (BK-2016-0003-0012)—The advisory committees should change the default rule for pro se parties to allow pro se parties to file either with paper or electronically, unless the court ordered otherwise. Requiring pro se parties to file manually imposes additional costs and burdens on these parties. Many pro se parties would rather file electronically.

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1 **Rule 7062. Stay of Proceedings to Enforce A Judgment**

2 Rule 62 F.R.Civ.P. applies in adversary proceedings,
3 except that proceedings to enforce a judgment are stayed
4 for 14 days after its entry.

Committee Note

The rule is amended to retain a 14-day period for the automatic stay of a judgment. Rule 62(a) F.R.Civ.P. now provides for a 30-day stay to accommodate the 28-day time periods under the Federal Rules of Civil Procedure for filing post-judgment motions and the 30-day period for filing a notice of appeal. Under the Bankruptcy Rules, however, those periods are limited to 14 days. *See* Rules 7052, 9015, 8002, and 9023.

Because this amendment is made to maintain the status quo regarding the length of an automatic stay of a judgment in an adversary proceeding, despite an amendment to that provision of Civil Rule 62(a), final approval is sought without publication.

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1 **Rule 8002. Time for Filing a Notice of Appeal**

2 (a) IN GENERAL.

3 * * * * *

4 (5) Entry Defined.

5 (A) A judgment, order, or decree is
6 entered for purposes of this Rule 8002(a):

7 (i) when it is entered in the docket
8 under Rule 5003(a), or

9 (ii) if Rule 7058 applies and
10 Rule 58(a) F.R. Civ. P. requires a separate
11 document, when the judgment, order, or
12 decree is entered in the docket under
13 Rule 5003(a) and when the earlier of these
14 events occurs:

- 15 • the judgment, order, or
16 decree is set out in a separate
17 document; or

18 • 150 days have run from
19 entry of the judgment, order, or
20 decree in the docket under Rule
21 5003(a).

22 (B) A failure to set out a judgment, order,
23 or decree in a separate document when required
24 by Rule 58(a) F.R. Civ. P. does not affect the
25 validity of an appeal from that judgment, order,
26 or decree.

27 * * * * *

28 (b) EFFECT OF A MOTION ON THE TIME TO
29 APPEAL.

30 (1) *In General.* If a party ~~timely~~ files in the
31 bankruptcy court any of the following motions and
32 does so within the time allowed by these rules, the
33 time to file an appeal runs for all parties from the

34 entry of the order disposing of the last such remaining
35 motion:

36 * * * * *

37 (c) APPEAL BY AN INMATE CONFINED IN AN
38 INSTITUTION.

39 (1) *In General.* If an institution has a system
40 designed for legal mail, an inmate confined there must
41 use that system to receive the benefit of this
42 Rule 8002(c)(1). If an inmate ~~confined in an~~
43 ~~institution~~ files a notice of appeal from a judgment,
44 order, or decree of a bankruptcy court, the notice is
45 timely if it is deposited in the institution's internal
46 mail system on or before the last day for filing. ~~If the~~
47 ~~institution has a system designed for legal mail, the~~
48 ~~inmate must use that system to receive the benefit of~~
49 ~~this rule. Timely filing may be shown by a~~
50 ~~declaration in compliance with 28 U.S.C. § 1746 or by~~

51 ~~a notarized statement, either of which must set forth~~
52 ~~the date of deposit and state that first class postage~~
53 ~~has been prepaid. and:~~

54 (A) it is accompanied by:

55 (i) a declaration in compliance
56 with 28 U.S.C. § 1746—or a
57 notarized statement—setting out the
58 date of deposit and stating that first-
59 class postage is being prepaid; or

60 (ii) evidence (such as a
61 postmark or date stamp) showing
62 that the notice was so deposited and
63 that postage was prepaid; or

64 (B) the appellate court exercises its
65 discretion to permit the later filing of a
66 declaration or notarized statement that satisfies
67 Rule 8002(c)(1)(A)(i).

Committee Note

Clarifying amendments are made to subdivisions (a), (b), and (c) of the rule. They are modeled on parallel provisions of F.R. App. P. 4.

Paragraph (5) is added to subdivision (a) to clarify the effect of the separate-document requirement of F.R. Civ. P. 58(a) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal.

Rule 7058 adopts F.R. Civ. P. Rule 58 for adversary proceedings. If Rule 58(a) requires a judgment to be set out in a separate document, the time for filing a notice of appeal runs—subject to subdivisions (b) and (c)—from when the judgment is docketed and the judgment is set out in a separate document or, if no separate document is prepared, from 150 days from when the judgment is entered in the docket. The court’s failure to comply with the separate-document requirement of Rule 58(a), however, does not affect the validity of an appeal.

Rule 58 does not apply in contested matters. Instead, under Rule 9021, a separate document is not required, and a judgment or order is effective when it is entered in the docket. The time for filing a notice of appeal under subdivision (a) therefore begins to run upon docket entry in contested matters, as well as in adversary proceedings for which Rule 58 does not require a separate document.

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R. App. P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former Rule 8002(b)(1) provided that “[i]f a party timely files in the bankruptcy court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” Responding to a circuit split concerning the meaning of “timely” in F.R. App. P. 4(a)(4), the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Bankruptcy Rules will not qualify as a motion that, under Rule 8002(b)(1), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Bankruptcy Rules, another party’s consent or failure to object to the motion’s lateness, or the court’s disposition of the motion without explicit reliance on untimeliness.

Subdivision (c)(1) is revised to conform to F.R. App. P. 4(c)(1), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution’s mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage “is being prepaid,” not (as directed by the former rule) that first-class postage “has been prepaid.” This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution’s mail system. A new

Director’s Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase “exercises its discretion to permit”—rather than simply “permits”—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of these amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of these amendments.

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1 **Rule 8006. Certifying a Direct Appeal to the Court of**
2 **Appeals**

3 * * * * *

4 (c) JOINT CERTIFICATION BY ALL
5 APPELLANTS AND APPELLEES.

6 (1) How Accomplished. A joint certification by
7 all the appellants and appellees under 28 U.S.C.
8 § 158(d)(2)(A) must be made by using the appropriate
9 Official Form. The parties may supplement the
10 certification with a short statement of the basis for the
11 certification, which may include the information listed
12 in subdivision (f)(2).

13 (2) Supplemental Statement by the Court.
14 Within 14 days after the parties' certification, the
15 bankruptcy court or the court in which the matter is
16 then pending may file a short supplemental statement
17 about the merits of the certification.

18 * * * * *

COMMITTEE NOTE

Subdivision (c) is amended to provide authority for the court to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all of the parties to the appeal. It is a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion.

The bankruptcy court may file a supplemental statement within 14 days after the certification, even if the appeal is no longer pending before it according to subdivision (b). If the appeal is pending in the district court or BAP during that 14-day period, the appellate court is authorized to file a statement. In all cases, the filing of a statement by the court is discretionary.

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of these amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of these amendments.

21 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 **Rule 8007. Stay Pending Appeal; Bonds; Suspension**
2 **of Proceedings**

3 (a) INITIAL MOTION IN THE BANKRUPTCY
4 COURT.

5 (1) *In General.* Ordinarily, a party must move
6 first in the bankruptcy court for the following relief:

7 (A) a stay of judgment, order, or decree of
8 the bankruptcy court pending appeal;

9 (B) the approval of a ~~supersedeas bond or~~
10 other security provided to obtain a stay of
11 judgment;

12 * * * * *

13 (c) FILING A BOND OR OTHER SECURITY.

14 The district court, BAP, or court of appeals may condition
15 relief on filing a bond or other ~~appropriate~~ security with the
16 bankruptcy court.

17 (d) BOND OR OTHER SECURITY FOR A
18 TRUSTEE OR THE UNITED STATES. The court may

19 require a trustee to file a bond or other appropriate security
20 when the trustee appeals. A bond or other security is not
21 required when the appeal is taken by the United States, its
22 officer, or its agency or by direction of any department of
23 the federal government.

24 * * * * *

Committee Note

The amendments to subdivisions (a)(1)(B), (c), and (d) conform this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

Because this amendment is made to conform to amendments to Civil Rule 62 and Appellate Rule 8, final approval is sought without publication.

1 **Rule 8010. Completing and Transmitting the Record**

2 * * * * *

3 (c) RECORD FOR A PRELIMINARY MOTION
4 IN THE DISTRICT COURT, BAP, OR COURT OF
5 APPEALS. This subdivision (c) applies if, before the
6 record is transmitted, a party moves in the district court,
7 BAP, or court of appeals for any of the following relief:

- 8 · leave to appeal;
- 9 · dismissal;
- 10 · a stay pending appeal;
- 11 · approval of a ~~supersedeas bond~~, or other security
12 provided to obtain a stay of judgment~~additional~~
13 ~~security on a bond or undertaking on appeal~~; or
- 14 · any other intermediate order.

15 The bankruptcy clerk must then transmit to the clerk of the
16 court where the relief is sought any parts of the record

17 designated by a party to the appeal or a notice that those
18 parts are available electronically.

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

Because this amendment is made to conform to amendments to Civil Rule 62 and Appellate Rule 11, final approval is sought without publication.

1 **Rule 8011. Filing and Service; Signature**

2 (a) FILING.

3 * * * * *

4 (2) *Method and Timeliness.*

5 (A) Nonelectronic Filing

6 (A)(i) In General. Filing For a
7 document not filed electronically, filing may
8 be accomplished by ~~transmission~~mail
9 addressed to the clerk of the district court or
10 BAP. Except as provided in subdivision
11 ~~(a)(2)(B) and (C)~~ (a)(2)(A)(ii) and (iii),
12 filing is timely only if the clerk receives the
13 document within the time fixed for filing.

14 ~~(B)(ii)~~ Brief or Appendix. A brief
15 or appendix not filed electronically is also
16 timely filed if, on or before the last day for
17 filing, it is:

18 ~~(i)~~ mailed to the clerk by first-
19 class mail—or other class of mail that
20 is at least as expeditious—postage
21 prepaid, ~~if the district court's or BAP's~~
22 ~~procedures permit or require a brief or~~
23 ~~appendix to be filed by mailing; or~~

24 ~~(ii)~~ dispatched to a third-party
25 commercial carrier for delivery within
26 3 days to the clerk, ~~if the court's~~
27 ~~procedures so permit or require.~~

28 ~~(C)~~(iii) *Inmate Filing.* If an
29 institution has a system designed for legal
30 mail, an inmate confined there must use that
31 system to receive the benefit of this
32 Rule 8011(a)(2)(A)(iii). A document not
33 filed electronically by an inmate confined in
34 an institution is timely if it is deposited in

35 the institution's internal mailing system on
36 or before the last day for filing. ~~If the~~
37 ~~institution has a system designed for legal~~
38 ~~mail, the inmate must use that system to~~
39 receive the benefit of this rule. Timely filing
40 may be shown by a declaration in
41 compliance with 28 U.S.C. §1746 or by a
42 notarized statement, either of which must set
43 forth the date of deposit and state that first-
44 class postage has been prepaid. and:

45 · it is accompanied by a
46 declaration in compliance with 28
47 U.S.C. § 1746—or a notarized
48 statement—setting out the date of
49 deposit and stating that first-class
50 postage is being prepaid; or evidence
51 (such as a postmark or date stamp)

52 showing that the notice was so
53 deposited and that postage was
54 prepaid; or

55 the appellate court exercises
56 its discretion to permit the later filing
57 of a declaration or notarized statement
58 that satisfies Rule 8011(a)(2)(A)(i).

59 (B) *Electronic Filing.*

60 (i) *By a Represented Person—*
61 *Generally Required; Exceptions.* An entity
62 represented by an attorney must file
63 electronically, unless nonelectronic filing is
64 allowed by the court for good cause or is
65 allowed or required by local rule.

66 (ii) *By an Unrepresented*
67 *Individual—When Allowed or Required.* An
68 individual not represented by an attorney:

85 case the filing or furnishing of a specified
86 number of paper copies.

87 * * * * *

88 (c) MANNER OF SERVICE.

89 (1) Nonelectronic Service. Methods. ~~Service~~
90 ~~must be made electronically, unless it is being made~~
91 ~~by or on an individual who is not represented by~~
92 ~~counsel or the court's governing rules permit or~~
93 ~~require service by mail or other means of delivery.~~
94 Service Nonelectronic service may be ~~made by or on~~
95 ~~an unrepresented party~~ by any of the following
96 methods:

- 97 (A) personal delivery;
- 98 (B) mail; or
- 99 (C) third-party commercial carrier for
100 delivery within 3 days.

101 (2) *Electronic Service.* Electronic service may
102 be made by sending a document to a registered user
103 by filing it with the court’s electronic-filing system or
104 by using other electronic means that the person served
105 consented to in writing.

106 ~~(2)~~(3) *When Service is Complete.* Service by
107 electronic means is complete on ~~transmission~~filing or
108 sending, unless the ~~party~~person making service
109 receives notice that the document was not ~~transmitted~~
110 successfully received by the person served. Service by
111 mail or by commercial carrier is complete on mailing
112 or delivery to the carrier.

113 (d) PROOF OF SERVICE.

114 (1) *What is Required.* A document presented
115 for filing must contain either of the following if it was
116 served other than through the court’s electronic-filing
117 system:

32 FEDERAL RULES OF BANKRUPTCY PROCEDURE

118 (A) an acknowledgment of service by the
119 person served; or

120 (B) proof of service consisting of a
121 statement by the person who made service
122 certifying:

123 (i) the date and manner of service;

124 (ii) the names of the persons served;

125 and

126 (iii) the mail or electronic address, the
127 fax number, or the address of the place of
128 delivery, as appropriate for the manner of
129 service, for each person served.

130 * * * * *

131 (e) SIGNATURE. Every document filed
132 electronically must include the electronic signature of the
133 person filing it or, if the person is represented, the
134 electronic signature of counsel. ~~The electronic signature~~

135 ~~must be provided by electronic means that are consistent~~
136 ~~with any technical standards that the Judicial Conference of~~
137 ~~the United States establishes. A filing made through a~~
138 ~~person's electronic-filing account, together with the~~
139 ~~person's name on a signature block, constitutes the~~
140 ~~person's signature. Every document filed in paper form~~
141 must be signed by the person filing the document or, if the
142 person is represented, by counsel.

Committee Note

The rule is amended to conform to the amendments to Fed. R. App. P. 25 on inmate filing, electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (a)(2)(A)(iii) is revised to conform to F.R.App. P. 25(a)(2)(A)(iii), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or

notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another

person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means receives notice that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.

Subdivision (e) requires the signature of counsel or an unrepresented party on every document that is filed. A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court. The filing also must comply with the rules of the court governing electronic filing.

Changes Made After Publication and Comment

Amendments were made to subdivisions (a), (c), (d), and (e) to conform to amendments to Rule 5005(a)(2) and

parallel civil, criminal, and appellate rules regarding electronic filing, service, and signatures, all of which were published for comment.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

1 **Rule 8013. Motions; Intervention**

2 * * * * *

3 (f) FORM OF DOCUMENTS; PAGELLENGTH
4 LIMITS; NUMBER OF COPIES.

5 * * * * *

6 (2) *Format of an Electronically Filed*
7 *Document.* A motion, response, or reply filed
8 electronically must comply with the requirements of a
9 paper version regarding covers, line spacing, margins,
10 typeface, and type style. It must also comply with the
11 pagelength limits under paragraph (3).

12 (3) *PageLength Limits.* ~~Unless the district~~
13 ~~court or BAP orders otherwise:~~Except by the district
14 court's or BAP's permission, and excluding the
15 accompanying documents authorized by subdivision
16 (a)(2)(C):

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17 (A) a motion or a response to a motion
18 ~~must not exceed 20 pages, exclusive of the e~~
19 ~~disclosure statement and accompanying~~
20 ~~documents authorized by subdivision (a)(2)(C)~~
21 produced using a computer must include a
22 certificate under Rule 8015(h) and not exceed
23 5,200 words; and

24 (B) ~~a reply to a response must not exceed~~
25 ~~10 pages.~~ a handwritten or typewritten motion or
26 a response to a motion must not exceed 20
27 pages;

28 (C) a reply produced using a computer
29 must include a certificate under Rule 8015(h)
30 and not exceed 2,600 words; and

31 (D) a handwritten or typewritten reply
32 must not exceed 10 pages.

33 * * * * *

Committee Note

Subdivision (f)(3) is amended to conform to F.R. App. P. 27(d)(2), which was recently amended to replace page limits with word limits for motions and responses produced using a computer. The word limits were derived from the current page limits, using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); Official Form 417C suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 8013(a)(2)(C) and any items listed in Rule 8015(h).

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

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1 **Rule 8015. Form and Length of Briefs; Form of**
2 **Appendices and Other Papers**

3 (a) PAPER COPIES OF A BRIEF. If a paper copy
4 of a brief may or must be filed, the following provisions
5 apply:

6 * * * * *

7 (7) *Length.*

8 (A) *Page limitation.* A principal brief
9 must not exceed 30 pages, or a reply brief 15
10 pages, unless it complies with subparagraph (B)
11 ~~and (C)~~.

12 (B) *Type-volume limitation.*

13 (i) A principal brief is acceptable if
14 it contains a certificate under Rule 8015(h)
15 and:

16 . ~~it~~ contains no more than
17 ~~14,000~~ 13,000 words; or

18 · ~~it~~ uses a monospaced face
19 and contains no more than 1,300 lines
20 of text.

21 (ii) A reply brief is acceptable if it
22 includes a certificate under Rule 8015(h)
23 and contains no more than half of the type
24 volume specified in item (i).

25 ~~(iii) Headings, footnotes, and~~
26 ~~quotations count toward the word and line~~
27 ~~limitations. The corporate disclosure~~
28 ~~statement, table of contents, table of~~
29 ~~citations, statement with respect to oral~~
30 ~~argument, any addendum containing~~
31 ~~statutes, rules, or regulations, and any~~
32 ~~certificates of counsel do not count toward~~
33 ~~the limitation.~~

34 ~~(C) Certificate of Compliance.~~

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35 ~~(i) A brief submitted under~~
36 ~~subdivision (a)(7)(B) must include a~~
37 ~~certificate signed by the attorney, or an~~
38 ~~unrepresented party, that the brief complies~~
39 ~~with the type-volume limitation. The person~~
40 ~~preparing the certificate may rely on the~~
41 ~~word or line count of the word-processing~~
42 ~~system used to prepare the brief. The~~
43 ~~certificate must state either:~~

44 ~~the number of words in the~~
45 ~~brief; or~~

46 ~~the number of lines of~~
47 ~~monospaced type in the brief.~~

48 ~~(ii) The certificate requirement is~~
49 ~~satisfied by a certificate of compliance that~~
50 ~~conforms substantially to the appropriate~~
51 ~~Official Form.~~

52

* * * * *

53

(f) LOCAL VARIATION. A district court or BAP

54

must accept documents that comply with the ~~applicable~~

55

form requirements of this rule and the length limits set by

56

Part VIII of these rules. By local rule or order in a

57

particular case, a district court or BAP may accept

58

documents that do not meet all of the form requirements of

59

this rule or the length limits set by Part VIII of these rules.

60

(g) ITEMS EXCLUDED FROM LENGTH. In

61

computing any length limit, headings, footnotes, and

62

quotations count toward the limit, but the following items

63

do not:

64

• the cover page;

65

• a corporate disclosure statement;

66

• a table of contents;

67

• a table of citations;

68

• a statement regarding oral argument;

- 69 • an addendum containing statutes, rules, or
- 70 regulations;
- 71 • certificates of counsel;
- 72 • the signature block;
- 73 • the proof of service; and
- 74 • any item specifically excluded by these
- 75 rules or by local rule.

76 (h) CERTIFICATE OF COMPLIANCE.

77 (1) *Briefs and Documents That Require a*
78 *Certificate.* A brief submitted under Rule 8016(d)(2),
79 8017(b)(4), or 8015(a)(7)(B)—and a document
80 submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or
81 8022(b)(1)—must include a certificate by the
82 attorney, or an unrepresented party, that the document
83 complies with the type-volume limitation. The
84 individual preparing the certificate may rely on the
85 word or line count of the word-processing system

86 used to prepare the document. The certificate must
 87 state the number of words—or the number of lines of
 88 monospaced type—in the document.
 89 (2) *Acceptable Form.* The certificate
 90 requirement is satisfied by a certificate of compliance
 91 that conforms substantially to the appropriate Official
 92 Form.

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 32, which reduced the word limits generally allowed for briefs. When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. Amended F.R. App. P. 32 applies a conversion ratio of 260 words per page and reduces the word limits accordingly. Rule 8015(a)(7) adopts the same reduced word limits for briefs prepared by computer.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (f) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (f) already established this authority as to the length limits in Rule 8015(a)(7); the amendment makes clear that this authority extends to all length limits in Part VIII of the Bankruptcy Rules.

A new subdivision (g) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in subdivision (a)(7)(C) is relocated to a new subdivision (h) and now applies to filings under all type-volume limits (other than Rule 8014(f)'s word limit)—including the new word limits in Rules 8013, 8016, 8017, and 8022. Conforming amendments are made to Official Form 417C.

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

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1 **Rule 8016. Cross-Appeals**

2 * * * * *

3 (d) LENGTH.

4 (1) *Page Limitation.* Unless it complies with
5 paragraphs (2) ~~and (3)~~, the appellant's principal brief
6 must not exceed 30 pages; the appellee's principal and
7 response brief, 35 pages; the appellant's response and
8 reply brief, 30 pages; and the appellee's reply brief,
9 15 pages.

10 (2) *Type-Volume Limitation.*

11 (A) The appellant's principal brief or the
12 appellant's response and reply brief is acceptable
13 if it includes a certificate under Rule 8015(h)
14 and:

15 (i) ~~it contains no more than 14,000~~
16 13,000 words; or

17 (ii) ~~it~~ uses a monospaced face and
18 contains no more than 1,300 lines of text.

19 (B) The appellee's principal and response
20 brief is acceptable if it includes a certificate
21 under Rule 8015(h) and:

22 (i) ~~it~~ contains no more than ~~16,500~~
23 15,300 words; or

24 (ii) ~~it~~ uses a monospaced face and
25 contains no more than 1,500 lines of text.

26 (C) The appellee's reply brief is
27 acceptable if it includes a certificate under
28 Rule 8015(h) and contains no more than half of
29 the type volume specified in subparagraph (A).

30 ~~(D) Headings, footnotes, and quotations~~
31 ~~count toward the word and line limitations. The~~
32 ~~corporate disclosure statement, table of contents,~~
33 ~~table of citations, statement with respect to oral~~

34 ~~argument, any addendum containing statutes,~~
35 ~~rules, or regulations, and any certificates of~~
36 ~~counsel do not count toward the limitation.~~

37 ~~(3) Certificate of Compliance. A brief~~
38 ~~submitted either electronically or in paper form under~~
39 ~~paragraph (2) must comply with Rule 8015(a)(7)(C).~~

40 * * * * *

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 28.1, which reduced the word limits generally allowed for briefs in cross-appeals. When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in F.R. App. P. 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. Amended F.R. App. P. 32 and 28.1 apply a conversion ratio of 260 words per page and reduce the word limits accordingly. Rule 8016(d)(2) adopts the same reduced word limits.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (d) is amended to refer to new Rule 8015(h) (which now contains the certificate-of-compliance provision formerly in Rule 8015(a)(7)(C)).

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

1 **Rule 8017. Brief of an Amicus Curiae**

2 (a) DURING INITIAL CONSIDERATION OF A
3 CASE ON THE MERITS.

4 (1) Applicability. This Rule 8017(a) governs
5 amicus filings during a court's initial consideration of
6 a case on the merits.

7 (2) When Permitted. The United States or its
8 officer or agency or a state may file an amicus-~~curiae~~
9 brief without the consent of the parties or leave of
10 court. Any other amicus curiae may file a brief only
11 by leave of court or if the brief states that all parties
12 have consented to its filing, except that a district court
13 or BAP may prohibit the filing of or strike an amicus
14 brief that would result in a judge's disqualification.

15 On its own motion, and with notice to all parties to an
16 appeal, the district court or BAP may request a brief
17 by an amicus curiae.

52 FEDERAL RULES OF BANKRUPTCY PROCEDURE

18 ~~(b)~~(3) *Motion for Leave to File.* The motion
19 must be accompanied by the proposed brief and state:

20 ~~(1)~~(A) the movant's interest; and

21 ~~(2)~~(B) the reason why an amicus brief is
22 desirable and why the matters asserted are
23 relevant to the disposition of the appeal.

24 ~~(e)~~(4) *Contents and Form.* An amicus brief
25 must comply with Rule 8015. In addition to the
26 requirements of Rule 8015, the cover must identify
27 the party or parties supported and indicate whether the
28 brief supports affirmance or reversal. If an amicus
29 curiae is a corporation, the brief must include a
30 disclosure statement like that required of parties by
31 Rule 8012. An amicus brief need not comply with
32 Rule 8014, but must include the following:

33 ~~(1)~~(A) a table of contents, with page
34 references;

35 ~~(2)~~(B) a table of authorities—cases
36 (alphabetically arranged), statutes, and other
37 authorities—with references to the pages of the
38 brief where they are cited;

39 ~~(3)~~(C) a concise statement of the
40 identity of the amicus curiae, its interest in the
41 case, and the source of its authority to file;

42 ~~(4)~~(D) unless the amicus curiae is one
43 listed in the first sentence of subdivision (a)(2), a
44 statement that indicates whether:

45 ~~(A)~~(i) a party’s counsel authored
46 the brief in whole or in part;

47 ~~(B)~~(ii) a party or a party’s counsel
48 contributed money that was intended to fund
49 preparing or submitting the brief; and

50 ~~(C)~~(iii) a person—other than the
51 amicus curiae, its members, or its counsel—

52 contributed money that was intended to fund
53 preparing or submitting the brief and, if so,
54 identifies each such person.

55 ~~(5)~~(E) an argument, which may be
56 preceded by a summary and need not include a
57 statement of the applicable standard of review;

58 ~~(6)~~(F) a certificate of compliance, if
59 required by Rule 8015(a)(7)(C) or 8015(b).

60 ~~(d)~~(5) *Length.* Except by the district court's
61 or BAP's permission, an amicus brief must be no
62 more than one-half the maximum length authorized by
63 these rules for a party's principal brief. If a court
64 grants a party permission to file a longer brief, that
65 extension does not affect the length of an amicus
66 brief.

67 ~~(e)~~(6) *Time for Filing.* An amicus curiae
68 must file its brief, accompanied by a motion for filing

69 when necessary, no later than 7 days after the
70 principal brief of the party being supported is filed.
71 An amicus curiae that does not support either party
72 must file its brief no later than 7 days after the
73 appellant's principal brief is filed. The district court
74 or BAP may grant leave for later filing, specifying the
75 time within which an opposing party may answer.

76 ~~(f)(7)~~ *Reply Brief.* Except by the district
77 court's or BAP's permission, an amicus curiae may
78 not file a reply brief.

79 ~~(g)(8)~~ *Oral Argument.* An amicus curiae
80 may participate in oral argument only with the district
81 court's or BAP's permission.

82 (b) DURING CONSIDERATION OF WHETHER
83 TO GRANT REHEARING.

84 (1) Applicability. This Rule 8017(b) governs
85 amicus filings during a district court's or BAP's

86 consideration of whether to grant rehearing, unless a
87 local rule or order in a case provides otherwise.

88 (2) *When Permitted.* The United States or its
89 officer or agency or a state may file an amicus brief
90 without the consent of the parties or leave of court.
91 Any other amicus curiae may file a brief only by leave
92 of court. A district court or BAP may prohibit the
93 filing of or strike an amicus brief that would result in
94 a judge's disqualification.

95 (3) *Motion for Leave to File.* Rule 8017(a)(3)
96 applies to a motion for leave.

97 (4) *Contents, Form, and Length.*
98 Rule 8017(a)(4) applies to the amicus brief. The brief
99 must include a certificate under Rule 8015(h) and not
100 exceed 2,600 words.

101 (5) *Time for Filing.* An amicus curiae
102 supporting the motion for rehearing or supporting

103 neither party must file its brief, accompanied by a
 104 motion for filing when necessary, no later than 7 days
 105 after the motion is filed. An amicus curiae opposing
 106 the motion for rehearing must file its brief,
 107 accompanied by a motion for filing when necessary,
 108 no later than the date set by the court for the response.

Committee Note

Rule 8017 is amended to conform to the recent amendment to F.R. App. P. 29, which now addresses amicus filings in connection with petitions for rehearing. Former Rule 8017 is renumbered Rule 8017(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the district court’s or BAP’s initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a motion for rehearing. Subdivision (b) sets default rules that apply when a district court or BAP does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with motions for rehearing, and governing the procedures when such filings are permitted.

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of an amicus brief by party consent if the brief would result in a judge’s disqualification. The amendment does not alter or address

the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R. App. 29(a). A similar provision is included in subdivision (b)(2).

Changes Made After Publication and Comment

Authorization for the court to prohibit the filing of or strike an amicus brief that would result in a judge's disqualification was added to subdivision (b)(2). Stylistic changes were also made.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Opposes this amendment because amicus briefs are usually filed before an appeal is assigned to a panel of judges and thus the amicus and its counsel would have no way of knowing whether recusal would later be required. Under those circumstances the better course would be for the judge to recuse. Striking of the amicus brief might be appropriate if it appeared that the brief was filed for the purpose of obtaining a recusal, but the proposed provision is not so limited. When an amicus retains counsel for the purpose of prompting a recusal of a judge, the lawyer could be disqualified instead.

Heather Dixon (BK-2016-0003-0009)—Opposes the wording of the amendments as published. Rule 29(a) and (b) should be revised to eliminate the filing of amicus briefs with the consent of all parties, not require the amicus brief to accompany a motion for leave to file, and specify the circumstances under which the filing of an amicus brief that would cause a judge’s recusal would be permitted.

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1 **Rule 8018.1. District-Court Review of a Judgment that**
2 **the Bankruptcy Court Lacked the**
3 **Constitutional Authority to Enter**

4 If, on appeal, a district court determines that the
5 bankruptcy court did not have the power under Article III
6 of the Constitution to enter the judgment, order, or decree
7 appealed from, the district court may treat it as proposed
8 findings of fact and conclusions of law.

Committee Note

This rule is new. It is added to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from. Consistent with the Supreme Court’s decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the district court in that situation may treat the bankruptcy court’s judgment as proposed findings of fact and conclusions of law. Upon making the determination to proceed in that manner, the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party’s objections, *see* Rule 9033; treat the parties’ briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law.

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

1 **Rule 8021. Costs**

2 * * * * *

3 (c) COSTS ON APPEAL TAXABLE IN THE
4 BANKRUPTCY COURT. The following costs on appeal
5 are taxable in the bankruptcy court for the benefit of the
6 party entitled to costs under this rule:

7 (1) the production of any required copies of a
8 brief, appendix, exhibit, or the record;

9 (2) the preparation and transmission of the
10 record;

11 (3) the reporter's transcript, if needed to
12 determine the appeal;

13 (4) premiums paid for a ~~supersedeas~~ bond or
14 other security bonds—to preserve rights pending
15 appeal;

16 (5) the fee for filing the notice of appeal.

17 * * * * *

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

Because this amendment is made to conform to amendments to Civil Rule 62 and Appellate Rule 39, final approval is sought without publication.

1 **Rule 8022. Motion for Rehearing**

2 * * * * *

3 (b) FORM OF MOTION; LENGTH. The motion
4 must comply in form with Rule 8013(f)(1) and (2). Copies
5 must be served and filed as provided by Rule 8011. ~~Unless~~
6 ~~the district court or BAP orders otherwise, a motion for~~
7 ~~rehearing must not exceed 15 pages.~~Except by the district
8 court's or BAP's permission:

9 (1) a motion for rehearing produced using a
10 computer must include a certificate under
11 Rule 8015(h) and not exceed 3,900 words; and

12 (2) a handwritten or typewritten motion must
13 not exceed 15 pages.

Committee Note

Subdivision (b) is amended to conform to the recent amendment to F.R. App. P. 40(b), which was one of several appellate rules in which word limits were substituted for page limits for documents prepared by computer. The word limits were derived from the previous page limits using the assumption that one page is equivalent to 260

words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); completion of Official Form 417C suffices to meet that requirement.

Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 8015(g).

Changes Made After Publication and Comment

None.

Summary of Public Comments

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Supports adoption of the published amendments.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the published amendments.

1 **Rule 9025. Security: Proceedings Against Sureties**
2 **Security Providers**

3 Whenever the Code or these rules require or permit a
4 party to give security, and security is given ~~in the form of a~~
5 ~~bond or stipulation or other undertaking,~~ with one or more
6 security providers, each providersurety submits to the
7 jurisdiction of the court, and liability may be determined in
8 an adversary proceeding governed by the rules in Part VII.

Committee Note

This rule is amended to reflect the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting this rule’s enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into the rule by these amendments.

Because this amendment is made to conform to amendments to Civil Rule 62, final approval is sought without publication.

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**Appendix:
Length Limits Stated in Part VIII of the
Federal Rules of Bankruptcy Procedure**

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monofaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
 - You must use the word limit if you produce your document on a computer; and
 - You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's	15,300	35	1,500

	Rule	Document Type	Word Limit	Page Limit	Line Limit
		principal and response brief			
	8016(d)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

Changes Made After Publication and Comment

None.

Summary of Public Comments

Pennsylvania Bar Association (BK-2016-0003-0008)— Supports adoption of the appendix.

Information to identify the case:

Debtor _____ Name	EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 11 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 11 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309F (For Corporations or Partnerships)**Notice of Chapter 11 Bankruptcy Case**

12/17

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name

2. All other names used in the last 8 years

3. Address

4. Debtor's attorney

Contact phone _____

Name and address

Email _____

5. Bankruptcy clerk's office

Documents in this case may be filed at this address.

Hours open _____

You may inspect all records filed in this case at this office or online at www.pacer.gov.

Contact phone _____

6. Meeting of creditors

The debtor's representative must attend the meeting to be questioned under oath.

_____ at _____
Date Time

Location:

Creditors may attend, but are not required to do so.

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

For more information, see page 2 ►

7. Proof of claim deadline**Deadline for filing proof of claim:**

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below.

Deadline for filing the complaint: _____**9. Creditors with a foreign address**

If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.

11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Information to identify the case:

Debtor 1	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____ - _____ - _____
Debtor 2 (Spouse, if filing)	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____ - _____ - _____
United States Bankruptcy Court for the: _____	District of _____			[Date case filed for chapter 12 _____] OR
	(State)			MM / DD / YYYY
Case number: _____				[Date case filed in chapter _____] OR
				MM / DD / YYYY
				Date case converted to chapter 12 _____] OR
				MM / DD / YYYY

Official Form 309G (For Individuals or Joint Debtors)

Notice of Chapter 12 Bankruptcy Case

12/17

For the debtors listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, from the debtors' property, or from certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in a discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name		
2. All other names used in the last 8 years		
3. Address		If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address		Contact phone _____ Email _____
5. Bankruptcy trustee Name and address		Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov .		Hours open _____ Contact phone _____

For more information, see page 2 ►

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.

_____ at _____
 Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint to challenge dischargeability of certain debts:

Filing deadline: _____

You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

Deadlines for filing proof of claim:

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

Filing deadline: 30 days after the conclusion of the meeting of creditors

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

9. Filing of plan

[The debtor has filed a plan, which is attached. The hearing on confirmation will be held on: _____ at _____
 Date Time]

Or [The debtor has filed a plan. The plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan and a notice of the hearing on confirmation will be sent separately.]

10. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

11. Filing a Chapter 12 bankruptcy case

Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business unless the court orders otherwise.

12. Discharge of debts

Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the clerk's office by the deadline.

13. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Information to identify the case:

Debtor _____ Name	EIN _____ - _____ - _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 12 _____ MM / DD / YYYY OR
Case number: _____	[Date case filed in chapter _____ MM / DD / YYYY
	Date case converted to chapter 12 _____ MM / DD / YYYY]

Official Form 309H (For Corporations or Partnerships)**Notice of Chapter 12 Bankruptcy Case****12/15**

For the debtor listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor, the debtor's property, or certain codebtors. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in the discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov .	Hours open _____ Contact phone _____
6. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

7. Meeting of creditors

The debtor's representative must attend the meeting to be questioned under oath.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

Deadline for filing the complaint: _____

9. Filing of plan

[The debtor has filed a plan, which is attached. The hearing on confirmation will be held on: _____ at _____
Date Time]

Or [The debtor has filed a plan. The plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan and a notice of the hearing on confirmation will be sent separately.]

10. Deadlines

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

11. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

12. Filing a chapter 12 bankruptcy case

Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business.

13. Discharge of debts

Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan.

If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN _____
 EIN _____

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN _____
 EIN _____

United States Bankruptcy Court for the: _____ District of _____
(State)

[Date case filed for chapter 13 _____
MM / DD / YYYY OR

Case number: _____

[Date case filed in chapter _____
MM / DD / YYYY

Date case converted to chapter 13 _____]
MM / DD / YYYY

Official Form 309I

Notice of Chapter 13 Bankruptcy Case

12/17

For the debtors listed above, a case has been filed under chapter 13 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, the debtors' property, and certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 13 plan may result in a discharge. Creditors who assert that the debtors are not entitled to a discharge under 11 U.S.C. § 1328(f) must file a motion objecting to discharge in the bankruptcy clerk's office within the deadline specified in this notice. Creditors who want to have their debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office by the same deadline. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov .	Hours open _____ Contact phone _____

For more information, see page 2 ►

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.

_____ at _____
 Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint to challenge dischargeability of certain debts:

Filing deadline: _____

You must file:

- a motion if you assert that the debtors are not entitled to receive a discharge under U.S.C. § 1328(f), or
- a complaint if you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4).

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

Deadlines for filing proof of claim:

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim.

Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

Filing deadline: 30 days after the conclusion of the meeting of creditors

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

9. Filing of plan

[The debtor has filed a plan, which is attached. The hearing on confirmation will be held on: _____ at _____
 Date Time]

Or [The debtor has filed a plan. The plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan and a notice of the hearing on confirmation will be sent separately.]

10. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadline in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

11. Filing a chapter 13 bankruptcy case

Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts according to a plan. A plan is not effective unless the court confirms it. You may object to confirmation of the plan and appear at the confirmation hearing. A copy of the plan [is included with this notice] or [will be sent to you later], and [the confirmation hearing will be held on the date shown in line 9 of this notice] or [the court will send you a notice of the confirmation hearing]. The debtor will remain in possession of the property and may continue to operate the business, if any, unless the court orders otherwise.

12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that debtors claimed, you may file an objection by the deadline.

13. Discharge of debts

Confirmation of a chapter 13 plan may result in a discharge of debts, which may include all or part of a debt. However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

COMMITTEE NOTE

Official Form 309F (For Corporations or Partnerships), *Notice of Chapter 11 Bankruptcy Case*, is amended at Lines 8 and 11. Both lines previously stated that a creditor seeking to have a debt excepted from discharge under § 1141(d)(6)(A) must file a complaint by the stated deadline. That statement has been revised in light of ambiguities in § 1141(d)(6)(A) regarding its relationship with § 523. Specifically, the provision is unclear about whether not only a debt “owed to a domestic governmental unit” but also a debt “owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute” must be of the type described by § 523(a)(2)(A) and (B). The provision is also unclear about whether the procedural requirements of § 523(c)(1) apply, given that § 1141(d)(6)(A) specifically refers to § 523(a) but not to § 523(c). Rather than take a position on the proper interpretation of § 1141(d)(6)(A), the form leaves to creditors the determination of whether § 523(c) applies to their claims, in which case they must commence a dischargeability proceeding by the Rule 4007(c) deadline that is stated on the form.

Official Forms 309G, (For Individual Debtors), *Notice of Chapter 12 Bankruptcy Case*, 309H, (For Corporations and Partnerships), *Notice of Chapter 12 Bankruptcy Case*, and 309I, *Notice of Chapter 13 Bankruptcy Case*, are each amended at Line 9 to remove references to “plan summaries” in conformance with amendments to Rule 3015(d) made in 2017.

Changes Made After Publication and Comment

Because the amendments to Official Forms 309G, 309H, and 309I are made to conform to an amendment to Rule 3015(d), final approval is sought without publication.

With respect to Official Form 309F, an amendment similar to the one proposed for line 8 of the form was made at line 11.

Summary of Public Comment to Official Form 309F

Judge Laurel Isicoff (Bankr. S.D. Fla.) (BK-2016-0003-0003)—Because no amendment to line 11 of the form is being proposed, using different language in lines 8 and 11 creates confusion for the recipient of the notice, who might believe that the deadline in paragraph 8 does not apply to the complaint referred to in paragraph 11.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the amended form.

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

Signature of attorney for appellant(s) (or appellant(s)
if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney
(or appellant(s) if not represented by an attorney):

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[Note to inmate filers: If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4710 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

Committee Note

The form is amended to include a notice to inmate filers that Director's Form 4710 may be used to provide a declaration under Rule 8002(c)(1) regarding the mailing of a notice of appeal using an institution's legal mail system.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Pennsylvania Bar Association (BK-2016-0003-0008)—
Supports adoption of the amended form.

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[This certification must be appended to your document if its length is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. Bankr. P. *[insert Rule citation; e.g., 8015(a)(7)(B)]*] [the word limit of Fed. R. Bankr. P. *[insert Rule citation; e.g., 8013(f)(3)(A)]*] because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g) [and *[insert applicable Rule citation, if any]*]:

- this document contains *[state the number of]* words, **or**
- this brief uses a monospaced typeface and contains *[state the number of]* lines of text.

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because:

- this document has been prepared in a proportionally spaced typeface using *[state name and version of word-processing program]* in *[state font size and name of type style]*, **or**
- this brief has been prepared in a monospaced typeface using *[state name and version of word-processing program]* with *[state number of characters per inch and name of type style]*.

Signature

Date: _____

Print name of person signing certificate of compliance:

COMMITTEE NOTE

The form is amended to reflect changes in the length limits specified by Part VIII of the Bankruptcy Rules for appellate documents and the broadened requirement for a certificate of compliance under Rule 8015(h). The rule now requires certification of compliance with the type-volume or word limits for briefs filed under Rule 8015(a)(7)(b) 8016(d)(2), or 8017(b)(4), and documents filed under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1).

Changes Made After Publication and Comment

None.

Summary of Public Comment

Pennsylvania Bar Association (BK-2016-0003-0008)—
Supports adoption of the amended form.

Fill in this information to identify the case:

Debtor Name _____
United States Bankruptcy Court for the: _____ District of _____
(State)
Case number: _____

Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11

12/17

[Name of Proponent]’s Plan of Reorganization, Dated [Insert Date]

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for: classes of priority claims;
 classes of secured claims;
 classes of non-priority unsecured claims; and
 classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

2.01 **Class 1**..... All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), [“gap” period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).

[Add classes of priority claims, if applicable]

2.02 **Class 2**..... The claim of _____, to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. *Note:* Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03 **Class 3**..... All non-priority unsecured claims allowed under § 502 of the Code.

[Add other classes of unsecured claims, if any.]

2.04 **Class 4** Equity interests of the Debtor. [If the Debtor is an individual, change this heading to *The interests of the individual Debtor in property of the estate.*]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01 **Unclassified claims** Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.

3.02 **Administrative expense claims** Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

3.03 **Priority tax claims** Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].

3.04 **Statutory fees** All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.

3.05 **Prospective quarterly fees** All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - Priority claims excluding those in Article 3	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 - Secured claim of [Insert name of secured creditor.]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 - Non-priority unsecured creditors	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity security holders of the Debtor	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

5.01 **Disputed claim** A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either:

- (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or
- (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 **Delay of distribution on a disputed claim** No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 **Settlement of disputed claims** The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01 **Assumed executory contracts and unexpired leases**

(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date:
 [List assumed, or if applicable assigned, executory contracts and unexpired leases.]

(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date.

A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01 **Definitions and rules of construction** The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions:

[Insert additional definitions if necessary].

8.02 **Effective date** The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.

8.03 **Severability** If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 **Binding effect** The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 **Captions** The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 Controlling effect

Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of _____ govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[8.07 Corporate governance

[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

[8.08 Retention of Jurisdiction

Language addressing the extent and the scope of the bankruptcy court's jurisdiction after the effective date of the plan.]

Article 9: Discharge

Check one box.

9.01

Discharge if the Debtor is an individual and § 1141(d)(3) is not applicable.

Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Discharge if the Debtor is a partnership and § 1141(d)(3) is not applicable. On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable. On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

No discharge if § 1141(d)(3) is applicable. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

Debtor Name _____

Case number _____

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

x

[Signature of the Plan Proponent]

[Printed Name]

x

[Signature of the Attorney for the Plan Proponent]

[Printed Name]

COMMITTEE NOTE

Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*, replaces Official Form 25A, *Plan of Reorganization in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. It is intended to provide an illustrative format, rather than a specific prescription for the form's language or content of a plan in any particular case.

In Article 1, *Summary*, a category is added for priority claims that are required to be classified and provided for under the plan, and the category for "unsecured claims" is revised to provide for only "non-priority unsecured claims." Also, the value that the proponent estimates to be distributed to unsecured claims is revised to clarify that the estimate is limited to non-priority claims. The instruction to identify and briefly summarize priority and administrative claims that will not be paid on the effective date of the plan, to the extent permitted by the Bankruptcy Code, is eliminated because it is duplicative of the information requested in Articles 3 and 4.

In Article 2, *Classification of Claims and Interests*, section 2.01 is revised to clarify that the priority of claims is determined under section 507(a) of the Bankruptcy Code and to provide for the classification of priority claims where necessary and appropriate. *See* 11 U.S.C. § 1129(a)(9)(B). Section 2.03 is revised to clarify that Class 3 "unsecured claims" are limited to "non-priority unsecured claims."

In Article 3, *Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees*, the title and categories of claims have been revised to include all unclassified administrative and priority claims and all fees payable under 28 U.S.C. § 1930 for which the Bankruptcy Code specifies the treatment under the plan. *See* 11 U.S.C. § 1129(a)(9), (12). In the title, the reference to "United States Trustee fees" is changed to "Quarterly and Court Fees" to include all of the fees payable under

28 U.S.C. § 1930. Also, section 3.04 is revised to include all statutory fees under 28 U.S.C. § 1930(a), and quarterly fees payable under 28 U.S.C. § 1930(a)(6) and (7) after the effective date of the plan are moved to a new section 3.05.

Article 4, *Treatment of Claims and Interests Under the Plan*, is revised to conform to the changes made in sections 2.01 and 2.03 of the plan to classify priority claims, if applicable, and to distinguish the non-priority unsecured claims.

In Article 6, *Provisions for Executory Contracts and Unexpired Leases*, references to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable. Section 6.01 is revised to clarify that executory contracts and unexpired leases are assumed, and if applicable assigned, under section 6.01(a) and rejected under section 6.01(b) as of the effective date of the plan. Section 6.01(b) is revised to clarify that all executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Article 9, *Discharge*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

The caption block for the plan is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on the plan was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be

used in non-individual chapter 11 cases and joint cases involving individual debtors.

- A reference to a claims reserve, if any, was added to the list of potential information items to be discussed in Article 7 (Means for Implementation of Plan).
- Section 8.08 (Retention of Jurisdiction) was added to address the post-effective date jurisdiction of the bankruptcy court.

Summary of Public Comment

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the amended form.

Judge Neil W. Bason (C.D. Cal.) (BK-2016-003-0013)—Made a number of detailed comments, including the following:

- Forms 425A and 425B are redundant and should be streamlined to eliminate unnecessary repetition of plan provisions in the disclosure statement.
- The explanation of who may or may not vote on a plan is inconsistent and incomplete. This explanation in the disclosure statement and the relevant plan provisions should be replaced with language that offers a different definition of “disputed claim” and a more extensive explanation of who may or may not vote.
- The plan does not contain provisions dealing with claims reserves or unclaimed funds.
- The meaning of the term “final non-appealable order” as used in the plan is ambiguous.
- The terminology in the executory contracts section (i.e., “executory contract,” “assume,” “reject”) is not well defined and may be confusing to non-lawyers. The plan should include a sample chart in Part III.F that shows how the debtor proposes to cure any defaults under executory contracts and unexpired leases.
- Add a separate signature line for a debtor’s spouse.
- Add provisions (i) allowing the debtor under Section 5.03 of the plan to enter into settlements under a certain dollar amount on notice and without court approval; and (ii) providing that the court will retain jurisdiction over certain matters after the effective date of the plan.
- Delete sections 8.03 and 8.05 of the plan, which address severability and captions, respectively.

Official Form 425A (Committee Note) (12/17)

- Section 9.01 of the plan is wrong in referencing § 1141(d)(3) of the Bankruptcy Code, and it is unclear regarding the timing of any discharge.

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Fill in this information to identify the case:

Debtor Name _____
United States Bankruptcy Court for the: _____ District of _____
(State)
Case number: _____

Check if this is an amended filing

Official Form 425B

Disclosure Statement for Small Business Under Chapter 11

12/17

[Name of Proponent]’s Disclosure Statement, Dated [Insert Date]

Table of Contents. See instructions about how to modify the table of contents if you do not have all of the sections below.

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I. Introduction

This is the disclosure statement (the *Disclosure Statement*) in the small business chapter 11 case of [] (the *Debtor*). This Disclosure Statement provides information about the Debtor and the Plan filed on [insert date] (the *Plan*) to help you decide how to vote.

A copy of the Plan is attached as *Exhibit A*. **Your rights may be affected.** You should read the Plan and this Disclosure Statement carefully. You may wish to consult an attorney about your rights and your treatment under the Plan.

The proposed distributions under the Plan are discussed at pages []- [] of this Disclosure Statement. [General unsecured creditors are classified in Class [] and will receive a distribution of []% of their allowed claims, to be distributed as follows [].]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the *Court*) will consider when deciding whether to confirm the Plan,
- Why [the proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. A separate order has been entered setting the following information:

- Time and place of the hearing to [finally approve this disclosure statement and] confirm the plan,
- Deadline for voting to accept or reject the plan, and
- Deadline for objecting to the [adequacy of disclosure and] confirmation of the plan.

If you want additional information about the Plan or the voting procedure, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.

II. Background

A. Description and History of the Debtor’s Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of [_____]. [Describe the Debtor’s business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor’s insiders as defined in § 101(31) of the United States Bankruptcy Code (the Code) and their relationship to the Debtor.

For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the 2 years prior to the commencement of the Debtor’s bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor During the Bankruptcy

List the name and position of all current officers, directors, managing members, or other persons in control (collectively the *Management*) who will not have a position post-confirmation that you list in III D 2.

Name	Position

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor’s bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, Debtor in Possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers

Check one box.

The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

The Debtor estimates that up to \$ may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed
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The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. Claims Objections

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. Disputed claims are treated in Article 5 of the Plan.

H. Current and Historical Financial Conditions

The identity and fair market value of the estate's assets are listed in *Exhibit B*. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in *Exhibit C*.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

[A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

III. Summary of the Plan of Reorganization and Treatment of Claims and Equity Interests**A. What Is the Purpose of the Plan of Reorganization?**

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. Therefore, the Plan Proponent has *not* placed the following claims in any class:

1. Administrative expenses, involuntary gap claims, and quarterly and Court fees

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 503(b) of the Code. Administrative expenses include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition, and compensation for services and reimbursement of expenses awarded by the court under § 330(a) of the Code. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment. Involuntary gap claims allowed under § 502(f) of the Code are entitled to the same treatment as administrative expense claims. The Code also requires that fees owed under section 1930 of title 28, including quarterly and court fees, have been paid or will be paid on the effective date of the Plan.

The following chart lists the Debtor's estimated administrative expenses, and quarterly and court fees, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Administrative expenses		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Involuntary gap claims		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Statutory Court fees		Paid in full on the effective date of the Plan

Statutory quarterly fees

Paid in full on the effective date of the Plan

Total	
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2. Priority tax claims

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim pursuant to 11 U.S.C. § 511, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor’s estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (Name and type of tax)	Estimated Amount Owed	Date of Assessment	Treatment												
	\$		<table border="0" style="width: 100%;"> <tr><td>Payment interval</td><td></td></tr> <tr><td>[Monthly] payment</td><td style="text-align: right;">\$</td></tr> <tr><td>Begin date</td><td></td></tr> <tr><td>End date</td><td></td></tr> <tr><td>Interest rate</td><td style="text-align: right;">%</td></tr> <tr><td>Total payout amount</td><td style="text-align: right;">\$</td></tr> </table>	Payment interval		[Monthly] payment	\$	Begin date		End date		Interest rate	%	Total payout amount	\$
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Payment interval															
[Monthly] payment	\$														
Begin date															
End date															
Interest rate	%														
Total payout amount	\$														

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. Classes of secured claims

Allowed Secured Claims are claims secured by property of the Debtor’s bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor’s claim is less than the amount of the creditor’s allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor’s secured prepetition claims and their proposed treatment under the Plan:

Class #	Description	Impairment?	Treatment
	Secured claim of: Name	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Monthly] payment \$
	Collateral description		Payments begin
	Allowed secured amount \$		Payments end
	Priority of lien		[Balloon payment]
	Principal owed		Interest rate %
	Pre-pet. arrearage		Treatment of lien
	Total claim \$		[Additional payment required to cure defaults] \$
	Secured claim of: Name	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Monthly] payment \$
	Collateral description		Payment begin
	Allowed secured amount \$		Payments end
	Priority of lien		[Balloon payment]
	Principal owed		Interest rate %
	Pre-pet. arrearage		Treatment of lien
	Total claim \$		[Additional payment required to cure defaults] \$

2. Classes of priority unsecured claims

The Code requires that, with respect to a class of claims of a kind referred to in §§ 507(a)(1), (4), (5), (6), and (7), each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim, unless a particular claimant agrees to a different treatment or the class agrees to deferred cash payments.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment?	Treatment
	Priority unsecured claim pursuant to section [insert]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	
	Total amount of claims \$		
	Priority unsecured claim pursuant to section [insert]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	
	Total amount of claims \$		

3. Classes of general unsecured claims

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of § 1122(b) convenience class if applicable.]

The following chart identifies the Plan’s proposed treatment of classes [] through [], which contain general unsecured claims against the Debtor:

Class #	Description	Impairment?	Treatment
	[1122(b) Convenience Class]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert proposed treatment, such as “Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law”]
	General unsecured class	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Monthly] payment \$ Payments begin Payments end [Balloon payment] \$ Interest rate from [date] % Estimated percent of claim paid %

4. Classes of equity interest holders

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (*LLC*), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan’s proposed treatment of the classes of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition Debtor had issued multiple classes of stock.]

Class #	Description	Impairment?	Treatment
	Equity interest holders	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	

D. Means of Implementing the Plan

1. Source of payments

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. Post-confirmation Management

The Post-Confirmation Management of the Debtor (including officers, directors, managing members, and other persons in control), and their compensation, shall be as follows:

Name	Position	Compensation

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor’s ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan in Article 6 lists all executory contracts and unexpired leases that the Debtor will assume, and if applicable assign, under the Plan. *Assumption* means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Article 6 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Article 6 or have not previously been assumed, and if applicable assigned, or are not the subject of a pending motion to assume, and if applicable assign, will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is

Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and equity interest holders concerned with how the plan may affect their tax liability should consult with their own accountants, attorneys, and/or advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum:

- (1) Tax consequences to the Debtor of the Plan;
- (2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. Confirmation Requirements and Procedures

To be confirmable, the Plan must meet the requirements listed in §1129 of the Code. These include the requirements that:

- the Plan must be proposed in good faith;
- if a class of claims is impaired under the Plan, at least one impaired class of claims must accept the Plan, without counting votes of insiders;
- the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and
- the Plan must be feasible.

These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. Except as stated in Part IV.A.3 below, a creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both

- (1) allowed or allowed for voting purposes and
- (2) impaired.

In this case, the Plan Proponent believes that classes are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. What is an allowed claim or an allowed equity interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either

- (1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or
- (2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was .

[If applicable – The deadline for filing objections to claims is .

2. What is an impaired claim or impaired equity interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it

is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered *impaired* if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. Who is not entitled to vote

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not “allowed claims” or “allowed equity interests” (as discussed above), unless they have been “allowed” for voting purposes;
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code;
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan; and
- administrative expenses.

Even if you are not entitled to vote on the plan, you have a right to object to the confirmation of the Plan [and to the adequacy of the Disclosure Statement].

4. Who can vote in more than one class

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless:

- (1) all impaired classes have voted to accept the Plan; or
- (2) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and the Plan is eligible to be confirmed by “cram down” of the non-accepting classes, as discussed later in Section B.2.

1. Votes necessary for a class to accept the plan

A class of claims accepts the Plan if both of the following occur:

- (1) the holders of more than $\frac{1}{2}$ of the allowed claims in the class, who vote, cast their votes to accept the Plan, and
- (2) the holders of at least $\frac{2}{3}$ in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least $\frac{2}{3}$ in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. Treatment of non-accepting classes of secured claims, general unsecured claims, and interests

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan upon the request of the Plan proponent if the non-accepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds non-accepting classes is commonly referred to as a *cram down* plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not *discriminate unfairly*, and

is *fair and equitable* toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a *cram down* confirmation will affect your claim or equity interest, as the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as *Exhibit E*.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. Ability to initially fund plan

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as *Exhibit F*.

2. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information. Those projections are listed in *Exhibit G*.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of \$.

The final Plan payment is expected to be paid on .

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

V. Effect of Confirmation of Plan

A. Discharge of Debtor

Check one box.

- Discharge if the Debtor is an individual and 11 U.S.C. § 1141(d)(3) is not applicable.** Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.
-
- Discharge if the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.
-
- Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt:
- (i) imposed by the Plan, or
 - (ii) to the extent provided in 11 U.S.C. § 1141(d)(6).
-
- No Discharge if § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.
-

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or re-voting on the Plan.

[If the Debtor is not an individual, add the following:

The Plan Proponent may also seek to modify the Plan at any time after confirmation only if

- (1) the Plan has not been substantially consummated and
- (2) the Court authorizes the proposed modifications after notice and a hearing.]

[If the Debtor is an individual, add the following:

Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to

- (1) increase or reduce the amount of payments under the Plan on claims of a particular class,
- (2) extend or reduce the time period for such payments, or
- (3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.



VI. Other Plan Provisions

[Insert other provisions here, as necessary and appropriate.]

x

[Signature of the Plan Proponent]

[Printed Name]

x

[Signature of the Attorney for the Plan Proponent]

[Printed Name]

Debtor Name _____

Case number _____

Exhibits

Exhibit A: Copy of Proposed Plan of Reorganization

Debtor Name _____

Case number _____

Exhibit B: Identity and Value of Material Assets of Debtor

Debtor Name _____

Case number _____

Exhibit C: Prepetition Financial Statements
(to be taken from those filed with the court)

Debtor Name _____

Case number _____

**Exhibit D: [Most Recently Filed Postpetition Operating Report]
[Summary of Postpetition Operating Reports]**

Exhibit E: Liquidation Analysis

Plan Proponent’s Estimated Liquidation Value of Assets

Assets		
a. Cash on hand		\$
b. Accounts receivable		\$
c. Inventory		\$
d. Office furniture and equipment		\$
e. Machinery and equipment		\$
f. Automobiles		\$
g. Building and land		\$
h. Customer list		\$
i. Investment property (such as stocks, bonds or other financial assets)		\$
j. Lawsuits or other claims against third-parties		\$
K Other intangibles (such as avoiding powers actions)		\$
Total Assets at Liquidation Value		\$
Less: Secured creditors’ recoveries	—	\$
Less: Chapter 7 trustee fees and expenses	—	\$
Less: Chapter 11 administrative expenses	—	\$
Less: Priority claims, excluding administrative expense claims	—	\$
[Less: Debtor’s claimed exemptions]	—	\$
(1) Balance for unsecured claims		\$
(2) Total dollar amount of unsecured claims		\$
Percentage of claims which unsecured creditors would receive or retain in a chapter 7 liquidation:		%
Percentage of claims which unsecured creditors will receive or retain under the Plan:		% [Divide (1) by (2)]

Exhibit F: Cash on hand on the effective date of the Plan

Cash on hand on effective date of plan	\$
Less: Amount of administrative expenses payable on effective date of the Plan	- \$
Less: Amount of statutory costs and charges	- \$
Less: Amount of cure payments for executory contracts	- \$
Less: Other Plan payments due on effective date of the Plan	- \$
Balance after paying these amounts	\$

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:

Cash in Debtor's bank account now	\$
Net earnings between now and effective date of the Plan [State the basis for such projections]	\$
Borrowing [Separately state terms of repayment]	\$
Capital contributions	\$
Other	\$
Total (This number should match "cash on hand" figure noted above)	\$

Debtor Name _____

Case number _____

Exhibit G: Projections of Cash Flow for Post-Confirmation Period

COMMITTEE NOTE

Official Form 425B, *Disclosure Statement for Small Business Under Chapter 11*, replaces Official Form 25B, *Disclosure Statement in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. Where possible, the form parallels how businesses commonly keep their financial records. It is intended to provide an illustrative format for disclosure, rather than a specific prescription for the form's language or content.

Part I, *Introduction*, is revised to clarify that the disclosure statement is being provided for purposes of voting on the plan. The instructions that the recipient discuss the plan and disclosure statement with an attorney are revised to clarify that, if the recipient has an attorney, the recipient is not required to consult with the attorney, but may wish to consult with an attorney regardless of whether it has one.

Part I.B., *Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing*, is revised to provide for the court's entry of a separate order setting time frames for hearings and deadlines, *see* Official Form 313, and to delete those dates from the form as redundant. Also, this part is revised to clarify that requests for additional information about the voting procedure, in addition to the plan, should be directed to the plan proponent's representative.

In Part I.C., *Disclaimer*, the instruction to provide the date by which an objection to final approval of the disclosure statement must be filed is eliminated as duplicative of the court's order required under Part I.B. Repetitive language indicating that the court's approval of the disclosure statement is not final is eliminated.

In Part II.C., *Management of the Debtor During the Bankruptcy*, the title is revised to eliminate the reference to the debtor's management before the bankruptcy, and the instruction is revised to limit the required disclosure to those current officers,

directors, managing members, and other persons in control who will not retain a position after confirmation. The instruction to provide information regarding the debtor's pre-petition management is deleted because similar information is required in the *Statement of Financial Affairs of Non-Individuals Filing for Bankruptcy*, Official Form 207. The instruction to provide information regarding the debtor's post-confirmation management is incorporated in Part III.D.2, *Post-confirmation Management*, of the form.

In Part III.B.1, *Administrative expenses, involuntary gap claims, and quarterly and Court fees*, the title and form are revised to clarify that the debtor must provide for the treatment of all fees and expenses owed under 28 U.S.C. § 1930, including quarterly fees and court fees. *See* 11 U.S.C. § 1129(a)(12). Also, the title and form are revised to include involuntary "gap" period claims in an involuntary case under section 502(f) of the Bankruptcy Code. *See* 11 U.S.C. §§ 507(a)(3), 1129(a)(9)(A). The reference to the provision governing the allowance of administrative expenses is corrected and changed from section 507(a) to 503(b) of the Bankruptcy Code. The example is revised to include compensation for services and reimbursement of expenses awarded by the court under section 330(a) of the Bankruptcy Code. The requirement that any agreement to pay professional fees and expenses and other unclassified administrative expenses on a date other than the effective date be in writing is deleted. *See* 11 U.S.C. § 1129(a)(9). The list is revised to include a single category of administrative expenses allowed under section 503(b) of the Bankruptcy Code, deleting as redundant the specific categories for reclamation claims under section 503(b)(9) and approved professional fees and expenses under section 503(b)(2), and to clarify that any holder of an allowed administrative expense claim may agree to payment other than in full on the effective date. *Id.*

Part III.B.2, *Priority tax claims*, is revised to include a reference to section 511 of the Bankruptcy Code governing the rate of interest on tax claims.

Part III.C.2, *Classes of priority unsecured claims*, is revised to comply with section 1129(a)(9)(B), including the addition that any particular claimant may agree to treatment other than cash

payment in full on the effective date and to clarify that any class may agree to deferred cash payments. *See* 11 U.S.C. § 1129(a)(9)(B).

Part III.D.2, *Post-confirmation Management*, is revised to comply with section 1129(a)(5) of the Bankruptcy Code.

Part III.F., *Executory Contracts and Unexpired Leases*, is revised to incorporate changes to Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*. “Exhibit 5.1” is changed to “Article 6” of the plan. References to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable, including the requirement that a party objecting to the assignment of an executory contract or unexpired lease under the plan must timely file and serve an objection to the plan. The form is revised to clarify that executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Part IV, *Confirmation Requirements and Procedures*, the introduction is revised to delete references to subsections (a) and (b) to clarify that a plan must satisfy all of the requirements of section 1129 of the Bankruptcy Code. Also, the form is revised to clarify that the requirement to obtain the acceptance of at least one impaired accepting class of claims, excluding any acceptance by an insider, applies only if the plan proposes to impair at least one class of claims. *See* 11 U.S.C. § 1129(a)(10).

In Part IV.B.1, *Votes necessary for a class to accept the plan*, the standards for confirmation in the event the plan has impaired classes have been corrected. *See* 11 U.S.C. § 1129(a)(8)(A), (10) and (b).

The title to Part IV.B.2, *Treatment of non-accepting classes of secured claims, general unsecured claims, and interests*, is revised for clarity to exclude priority claimants. *See* 11 U.S.C. § 1129(b). Also, the requirement that the proponent must request

confirmation pursuant to section 1129(b) of the Bankruptcy Code is added.

In Part IV.D.2, *Ability to make future plan payments and operate without further reorganization*, the requirement that the plan proponent show that the business will have sufficient cash flow to operate the business, in addition to making the required plan payments, is new. *See* 11 U.S.C. § 1129(a)(11).

In Part V.A., *Discharge of Debtor*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

In the title to Exhibit G, *Projections of Cash Flow for Post-Confirmation Period*, the reference to “and Earnings” is deleted to ensure consistency given the disparate ways in which “earnings” can be interpreted.

The caption block for the disclosure statement is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on the disclosure statement was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals.
- The column in Part III.C.1 (Classes of secured claims) for disclosing the insider status of creditors holding secured claims was deleted.
- A cross-reference to Part IV.A.3 was added to the introductory language in Part IV.A (Who May Vote or Object).

Summary of Public Comment

National Conference of Bankruptcy Judges (BK-2016-0003-0007)—Questions the decision to remove from Form 425B the hearing date on the disclosure statement and the deadlines for voting and filing objections.

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the amended form.

Judge Neil W. Bason (C.D. Cal.) (BK-2016-003-0013)—Made a number of detailed comments, including the following:

- Forms 425A and 425B are redundant and should be streamlined to eliminate unnecessary repetition of plan provisions in the disclosure statement.
- The explanation of who may or may not vote on a plan is inconsistent and incomplete. This explanation in the disclosure statement and the relevant plan provisions should be replaced with language that offers a different definition of “disputed claim” and a more extensive explanation of who may or may not vote.
- The charts at Part III.C of Official Form 425B only require disclosure of insider status for secured claims, but not for priority or unsecured claims. Insider disclosures should be added to the latter two classes to facilitate the § 1129(a)(10) analysis.
- Official Form 425B does not address whether a creditor has made a § 1111(b) election, or a process for creditors to exercise their rights under section 1111(b). Add a provision explaining the § 1111(b) election and setting a deadline for creditors to make such an election.
- The two charts in Part II.C and III.D.2 should be combined to allow a better comparison of individuals who will and will not have a postpetition control position in the debtor.
- Add a separate signature line for a debtor’s spouse.

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Check if this is an amended filing

Official Form 425C

Monthly Operating Report for Small Business Under Chapter 11

12/17

Month: _____

Date report filed: _____
MM / DD / YYYY

Line of business: _____

NAISC code: _____

In accordance with title 28, section 1746, of the United States Code, I declare under penalty of perjury that I have examined the following small business monthly operating report and the accompanying attachments and, to the best of my knowledge, these documents are true, correct, and complete.

Responsible party: _____

Original signature of responsible party _____

Printed name of responsible party _____

1. Questionnaire

Answer all questions on behalf of the debtor for the period covered by this report, unless otherwise indicated.

	Yes	No	N/A
If you answer <i>No</i> to any of the questions in lines 1-9, attach an explanation and label it <i>Exhibit A</i>.			
1. Did the business operate during the entire reporting period?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Do you plan to continue to operate the business next month?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Have you paid all of your bills on time?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Did you pay your employees on time?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Have you deposited all the receipts for your business into debtor in possession (DIP) accounts?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Have you timely filed your tax returns and paid all of your taxes?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Have you timely filed all other required government filings?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Are you current on your quarterly fee payments to the U.S. Trustee or Bankruptcy Administrator?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Have you timely paid all of your insurance premiums?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
If you answer <i>Yes</i> to any of the questions in lines 10-18, attach an explanation and label it <i>Exhibit B</i>.			
10. Do you have any bank accounts open other than the DIP accounts?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Have you sold any assets other than inventory?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Have you sold or transferred any assets or provided services to anyone related to the DIP in any way?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Did any insurance company cancel your policy?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. Did you have any unusual or significant unanticipated expenses?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. Have you borrowed money from anyone or has anyone made any payments on your behalf?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16. Has anyone made an investment in your business?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

- 17. Have you paid any bills you owed before you filed bankruptcy?
- 18. Have you allowed any checks to clear the bank that were issued before you filed bankruptcy?

2. Summary of Cash Activity for All Accounts

19. **Total opening balance of all accounts** \$ _____
 This amount must equal what you reported as the cash on hand at the end of the month in the previous month. If this is your first report, report the total cash on hand as of the date of the filing of this case.

20. **Total cash receipts**
 Attach a listing of all cash received for the month and label it *Exhibit C*. Include all cash received even if you have not deposited it at the bank, collections on receivables, credit card deposits, cash received from other parties, or loans, gifts, or payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit C*.
 Report the total from *Exhibit C* here. \$ _____

21. **Total cash disbursements**
 Attach a listing of all payments you made in the month and label it *Exhibit D*. List the date paid, payee, purpose, and amount. Include all cash payments, debit card transactions, checks issued even if they have not cleared the bank, outstanding checks issued before the bankruptcy was filed that were allowed to clear this month, and payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit D*.
 Report the total from *Exhibit D* here. - \$ _____

22. **Net cash flow** + \$ _____
 Subtract line 21 from line 20 and report the result here.
 This amount may be different from what you may have calculated as *net profit*.

23. **Cash on hand at the end of the month** = \$ _____
 Add line 22 + line 19. Report the result here.
 Report this figure as the *cash on hand at the beginning of the month* on your next operating report.
 This amount may not match your bank account balance because you may have outstanding checks that have not cleared the bank or deposits in transit.

3. Unpaid Bills

Attach a list of all debts (including taxes) which you have incurred since the date you filed bankruptcy but have not paid. Label it *Exhibit E*. Include the date the debt was incurred, who is owed the money, the purpose of the debt, and when the debt is due. Report the total from *Exhibit E* here.

24. **Total payables** \$ _____
(Exhibit E)

4. Money Owed to You

Attach a list of all amounts owed to you by your customers for work you have done or merchandise you have sold. Include amounts owed to you both before, and after you filed bankruptcy. Label it *Exhibit F*. Identify who owes you money, how much is owed, and when payment is due. Report the total from *Exhibit F* here.

25. **Total receivables** \$ _____
 (Exhibit F)

5. Employees

26. What was the number of employees when the case was filed? _____
 27. What is the number of employees as of the date of this monthly report? _____

6. Professional Fees

28. How much have you paid this month in professional fees related to this bankruptcy case? \$ _____
 29. How much have you paid in professional fees related to this bankruptcy case since the case was filed? \$ _____
 30. How much have you paid this month in other professional fees? \$ _____
 31. How much have you paid in total other professional fees since filing the case? \$ _____

7. Projections

Compare your actual cash receipts and disbursements to what you projected in the previous month. Projected figures in the first month should match those provided at the initial debtor interview, if any.

	<u>Column A</u>	-	<u>Column B</u>	=	<u>Column C</u>
	Projected		Actual		Difference
	Copy lines 35-37 from the previous month's report.		Copy lines 20-22 of this report.		Subtract Column B from Column A.
32. Cash receipts	\$ _____	-	\$ _____	=	\$ _____
33. Cash disbursements	\$ _____	-	\$ _____	=	\$ _____
34. Net cash flow	\$ _____	-	\$ _____	=	\$ _____
35. Total projected cash receipts for the next month:					\$ _____
36. Total projected cash disbursements for the next month:					- \$ _____
37. Total projected net cash flow for the next month:					= \$ _____

8. Additional Information

If available, check the box to the left and attach copies of the following documents.

- 38. Bank statements for each open account (redact all but the last 4 digits of account numbers).
- 39. Bank reconciliation reports for each account.
- 40. Financial reports such as an income statement (profit & loss) and/or balance sheet.
- 41. Budget, projection, or forecast reports.
- 42. Project, job costing, or work-in-progress reports.

COMMITTEE NOTE

Official Form 425C, *Monthly Operating Report for Small Business Under Chapter 11*, replaces Official Form 25C, *Small Business Monthly Operating Report*. It is revised as part of the Forms Modernization Project, which was designed so that persons completing the forms would do so accurately and completely. To facilitate this, Official Form 425C is renumbered and includes formatting and stylistic changes throughout the form. The form requires basic financial information that the Internal Revenue Service recommends that businesses maintain.

The form is revised to add a checkbox to indicate if the report is an amended filing. It also clarifies that persons completing the form on behalf of the debtor should answer all questions for the period covered by the report, unless otherwise indicated. All instructions indicating that the U.S. Trustee may waive the attachments to the form are eliminated.

The form is reorganized. The previous sections for *Tax and Banking Information* are eliminated as redundant of information requested elsewhere within the form. The previous sections for *Income, Summary of Cash on Hand, Expenses, and Cash Profit* are revised and incorporated into Section 2, *Summary of Cash Activity for All Accounts*.

In Part 1, *Questionnaire*, a third checkbox column option, “N/A,” has been added to indicate if the question is not applicable. New exhibits to be attached provide explanations for any negative responses to questions 1 through 9 (Exhibit A) and any affirmative answers to questions 10 through 18 (Exhibit B). The questions are reorganized and renumbered, and several are revised. Question 1 is revised to ask whether the business operated during the period. Question 8, regarding the payment of quarterly fees under 28 U.S.C. § 1930(a)(6), is revised to include payments to the bankruptcy administrator. Question 15 is expanded to include payments made on the debtor’s behalf. The question whether the debtor has paid anything to an attorney or other professionals is eliminated, as redundant of information disclosed in Part 6. A new

question 17 is added inquiring whether the debtor has allowed any checks to clear the bank that were issued before the bankruptcy case.

Part 2, *Summary of Cash Activity for All Accounts*, clarifies and simplifies the reporting of the debtor's cash on hand during the period, and the letters of the attached exhibits are revised. References to "income," "expenses," and "cash profit" are eliminated. Line 19 clarifies that the cash on hand at the beginning of the month is the same as the cash on hand reported at the end of the previous month (or the commencement of the case if no prior report has been submitted). Net cash flow during the month, calculated in line 22, is equal to total cash receipts in line 20 (as itemized in Exhibit C) less total cash disbursements in line 21 (as itemized in Exhibit D). Net cash flow is added to the beginning balance to calculate the cash on hand at the end of the month in line 23. The form is revised to add explanations of the receipts and disbursements to be included in Exhibits C and D, as well as an instruction to clarify that bank statements should not be submitted in lieu of the exhibits.

In Part 3, *Unpaid Bills*, the exhibit letter is revised to *Exhibit E*.

In Part 4, *Money Owed to You*, the exhibit letter is revised to *Exhibit F*.

In Part 6, *Professional Fees*, the subheadings "*Bankruptcy Related*" and "*Non-Bankruptcy Related*" are eliminated.

Part 7, *Projections*, is revised to compare the debtor's actual cash receipts, cash disbursements, and net cash flow for the month to the projections in the previous month's report (or if the case is new, that the debtor reported at the initial debtor interview). See 11 U.S.C. § 308(b)(2) and (3). References to "income," "expenses," "cash profit," and the 180 day look-back period are eliminated.

Part 8, *Additional Information*, is revised to clarify which documents should be attached, if available and regardless of whether the debtor prepares them internally. These documents are:

(1) redacted bank statements for each open account; (2) bank reconciliation reports for each account; (3) financial reports such as an income statement (profit & loss) or balance sheet; (4) budget, projection, or forecast reports; and (5) project, job casting, or work-in-progress reports.

The caption block for this form is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

The caption on this form was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in non-individual chapter 11 cases and joint cases involving individual debtors.

Summary of Public Comment

Pennsylvania Bar Association (BK-2016-0003-0008)—Supports adoption of the amended form.

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Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Official Form 426

**Periodic Report Regarding Value, Operations, and Profitability of Entities
in Which the Debtor's Estate Holds a Substantial or Controlling Interest**

12/17

This is the *Periodic Report* as of on the value, operations, and profitability of those entities in which a Debtor holds, or two or more Debtors collectively hold, a substantial or controlling interest (a "Controlled Non-Debtor Entity"), as required by Bankruptcy Rule 2015.3. For purposes of this form, "Debtor" shall include the estate of such Debtor.

[Name of Debtor] holds a substantial or controlling interest in the following entities:

Name of Controlled Non-Debtor Entity	Interest of the Debtor	Tab #

This *Periodic Report* contains separate reports (*Entity Reports*) on the value, operations, and profitability of each Controlled Non-Debtor Entity.

Each *Entity Report* consists of five exhibits.

- *Exhibit A* contains the most recently available: balance sheet, statement of income (*loss*), statement of cash flows, and a statement of changes in shareholders' or partners' equity (*deficit*) for the period covered by the *Entity Report*, along with summarized footnotes.
- *Exhibit B* describes the Controlled Non-Debtor Entity's business operations.
- *Exhibit C* describes claims between the Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity.
- *Exhibit D* describes how federal, state or local taxes, and any tax attributes, refunds, or other benefits, have been allocated between or among the Controlled Non-Debtor Entity and any Debtor or any other Controlled Non-Debtor Entity and includes a copy of each tax sharing or tax allocation agreement to which the Controlled Non-Debtor Entity is a party with any other Controlled Non-Debtor Entity.
- *Exhibit E* describes any payment, by the Controlled Non-Debtor Entity, of any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor, or the incurrence of any obligation to make such payments, together with the reason for the entity's payment thereof or incurrence of any obligation with respect thereto.

This *Periodic Report* must be signed by a representative of the trustee or debtor in possession.

Debtor Name _____

Case number _____

The undersigned, having reviewed the *Entity Reports* for each Controlled Non-Debtor Entity, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that to the best of his or her knowledge, (i) this *Periodic Report* and the attached *Entity Reports* are complete, accurate, and truthful to the best of his or her knowledge, and (ii) the Debtor did not cause the creation of any entity with actual deliberate intent to evade the requirements of Bankruptcy Rule 2015.3

For non-individual Debtors:

X _____

Signature of Authorized Individual

Printed name of Authorized Individual

Date _____
MM / DD / YYYY

For individual Debtors:

X _____

Signature of Debtor 1

Printed name of Debtor 1

Date _____
MM / DD / YYYY

X _____

Signature of Debtor 2

Printed name of Debtor 2

Date _____
MM / DD / YYYY

Debtor Name _____

Case number _____

 Exhibit A: Financial Statements for [Name of Controlled Non-Debtor Entity]

Debtor Name _____

Case number _____

Exhibit A-1: Balance Sheet for **[Name of Controlled Non-Debtor Entity]** as of **[date]**

[Provide a balance sheet dated as of the end of the most recent 3-month period of the current fiscal year and as of the end of the preceding fiscal year.

Describe the source of this information.]

Exhibit A-2: Statement of Income (*Loss*) for **[Name of Controlled Non-Debtor Entity]** for period ending [date]

[Provide a statement of income (*loss*) for the following periods:

(i) For the initial report:

- a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and
- b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-3: Statement of Cash Flows for [Name of Controlled Non-Debtor Entity] for period ending [date]

[Provide a statement of changes in cash position for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-4: Statement of Changes in Shareholders'/Partners' Equity (*Deficit*) for [**Name of Controlled Non-Debtor Entity**]
for period ending [date]

[Provide a statement of changes in shareholders'/partners equity (*deficit*) for the following periods:

(i) For the initial report:

- a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and
- b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Debtor Name _____

Case number _____

Exhibit B: Description of Operations for [Name of Controlled Non-Debtor Entity]

[Describe the nature and extent of the Debtor's interest in the Controlled Non-Debtor Entity.

Describe the business conducted and intended to be conducted by the Controlled Non-Debtor Entity, focusing on the entity's dominant business segments.

Describe the source of this information.]

Debtor Name _____

Case number _____

Exhibit C: Description of Intercompany Claims

[List and describe the Controlled Non-Debtor Entity's claims against any other Controlled Non-Debtor Entity, together with the basis for such claims and whether each claim is contingent, unliquidated or disputed.

Describe the source of this information.]

Debtor Name _____

Case number _____

Exhibit D: Allocation of Tax Liabilities and Assets


[Describe how income, losses, tax payments, tax refunds, or other tax attributes relating to federal, state, or local taxes have been allocated between or among the Controlled Non-Debtor Entity and one or more other Controlled Non-Debtor Entities.

Include a copy of each tax sharing or tax allocation agreement to which the entity is a party with any other Controlled Non-Debtor Entity.

Describe the source of this information.]

Debtor Name _____

Case number _____

 Exhibit E: Description of Controlled Non-Debtor Entity's payments of Administrative Expenses, or Professional Fees otherwise payable by a Debtor

[Describe any payment made, or obligations incurred (or claims purchased), by the Controlled Non-Debtor Entity in connection with any claims, administrative expenses, or professional fees that have been or could be asserted against any Debtor.

Describe the source of this information.]

COMMITTEE NOTE

Official Form 426, *Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*, is revised and renumbered as part of the Forms Modernization Project. It implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

In addition to formatting revisions, certain aspects of Official Form 426 are changed to make the form easier for the debtor to complete and to better identify the kinds of information that a debtor must disclose in accordance with section 419 of BAPCPA and Rule 2015.3.

Official Form 426 limits its application to entities in which the debtor has a substantial or controlling interest, which the rule defines as a “Controlled Non-Debtor Entity.” The scope of this defined term is guided by subdivisions (a) and (c) of Rule 2015.3.

Official Form 426 eliminates the requirement to file a valuation of the Controlled Non-Debtor Entity. Exhibit A to Official Form 426 requires only periodic filings of the Controlled Non-Debtor Entity’s most recently available balance sheet, statement of income (*loss*), statement of cash flows, and statement of changes in shareholders’ or partners’ equity (*deficit*), together with summarized footnotes for such financial statements. If any of these financial statements are not available, the debtor can seek relief under Rule 2015.3(d).

Exhibit B to Official Form 426 requires a description of the Controlled Non-Debtor Entity's business, which was required by Exhibit C of former Rule 26.

Exhibits C, D, and E to Official Form 426 are new. Exhibit C requires a description of claims between a Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity. Exhibit D requires disclosure of information relating to the allocation of taxable income, losses, and other attributes among Controlled Non-Debtor Entities. Exhibit E requires disclosure about a Controlled Non-Debtor Entity's payment of claims or administrative expenses that would otherwise have been payable by a debtor.

The caption block for this form is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

The caption on this form was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in non-individual chapter 11 cases and joint cases involving individual debtors.

Summary of Public Comment

Pennsylvania Bar Association (BK-2016-0003-0008)—
Supports adoption of the amended form.

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APPENDIX B

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Appendix B

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

For Publication for Public Comment

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief Is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 * * * * *

8 (g) ADDRESSING NOTICES.

9 (1) Notices required to be mailed or otherwise
10 delivered under Rule 2002 to a creditor, indenture
11 trustee, or equity security holder shall be addressed as
12 such entity or an authorized agent has directed in its
13 last request filed in the particular case. For purposes
14 of this subdivision—

15 (A) a proof of claim filed by a creditor or
16 indenture trustee that designates a ~~mailing~~an

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

17 address constitutes a filed request to ~~mail~~receive
18 notices ~~to~~at that address, unless a notice of no
19 dividend has been given under Rule 2002(e) and
20 a later notice of possible dividend under
21 Rule 3002(c)(5) has not been given; and

22 (B) a proof of interest filed by an equity
23 security holder that designates a ~~mailing~~an
24 address constitutes a filed request to ~~mail~~receive
25 notices ~~to~~at that address.

26 * * * * *

Committee Note

Subdivision (g) of the rule is amended to allow a creditor to elect to receive notices by email. A creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.

1 **Rule 4001. Relief from Automatic Stay; Prohibiting**
2 **or Conditioning the Use, Sale, or Lease of**
3 **Property; Use of Cash Collateral;**
4 **Obtaining Credit; Agreement**

5 * * * * *

6 (c) OBTAINING CREDIT.

7 * * * * *

8 (4) This subdivision (c) does not apply in
9 chapter 13 cases.

10 * * * * *

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision. This amendment does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit.

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1 **Rule 6007. Abandonment or Disposition of Property**

2 * * * * *

3 (b) MOTION BY PARTY IN INTEREST. A party
4 in interest may file and serve a motion requiring the trustee
5 or debtor in possession to abandon property of the estate.
6 Unless otherwise directed by the court, the party filing the
7 motion shall serve the motion and any notice of the motion
8 on the trustee or debtor in possession, the United States
9 trustee, all creditors, indenture trustees, and committees
10 elected pursuant to § 705 or appointed pursuant to § 1102
11 of the Code. A party in interest may file and serve an
12 objection within 14 days of service, or within the time fixed
13 by the court. If a timely objection is made, the court shall
14 set a hearing on notice to the United States trustee and to
15 other entities as the court may direct. If the court grants the
16 motion, the order effects the abandonment without further
17 notice, unless otherwise directed by the court.

Committee Note

Subdivision (b) of the rule is amended to specify the parties to be served with the motion and any notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) more closely with the procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice or effect the abandonment of property ordered by the court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

1 **Rule 9036. Notice or Service Generally by Electronic**
2 **Transmission**

3 Whenever these rules require or permit sending a
4 notice or serving a paper by mail, the clerk or other party
5 may send the notice to—or serve the paper on—a
6 registered user by filing it with the court’s electronic-filing
7 system. Or it may be sent to any person by other electronic
8 means that the person consented to in writing. In either of
9 these events, service is complete upon filing or sending but
10 is not effective if the filer or sender receives notice that it
11 did not reach the person to be served. This rule does not
12 apply to any complaint or motion required to be served in
13 accordance with Rule 7004.~~the clerk or some other person~~
14 ~~as directed by the court is required to send notice by mail~~
15 ~~and the entity entitled to receive the notice requests in~~
16 ~~writing that, instead of notice by mail, all or part of the~~
17 ~~information required to be contained in the notice be sent~~
18 ~~by a specified type of electronic transmission, the court~~
19 ~~may direct the clerk or other person to send the information~~

20 ~~by such electronic transmission. Notice by electronic means~~
21 ~~is complete on transmission.~~

Committee Note

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery has increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

1 **Rule 9037. Privacy Protection for Filings Made with**
2 **the Court**

3 * * * * *

4 (h) MOTION TO REDACT A PREVIOUSLY
5 FILED DOCUMENT.

6 (1) Content of the Motion; Service. Unless the
7 court orders otherwise, if an entity seeks to redact
8 from a previously filed document information that is
9 protected under subdivision (a), the entity must file a
10 motion to redact. The movant must:

11 (A) attach a copy of the previously filed,
12 unredacted document, showing the proposed
13 redactions;

14 (B) include the docket or proof-of-claim
15 number of the previously filed document; and

16 (C) unless the court orders otherwise,
17 serve the debtor, debtor's attorney, trustee if any,
18 United States trustee, filer of the unredacted

19 document, and any individual whose personal
20 identifying information is to be redacted.
21 (2) Restricting Public Access to the Unredacted
22 Document. The court must promptly restrict public
23 access to the motion and the unredacted document
24 pending its ruling on the motion. If the court grants it,
25 these restrictions on public access remain in effect
26 until a further court order. If the court denies it, the
27 restrictions must be lifted, unless the court orders
28 otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims

register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

The moving party must attach to the motion a copy of the original document showing the proposed redactions. The attached document must otherwise be identical to the one previously filed. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the redacted document should be placed on the docket, and public

access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Fill in this information to identify the case:

Debtor 1 _____
Debtor 2 _____
(Spouse, if filing)
United States Bankruptcy Court for the: _____ District of _____

Official Form 410

Proof of Claim

12/18

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. **Who is the current creditor?** _____
Name of the current creditor (the person or entity to be paid for this claim)
Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?** No
 Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	_____	_____
Name	Name	Name
Number Street	Number Street	Number Street
City State ZIP Code	City State ZIP Code	City State ZIP Code
Contact phone _____	Contact phone _____	Contact phone _____
Contact email _____	Contact email _____	Contact email _____
<input type="checkbox"/> Check this box if you would like to receive all notices and papers by email instead of by regular mail.		
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		

4. **Does this claim amend one already filed?** No
 Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim? No Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? No Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _

7. How much is the claim? \$_____ Does this amount include interest or other charges? No Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.

9. Is all or part of the claim secured? No Yes. The claim is secured by a lien on property.

Nature of property:

Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

Motor vehicle

Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: \$_____

Amount of the claim that is secured: \$_____

Amount of the claim that is unsecured: \$_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: \$_____

Annual Interest Rate (when case was filed) _____%

Fixed

Variable

10. Is this claim based on a lease? No Yes. Amount necessary to cure any default as of the date of the petition. \$_____

11. Is this claim subject to a right of setoff?

No

Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

No

Yes. Check one:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

Other. Specify subsection of 11 U.S.C. § 507(a)(_) that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- I am the creditor.
- I am the creditor's attorney or authorized agent.
- I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

City State ZIP Code

Contact phone _____ Email _____

Committee Note

The form is amended to allow the creditor to elect to receive all notices and other papers in the bankruptcy case by email. A creditor who makes this election consents to receiving notices and papers by electronic means in the particular case.

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TAB 3C

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 6, 2017

Nashville, Tennessee

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Thomas L. Ambro
District Judge Pamela Pepper
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
David Hubbert, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Thomas Moers Mayer, Esquire
Jill Michaux, Esquire
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel R. Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office

Discussion Agenda

1. Greetings and introductions

Judge Ikuta welcomed the members and guests to the meeting and introduced the U.S. Marshals. Members and guests introduced themselves to the group.

2. Approval of minutes of Washington D.C. meeting on November 14, 2016

The draft minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 3, 2017 meeting of the Committee on Rules of Practice and Procedure

Professor Harner reported on the January 2017 meeting of the Standing Committee. The bankruptcy rules action items were approved. The Standing Committee discussed the five-year report regarding the work of the rules committees and determined to submit one report on behalf of all of the rules committees. The Standing Committee voiced its support for the need to continue coordinating the work of the rules committees.

(B) Meeting of the Advisory Committee on Civil Rules

No report. Next meeting scheduled for April 25-26, 2017.

(C) Meeting of the Advisory Committee on Appellate Rules

No report. Next meeting scheduled for May 2, 2017.

(D) January 2017 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Bernstein reported on the January 2017 meeting. Several proposals were of interest to the Committee, including a potential venue provision change. The proposal is under study, and a further report will be provided at the next meeting of the Bankruptcy Committee. Another proposal related to acceptance of findings of facts of a bankruptcy judge, but this proposal was rescinded given recent Supreme Court decisions. Finally, Judge Bernstein reported on the suggestion from this Committee regarding the change of address form, and it is still under consideration.

Another issue discussed by the Bankruptcy Committee was judgeships, and a recommendation was made regarding the number of judgeships and changing duty stations for bankruptcy judges.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues

(A) Recommendation concerning Proposed Amendments to Rule 5005(a)(2)

Professor Harner provided the report. Several comments were received on the published rule, including one regarding electronic filing by *pro se* parties. The commenter suggested that *pro se* parties be given the option to file electronically or in paper form unless the court for good cause requires electronic filing. Information was received from other rules committees regarding comparable rule proposals. The subcommittee's working group focused on proposing language regarding electronic signatures to allow for potential changes to electronic filing based on future technological developments. The working group considered how to strike a balance for *pro se* parties and electronic filing, recognizing that while some *pro se* parties are sophisticated users with the resources to file electronically, others do not have access to those capabilities. For this and other reasons discussed during its conference call, the subcommittee did not recommend any changes to the proposed language in the rule regarding electronic filing by *pro se* parties.

The group discussed the use of the term "authorized" and the determination to approach the rule more generally. The subcommittee wanted to ensure the rule was flexible enough to permit various approaches by courts to electronic filing. Professor Harner explained that some of the changes to the proposed rule were made to conform to the proposed language of the other rules committees. The proposed rule amendment was approved by motion and vote.

(B) Recommendation concerning Proposed Amendments to Rule 3002.1(b) and (e)

Professor Gibson reported that amendments were proposed to Rule 3002.1 to address home equity lines of credit and objections to notices of payment changes. Several comments were received, including one from the National Conference of Bankruptcy Judges (NCBJ). A number of the NCBJ's suggestions were accepted, and a revised version of the proposed rule was included in the materials. Conforming changes were made to the Committee Note to reflect the proposed changes, and the revised Committee Note was included with the materials.

The group discussed a few stylistic issues, and a minor edit was made to add "if no motion was filed by the day before" in place of the proposed language in the version of the rule

in the materials. Language will be added to the Committee Note to clarify the new language. The revised proposed rule amendment and Committee Note were approved by motion and vote.

- (C) Recommendation regarding Suggestion 16-BK-D for possible amendment to Rule 4001(c) that would simplify notice requirements for obtaining credit in Chapter 13 cases

Judge Goldgar reported on this issue, explaining the origin of the suggestion, mainly that there are many procedural hoops for debtors in chapter 13 cases to obtain post-petition credit. The original suggestion was to amend the rule to make it less stringent for chapter 13 debtors, as the current rule contains many requirements. Professor Harner completed some research on the issue and determined that courts handle post-petition chapter 13 credit in a variety of ways. The different approaches adopted by courts may relate to the structure of the Bankruptcy Code (sections 364 and 1304), rather than the rules, and whether chapter 13 debtors not engaged in business can obtain credit under section 364. Some courts have concluded that section 364 (and Rule 4001(c)) apply only to chapter 13 debtors engaged in business. The subcommittee determined that the best resolution was to add a new subdivision (4) to Rule 4001(c) to exclude chapter 13 cases from the application that subdivision.

The Committee discussed the proposed amendment, noting its practicality. One member asked about the potential risks for post-petition lenders if chapter 13 cases are excluded from the subdivision. Others suggested leaving such matters to local practice. In response, a suggestion was made to amend the Committee Note to explain the effect of the rule change. The proposed amendment was approved for publication by motion and vote, along with the amendment to the Committee Note.

- (D) Recommendations regarding Suggestion 12-BK-B proposing amendment to Rule 2002(f)(7) to require notice of an order confirming a chapter 13 plan, and Suggestion 12-BK-M proposing amendments to Bankruptcy Rule 2002(h) to include Chapter 13

Professor Harner addressed this issue. She reviewed the suggestions, explaining that the first suggestion related to Rule 2002(f)(7) and the absence of the order confirming a chapter 13 plan from the subdivision. The second proposed amendment concerned Rule 2002(h) and the absence of chapter 13 creditors from the rule, which limits notice in certain circumstances. She explained that after completing some research into past deliberations of the Committee, she

discovered that there was no clear reason for excluding chapter 13 from these two subdivisions of Rule 2002.

After discussion, the subcommittee determined to add language referencing chapter 13 to Rules 2002(f)(7). With regard to Rule 2002(h), the subcommittee agreed that given the amount of notice received in chapter 13 cases, adding chapter 13 cases to the subdivision (h) limitation made sense. In completing its review, the subcommittee noted that there are pending amendments to Rule 2002. For this reason, the subcommittee recommended that the amendments to Rule 2002(f) and (h) be approved, but held until after the 2017 amendments to Rule 2002 become effective to avoid confusion.

A Committee member asked why chapter 12 was excluded from subdivision (h), noting that the lack of a clear reason for its exclusion could lead to the same confusion that exists regarding chapter 13 if a similar suggestion is made in the future. Professor Harner advised that the subcommittee could consider this suggestion. Another member suggested that current practices lead to wasted noticing in bankruptcy cases, suggesting that the creditor matrix maintained by the court should be updated to remove non-claimants once the amendments to Rule 2002 go into effect. Judge Ikuta advised that this suggestion could be relayed to the appropriate group at the Administrative Office, and Ken Gardner supported the suggestion.

Professor Harner reviewed the recommendation: the subcommittee recommended that the proposed amendments to Rule 2002(f)(7) and (h) be approved, but held (and not provided to the Standing Committee for publication) until the current proposed amendments to Rule 2002 take effect to avoid any potential confusion. She noted that this would permit the subcommittee to consider the suggestion to include chapter 12 cases in subdivision (h). Judge Ikuta supported the suggestion to hold the proposed amendments until after the effective date of the current Rule 2002 amendments, noting that these proposed amendments to Rule 2002 are subject to possible further amendment.

The proposed amendments were approved for publication by motion and vote, with the provision that any proposed amendments be held until after the effective date of the current pending amendments to Rule 2002.

5. Report by the Subcommittee on Business Issues.

(A) Recommendations concerning Electronic Notice and Service

Professor Harner reported on the issues to be considered by the Committee at the meeting. She advised that the subcommittee will consider several additional issues related to noticing in bankruptcy cases at a later date.

Professor Harner explained the subcommittee's proposed approach for implementing a move towards enhanced electronic notice and service in bankruptcy cases. First, a proposed amendment to the proof of claim form (Official Form 410) would add a checkbox regarding consent to electronic noticing and service via email for non-registered users. A draft of the amended form was included in the agenda materials. Second, a corresponding amendment to Rule 2002(g) would permit creditors to expand their choices for receiving notice by email. Third, a proposed amendment to Rule 9036 would broaden the rule to include any party serving a paper under the rule to permit the party to serve electronically on registered users and parties who consent to service electronically, including those who consent via the proof of claim form. Some analysis was done on the term "in writing" and whether a check box on the proof of claim form would constitute "in writing," and the consensus was that it would meet the requirements.

In response to a question regarding why the subcommittee focused on amending the proof of claim form, Professor Harner explained that the proof of claim form appeared to be the best method for addressing the concerns of commenters regarding large filers and broader use of electronic notice and service. A member raised an issue regarding notice to security holders rather than claim holders. Judge Ikuta advised that the concern regarding security holders should be submitted as a suggestion for consideration.

Ken Gardner explained the mechanics of the proposed change to the proof of claim form, and how the information would be included in the court's database as part of the creditor matrix. An issue was raised regarding debtors' access to the court's database for noticing purposes to avoid sending paper notices to parties who have consented to electronic notices and service. The group discussed whether the proposed change lessens the burdens of noticing. One member noted that any email address submitted in connection with a proof of claim should supplement rather than replace any contact information submitted under Bankruptcy Code section 342 (and maintained by the Bankruptcy Noticing Center). In response, one member referenced the 2001 Committee Note to Rule 2002(g), which indicates that information on a later-filed proof of claim

replaces an earlier designation of a mailing address in a particular case. Further discussion was had regarding the implications of section 342 and the requirements for notice and those receiving notice. Members stated that the amendment to the proof of claim form is intended as an “opt-in” and not a requirement, and that language could be added to the Committee Note to address any issues with section 342. Judge Ikuta suggested follow up with the Bankruptcy Noticing Center regarding some of these issues, including whether debtors could get access to email addresses of creditors who opt in to electronic noticing and service for noticing purposes. Another member suggested that a solution may be to review the make-up of the creditor matrix if this proposed amendment were to go forward to attempt to eliminate duplicative noticing addresses.

Professor Harner suggested that the Committee Note could be amended to address the issues raised at the meeting. Judge Ikuta added that the Committee could complete additional research on the practical application of the proposed amendment, but that the proposed amendment could go forward. Professors Gibson and Coquillette noted their concern with publishing something that may not receive final approval in the published form. Professor Harner added that publication may signal that the Committee is behind a broader use of electronic notice and service, and that one method of obtaining feedback regarding that approach is to publish proposed amendments. The proposed amendment was approved for publication by motion and vote.

- (B) Report on Suggestion 16-BK-C regarding Rule 6007 and notice of abandonment of estate property

Professor Harner explained that the suggestion is to amend Rule 6007 to eliminate the ambiguity between sections (a) and (b) of the rule regarding service of notice. The subcommittee considered the various approaches used by courts to implement Rule 6007(b). The proposed amendment to Rule 6007(b) clarifies the parties to be served with the motion and notice of the motion, eliminates the distinction between notice and service in the rule, and provides that if the court grants the motion, no further notice is required unless otherwise ordered.

A member asked whether the proposed amendment would mean that nothing additional would be required to effectuate abandonment. The group discussed possible language. Additional language was added to the proposed amendment to clarify that “the order effects the abandonment” without further notice or action by the court. Another question was raised regarding notice versus service, and a member explained that the point was to recognize that there are a variety of court practices with regard to motions to compel abandonment and to

eliminate the distinction between the terms “notice” and “service.” The group agreed to new language including the term “required notice.” The revised proposed amendment was approved for publication by motion and vote.

Following approval, Judge Campbell raised the issue of whether the term “required” should be explained more fully in the Committee Note. The group agreed to revise the language of the rule to remove the term “required,” changing it to “the motion and any notice of the motion” to permit for the possibility that notice may not be required in some jurisdictions. The group voted to approve the new language for the proposed amendment for publication.

(C) Report and Recommendation Concerning Proposed Amendments to Official Forms 309F, 425A, 425B, 425C, and 426

Professor Harner advised that the revised forms (Official Forms 425A, B, and C, and 426) all relate to business cases and were carved out the Forms Modernization Project for consideration by the subcommittee. The revisions adopted the format of the newly styled forms of the Forms Modernization Project and made the forms easier to understand. The forms were published for comment, and several comments were submitted on Forms 425A and B. One comment questioned the removal of the notice of hearing and certain deadlines from the disclosure statement form. The subcommittee discussed this issue, but determined to not make the change to avoid any conflicts between the form and official court orders. Another comment supported the forms, and suggested that the disclosure statement and plan be combined into one form.

Professor Harner referred to her memo in the agenda materials for detailed analysis of all of the comments, explaining that five changes were recommended by the subcommittee in response to the comments. She reminded the group that these forms are suggested forms and are not required. The five changes are as follows: (1) removal of the insider column from the claims chart in the disclosure statement; (2) a better explanation of the exceptions to voting rules in the disclosure statement; (3) a change to Article VII of the plan regarding any claims reserve; (4) a placeholder for the court’s retention of jurisdiction following confirmation in the plan; and (5) a change to the signature block to match the caption for the form to permit multiple debtors. The forms were approved by motion and vote.

Professor Gibson presented the amendment to Official Form 309F explaining that the proposed amendment was to the language regarding an exception to discharge instructions on the form. There was some ambiguity regarding the availability of an exception to discharge in

certain circumstances, and the Committee wanted to avoid taking a position on whether an exception to discharge was required. Two comments were received, and one pointed out that a similar amendment may be required to Part 11 of the form. The subcommittee recommended a similar amendment to Part 11 of the form to conform with the proposed changes to Part 8. The revised form was included in the agenda materials. The form was approved by motion and vote.

6. Report by the Subcommittee on Privacy, Public Access, and Appeals

(A) Review comments in Rules 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8022, 8023 and new Rule 8018.1

Professor Gibson explained that there a number of Part VIII rule amendments were published in August 2016, the majority of which were to conform to amendments to the Federal Rules of Appellate Procedure. New Rule 8018.1 and amended Rules 8011 and 8023 were also published in August. Several comments were filed, and were generally supportive, although two comments were filed in opposition to the amendments to Rule 8017. The proposed amendment to Rule 8017 conforms to a proposed amendment to corresponding Appellate Rule 29, and would permit district courts and bankruptcy appellate panels to strike or prohibit the filing of an amicus brief that the parties had consented to if it would result in a judge's disqualification. Professor Gibson stated that it may make sense to wait to see any action taken by the Appellate Rules Committee with regard to its proposed amendment to Appellate Rule 29 as the proposed amendment to Rule 8017 was merely to confirm to the Appellate Rule 29 amendment. The Appellate Rules Committee is meeting in early May, and it received similar comments regarding its proposed amendments to Appellate Rule 29. The subcommittee recommended approving the amended Part VIII rules, with the exception of the proposed amendments to Rule 8017, which will be subject to the actions of the Appellate Rules Committee regarding Appellate Rule 29, and Rule 8011, which was considered separately at the meeting.

An issue was raised regarding proposed Rule 8023 that adds a cross reference to Rule 9019, and a suggestion that language be added to the Committee Note to clarify the impact of adding the reference to Rule 9019. The group discussed the issue and whether or not it adds ambiguity into the rule. One member suggested removing the reference to Rule 9019 from Rule 8023. Professor Gibson explained that the amendment was made to alert parties to the potential need for approval of a dismissal resulting from a settlement and has no impact on the law, but it may impact procedure. Judge Campbell asked whether there have been problems with Rule 8023 since its enactment several years ago. Professor Gibson stated that the language was added to avoid the erroneous interpretation that Rule 8023 overrides the requirements of Rule 9019.

Possible language could be added to filings to clarify that Rule 9019 does not apply. Others stated that it may put a burden on clerks to seek a judicial determination for each of these filings. A suggestion was made to add language to the Committee Note. Given the varying views expressed in the discussion, Judge Ikuta recommended that the proposed amendment to Rule 8023 be reconsidered by the subcommittee, and the Committee agreed.

The Committee voted on a motion for final approval of the Part VIII Rules, with the exception of Rules 8011 and 8023, and in consideration of any further action by the Appellate Rules Committee with regard to Rule 8017, and the motion was approved.

(B) Consider possible amendments to rules 7062, 8007, 8010, 8021, and 9025 to address published amendments to Civil Rule 62 and 65.1, and FRAP 8(a)(1)(B), (b); 11(g); and 39(e) regarding the term “supersedeas bonds” and the period during which a judgment is automatically stayed after entry

Professor Gibson detailed the proposed amendments which are all conforming amendments to other proposed rule amendments regarding the use of the term “supersedeas” in the federal rules. Generally, the term was replaced with “bond or other security” throughout the federal rules. The one exception to conforming is Rule 7062, which incorporates Civil Rule 62. The subcommittee recommended retaining the current 14-day time period for the automatic stay of a judgment in Rule 7062, rather than adopting the amended time period in the Civil Rules.

Since the subcommittee meeting, the Civil Rules Committee advised that it will consider a change to the “other undertaking” language in Civil Rule 62, as well as other similar language changes. If this occurs, the proposed amendment to Bankruptcy Rule 9025 would be changed to match the Civil Rules Committee’s amended language, if the proposed language is approved by the Civil Rules Committee. In addition, Professor Gibson advised that it is possible that the Appellate Rules Committee will make changes to its proposed rule amendments to conform to the Civil Rules changes, and that committee meets in early May. If the Appellate Rules Committee makes changes to the language in its proposed rules, the proposed language in the Bankruptcy Rules will need to be changed.

The subcommittee recommended that the amendments be adopted without publication as they are merely conforming changes. Any approval by the Committee would be subject to potential changes to the proposed language based on the actions by the Civil and Appellate Rules Committees. One member asked about the provision of security by stipulation, and the Committee agreed that it is appropriate for the language to be removed from Rule 9025. A

motion to approve the proposed amendments without publication was approved, subject to any language changes from the other rules committees.

- (C) Recommendation to revise Rule 8011 to incorporate pending changes regarding electronic filing and notice across the rules committees

Professor Gibson explained that there are two sets of amendments to Rule 8011. The first relate to filings by inmates, and the second relate to electronic filing. The rules committees are working together to develop similar language regarding electronic filing. Professor Gibson explained that this Committee has the earliest meeting, so it does not have the benefit of feedback from the other rules committees. The subcommittee recommended approval of the proposed electronic-filing amendments to Rule 8011 without publication, given that they are merely conforming amendments. Professor Gibson advised that there was a suggestion to add language to the Committee Note indicating that the clerk is not responsible for monitoring if electronic service was received. The subcommittee generally approved adding language to this effect to the Committee Note, adding language that if a sender receives notice that the paper did not reach the person to be served, that person is then responsible for making effective service. This language is consistent with the rule itself. Members raised concerns with the use of the term “receives notice” and also whether there needs to be a distinction made between service by commercial carrier and service electronically. After discussion, the Committee determined to retain the term “receives notice” and include further explanation in the Committee Note.

The Committee discussed the proposed rule and Committee Note and raised some practical concerns with regard to the impact of the changes. Specifically, the group discussed the term “user name and password” and revised language was proposed. Professor Gibson advised that since the rules committees are attempting to maintain similar wording, the other committees will be notified of the proposed language changes.

A motion to approve the amendments to Rule 8011, with revised language regarding user name and passwords and an additional paragraph to the Committee Note regarding effective service, was passed unanimously.

(C) Oral Report on feedback to the Appellate Rules Committee in response to a request for comment on a proposed amendment to Appellate Rule 26.1 (*Corporate Disclosure Statement*) that address recusal matters in bankruptcy appeals

Professor Gibson explained that the subcommittee participated in a conference call with the chair and reporter for the Appellate Rules Committee. The Appellate Rules Committee is considering an amendment to Appellate Rule 26.1 based, in part, on an advisory ethics opinion issued several years ago regarding additional required disclosures in contested matters and adversary proceedings in connection with bankruptcy appeals. The subcommittee provided feedback regarding the proposed changes to Appellate Rule 26.1, and the Appellate Rules Committee reporter revised the proposed amended rule in response to the subcommittee's suggestions. Professor Gibson suggested that the Committee retain the suggestions for amendments related to the advisory ethics opinion for future consideration. Judge Ikuta asked whether others have encountered issues with regard to disclosure and bankruptcy appeals. Several members reported on local rules in place in their districts regarding disclosure, but no specific problems were noted. The subcommittee recommended waiting to make any proposed amendments to the bankruptcy rules pending a decision from the Appellate Rules Committee regarding Appellate Rule 26.1.

Information Items

Tom Mayer updated the Committee on the suggestion for a proposed rule for the filing of proceedings pursuant to Chapter VI of the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA). He advised that the rule at issue is not for national use, but instead is a local rule applicable only in the District of Puerto Rico. It provides a procedural method for starting a Title VI proceeding. Mr. Mayer hopes the rule will be in place on or before May 1, 2017. Judge Ikuta thanked those involved for their efforts in working with the court to provide it with a potential local rule.

Judge Ikuta advised that the Judicial Conference's five-year review was discussed at the Standing Committee meeting, and that the Committee's suggestions were well accepted. She noted the rules committees' work on the electronic filing rules is an example of a successful coordination effort.

Scott Myers updated the group about the coordination effort among the rules committees, advising that a full report was provided at the Standing Committee meeting. He stated that there

is a lot of support for the effort from the other rules committees and members of the Standing Committee.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Committee's meeting. There were no objections, and all recommendations were approved by motion at the meeting.

1. Subcommittee on Consumer Issues.

Revisions to Spring 2016 Recommendation for amendment to Rule 9037(h) (*Privacy Protection for Filings Made with the Court*), in response to Suggestion 14-BK-B.

2. Subcommittee on Business Issues.

Recommendation of no action on possible amendments to bankruptcy corporate ownership rules to parallel pending amendments to Criminal Rule 12.4.

3. Subcommittee on Privacy, Public Access, and Appeals.

Recommendation of no action regarding possible rule amendments to address situation of remand of a bankruptcy appeal from a court of appeals to the district court, and time frame for district court to determine whether the district or bankruptcy court is responsible for the case.

Judge Ikuta advised that the fall 2017 meeting will be in Washington D.C., on September 26-27. The meeting was adjourned at 3:20 p.m.

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TAB 4A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 18, 2017

Introduction

The Civil Rules Advisory Committee met in Austin, Texas, on April 25, 2017. Draft Minutes of this meeting are attached.

Action items are presented in Part I. Proposals to amend Civil Rules 5, 23, 62, and 65.1 were published for comment last August. The Rule 5 proposals coordinate with similar proposals published for comment on recommendations by the Appellate, Bankruptcy, and Criminal Rules Committees. The Rules 62 and 65.1 proposals work in tandem with coordinating proposals published for comment on recommendation of the Appellate Rules Committee. Written comments were submitted on all proposals, although Rule 23 received a majority of them. Three hearings were held, the first on November 3 in conjunction with the Civil Rules meeting, the second on January 4, and the third, by teleconference, on February 16. Almost all of the

testimony addressed Rule 23. Summaries of the comments and testimony are provided with each rule. The Committee recommends that these proposals be recommended for adoption with revisions suggested by the comments and testimony or developed from further joint work with the other advisory committees.

Part II recounts the Committee's tentative views on assigning relative priorities in allocating its resources to five topics. Two of them are new: A proposal to create rules to govern district-court review of individual Social Security disability claims, and a proposal to expand attorney rights to participate in jury voir dire questioning under Civil Rule 47. Three of the topics are familiar from discussion last January: demands for jury trial, both in original actions and in cases removed from state court; the means of serving Rule 45 subpoenas; and offers of judgment under Rule 68.

Part III describes the next steps to be taken by the Rule 30(b)(6) Subcommittee in considering whether to propose amendments that would address recurring issues that arise when an organization is named as a deponent and must provide testimony through persons who are knowledgeable about the information available to the organization.

Part IV provides a brief account of progress in implementing the Expedited Procedures and Mandatory Initial Discovery Pilot Projects.

Finally, Part V describes Committee action on a variety of proposals advanced in suggestions submitted to the Committee.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

A. RULE 5

The proposed amendments of Rule 5 address service and filing of papers after the summons and complaint. The central purpose of the amendments is to recognize the changes that have developed in practice regarding filing and service through the court's electronic-filing system. The amendments also address recurring issues about incidental aspects of e-filing and service.

Turning first to service, proposed Rule 5(b)(2)(E) is recommended for adoption as published. Present Rule 5(b)(2)(E) requires consent of the person served if service is to be made by any electronic means. Present Rule 5(b)(3) provides that if authorized by local rule, a party may use the court's transmission facilities to make service. The proposal changes this system to allow service by sending a paper to a registered user by filing it with the court's electronic filing system. Consent of the registered user is not required. Adopting a uniform national provision entails the further proposal to abrogate Rule 5(b)(3). Rule 5(b)(2)(E) will continue to require written consent of the person to be served when service is made by electronic means outside the court's system.

Although the service provisions are recommended without change, a new paragraph is proposed for the Committee Note. This paragraph summarizes the service provisions and advises that: “[T]he rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.” The Note further observes that a filer who learns that the transmission failed is responsible for making effective service, an obligation imposed by the present rule and carried forward in the proposed rule.

Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule. A local rule may require electronic filing only if reasonable exceptions are allowed. Most courts have come to require registered users to file electronically. Proposed Rule 5(d)(3)(A) makes this practice uniform—a person represented by an attorney must file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. This amendment has not generated any controversy.

Electronic filing by a person not represented by an attorney is treated differently by proposed Rule 5(d)(3)(B). Electronic filing is permitted only if allowed by court order or by local rule, and may be required only by court order or by a local rule that includes reasonable exceptions. This proposal has generated some concerns. Comments and testimony made it clear that some pro se parties are fully capable of engaging in electronic filing and that permitting this practice can work to benefit the filer, the court, and all other parties. But the Committee—in line with the other advisory committees—concluded that for the present the risks of a general opportunity to file electronically outweigh the benefits. The prospect that a pro se party might be required to file electronically raised fears that access to the court would be effectively denied to persons not equipped to do so. Proposed Rule 5(d)(3)(B) was included in the rule to support programs in a few courts that have set up systems for pro se filing by prisoners. The programs seem to work and to provide real benefits. The Committee Note includes a reminder that access to court must be protected. The Committee concluded that this provision should be included in the recommendation.

Proposed Rule 5(d)(3)(C) is a signature provision to take the place of the provisions in local rules that govern signing an electronic filing. The published version provided that “[t]he user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.” Comments found ambiguity—this wording might be read to require that the name and password appear on the paper. The comments also expressed uncertainty about identifying an attorney of record on the party’s first filing. In consultation with the other advisory committees, the recommendation is to substitute this language:

An authorized filing made through a person’s electronic filing account, together with the person’s name on a signature block, constitutes the person’s signature.

Proposed Rule 5(d), finally, includes a provision for a certificate of service. Present Rule 5(d)(1) states this: “Any paper after the complaint that is required to be served—together

with a certificate of service—must be filed within a reasonable time after service.” The published proposal aimed to dispense with a separate certificate of service for papers served by filing with the court’s electronic-filing system under proposed Rule 5(b)(2)(E): “A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court’s electronic-filing system.” Further discussion found reasons to revise this approach. Treating the notice of electronic filing as a certificate of service has an element of fiction; the Civil Rule proposal then was modified, following the lead of the Appellate Rule proposal, to provide that no certificate of service is required when a paper is served by filing it with the court’s system. That change is carried forward in the revised language set out below.

Additional difficulties emerged from carrying forward the present rule’s provision that a paper must be filed within a reasonable time after service. The principal difficulty seems to be unique to the Civil Rules. Following the direction that a paper must be filed within a reasonable time after service, Rule 5(d)(1)’s second sentence directs that many disclosures and discovery papers “must not be filed until they are used in the proceeding or the court orders filing * * *.” That raised the question whether a certificate of service should be required for a paper that may be filed a long time after it is served, and may well not be filed at all. Several attempts were made to draft a provision to address this situation. Different views were expressed on the value of filing the certificate. Some observers thought that filing certificates would do no more than add needless clutter to court files. But others thought that filing certificates would enable a judge to monitor the docket to ensure that the parties were diligently pursuing an action, and might also prove useful to parties not directly involved with the papers served. Weighing these concerns, the Committee recommends this language for adoption as Rule 5(d)(1)(B), recognizing that item (ii) will be unique to the Civil Rules:

- 1 (B) *Certificate of Service*. No certificate of service is required when a paper is
- 2 served by filing it with the court’s electronic-filing system. When a paper
- 3 that is required to be served is served by other means:
- 4
- 5 (i) if the paper is filed, a certificate of service must be included with it or
- 6 filed within a reasonable time after service, and
- 7
- 8 (ii) if the paper is not filed, a certificate of service need not be filed unless
- 9 filing is required by local rule or court order.

The overstrike and underline version of Rule 5 set out here uses simple overstriking to show changes from present Rule 5, underlining to show new words included in the published proposal, overstriking and underlining to show words included in the published proposal but not in the final proposal, and double underlining to show new words added after publication by the final proposal. The simpler traditional system of overstriking and underlining is used in the Committee Note.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

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3 * * * * *

4 **(b) SERVICE: HOW MADE.**

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6 * * * * *

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8 (2) *Service in General.* A paper is served under this rule by:

9
10 (A) handing it to the person;

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12 * * * * *

13
14 (E) sending it to a registered user by filing it with the court's electronic-filing
15 system or sending it by other electronic means if that the person consented
16 to in writing—in either of which events service is complete upon
17 ~~transmission~~ filing or sending, but is not effective if the serving party filer
18 or sender learns that it did not reach the person to be served; or

19
20 * * * * *

21
22 ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's~~
23 ~~transmission facilities to make service under Rule 5(B)(2)(E).~~ [Abrogated
24 (Apr. __, 2018, eff. Dec. 1, 2018.)]

25
26 * * * * *

27
28 **(d) FILING.**

29
30 (1) *Required Filings; Certificate of Service.*

31
32 (A) *Papers after the Complaint.* Any paper after the complaint that is required to
33 be served—~~together with a certificate of service~~—must be filed within
34 no later than a reasonable time after service. But disclosures under
35 Rule 26(a)(1) or (2) and the following discovery requests and responses
36 must not be filed until they are used in the proceeding or the court orders
37 filing: depositions, interrogatories, requests for documents or tangible
38 things or to permit entry onto land, and requests for admission.

39
40 (B) *Certificate of Service.* ~~A certificate of service must be filed within a~~
41 ~~reasonable time after service, but a notice of electronic filing constitutes a~~
42 ~~certificate of service on any person served by the court's electronic filing~~
43 ~~system.~~ No certificate of service is required when a paper is served by

44 filing it with the court’s electronic-filing system. When a paper that is
45 required to be served is served by other means:

46
47 (i) if the paper is filed, a certificate of service must be filed with it or
48 within a reasonable time after service, and

49 (ii) if the paper is not filed, a certificate of service need not be filed unless
50 filing is required by local rule or court order.

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52 * * * * *

53
54 (2) Nonelectronic Filing ~~How Filing is Made in General~~. A paper not filed
55 electronically is filed by delivering it:

56
57 (A) to the clerk; or

58
59 (B) to a judge who agrees to accept it for filing, and who must then note
60 the filing date on the paper and promptly send it to the clerk.

61
62 (3) ~~Electronic Filing, and Signing, or Verification~~. ~~A court may, by local rule, allow~~
63 ~~papers to be filed, signed, or verified by electronic means that are consistent with~~
64 ~~any technical standards established by the Judicial Conference of the United~~
65 ~~States. A local rule may require electronic filing only if reasonable exceptions are~~
66 ~~allowed.~~

67
68 (A) By a Represented Person—Generally Required; Exceptions. A person represented by
69 an attorney must file electronically, unless nonelectronic filing is allowed
70 by the court for good cause or is allowed or required by local rule.

71
72 (B) By an Unrepresented Person—When Allowed or Required. A person not
73 represented by an attorney:

74 (i) may file electronically only if allowed by court order or by local rule;
75 and

76 (ii) may be required to file electronically only by court order, or by a local
77 rule that includes reasonable exceptions.

78
79 (C) Signing. ~~The user name and password of an attorney of record, together with~~
80 ~~the attorney’s name on a signature block, serves as the attorney’s~~
81 ~~signature~~. An authorized filing made through a person’s electronic filing
82 account, together with the person’s name on a signature block, constitutes
83 the person’s signature.

84
85 (D) Same as a Written Paper. A paper filed electronically ~~in compliance with a~~
86 ~~local rule~~ is a written paper for purposes of these rules.

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* * * * *

COMMITTEE NOTE

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Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

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The amended rule recognizes electronic service through the court’s transmission facilities as to any registered user. A court may choose to allow registration only with the court’s permission. But a party who registers will be subject to service through the court’s facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court’s facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

15

16

Service is complete when a person files the paper with the court’s electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic-filing system that an attempted transmission by the court’s system failed. But a filer who learns that the transmission failed is responsible for making effective service.

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25

Because Rule 5(b)(2)(E) now authorizes service through the court’s facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

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29

Subdivision (d). Rule 5(d)(1) has provided that any paper after the complaint that is required to be served “must be filed within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

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~~Amended Rule 5(d)(1) provides that a notice of electronic filing generated by the court’s electronic filing system is a certificate of service on any person served by the court’s electronic filing system. Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court’s electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of (nonexistent) service. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the~~

42

43 proceeding or the court orders filing, the certificate need not be filed until the paper is filed,
44 unless filing is required by local rule or court order.

45 Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts
46 have adopted local rules that require electronic filing, and allow reasonable exceptions as
47 required by the former rule. The time has come to seize the advantages of electronic filing by
48 making it generally mandatory in all districts for a person represented by an attorney. But
49 exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a
50 local rule may allow or require nonelectronic filing for other reasons.

51
52 Filings by a person proceeding without an attorney are treated separately. It is not yet
53 possible to rely on an assumption that pro se litigants are generally able to seize the advantages
54 of electronic filing. Encounters with the court's system may prove overwhelming to some.
55 Attempts to work within the system may generate substantial burdens on a pro se party, on other
56 parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for
57 governing by local rules or court order. Efficiently handled electronic filing works to the
58 advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants
59 with the court's permission. Such approaches may expand with growing experience in the courts,
60 along with the greater availability of the systems required for electronic filing and the increasing
61 familiarity of most people with electronic communication. Room is also left for a court to require
62 electronic filing by a pro se litigant by court order or by local rule. Care should be taken to
63 ensure that an order to file electronically does not impede access to the court, and reasonable
64 exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In
65 the beginning, this authority is likely to be exercised only to support special programs, such as
66 one requiring e-filing in collateral proceedings by state prisoners.

67
68 ~~The user name and password of an attorney of record, together with the attorney's name~~
69 ~~on a signature block, serves as the attorney's signature. An authorized filing through a person's~~
70 ~~electronic filing account, together with the person's name on a signature block, constitutes the~~
71 ~~person's signature.~~

72 Gap Report

73
74 Published Rule 5(d)(1)(B) carried forward the requirement in present Rule 5(d)(1) that
75 any paper after the complaint that is required to be served "must be filed within a reasonable
76 time after service." That language does not clearly allow a paper to be filed before it is served. It
77 is changed to direct filing "no later than" a reasonable time after service.

78
79 The certificate of service provisions in proposed Rule 5(d)(1)(B) are changed. First, the
80 provision that a notice of electronic filing constitutes a certificate of service on any person served
81 by the court's electronic-filing service is replaced by a provision that no certificate of service is
82 required when a paper is served by filing it with the court's electronic-filing system. Next, the
83 provision that when a paper is served by other means a certificate of service must be filed within
84 a reasonable time after service is replaced by a two-part direction: If the paper is filed, a
85 certificate of service must be filed with it or within a reasonable time after service, and if the

86 paper is not filed, a certificate of service need not be filed unless filing is required by local rule
87 or court order. The provision recognizing that a paper that has been served may not be filed
88 reflects the direction in proposed Rule 5(d)(1)(A), carried over from present Rule 5(d)(1), that
89 many disclosures and discovery papers must not be filed until the court orders filing or they are
90 used in the action.

91

92 The Committee Note has been changed to reflect these changes.

RULE 5: CLEAN TEXT

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) SERVICE: HOW MADE.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court’s electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

* * * * *

(3) [Abrogated (Apr. __, 2018, eff. Dec. 1, 2018.)]

* * * * *

(d) FILING.

(1) *Required Filings; Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests

for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service*. No certificate of service is required when a paper is served by filing it with the court’s electronic-filing system. When a paper that is required to be served is served by other means:

- (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and
- (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by local rule or court order.

* * * * *

(2) *Nonelectronic Filing*. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing*.

(A) *By a Represented Person — Generally Required; Exceptions*. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required*. A person not represented by an attorney:

- (i) may file electronically only if allowed by court order or by local rule; and
- (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing*. An authorized filing made through a person’s electronic filing account, together with the person’s name on a signature block, constitutes the person’s signature.

(D) *Same as a Written Paper*. A paper filed electronically is a written paper for purposes of these rules.

* * * * *

COMMITTEE NOTE

Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court’s transmission facilities as to any registered user. A court may choose to allow registration only with the court’s permission. But a party who registers will be subject to service through the court’s facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court’s facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court’s electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic-filing system that an attempted transmission by the court’s system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court’s facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (d). Rule 5(d)(1) has provided that any paper after the complaint that is required to be served “must be filed within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court’s electronic-filing system. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by

making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

An authorized filing through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature.

SUMMARY OF COMMENTS: RULE 5

In General

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Rule 5(b)

Pennsylvania Bar Association, CV-0064: The rule should provide for service by electronic means of papers not filed at the time of service, notably disclosures and discovery materials. Service would be by email addressed to attorneys of record at the addresses on the court's electronic filing system. E-service is faster generally, and reduces problems and uncertainty about service.

Rule 5(d)(1)

Andrew D’Agostino, Esq., 0035: It should be made clear that the proof of service of the complaint or other case-initiating document can be filed electronically.

Sergey Vernyuk, Esq., 0049: (1) Lawyers regularly include certificates of service as part of the papers served, both in paper form and e-form. The rule should clarify the status of an anticipatory certificate—should the certificate always be a separate document, prepared after actual service? (2) The bar should be educated on the proposition that a certificate need not be included in a disclosure or discovery paper that is not to be filed. (3) Rule 5(d) will continue to direct that “discovery requests and responses,” including “depositions” and “requests for documents [etc.]” not be filed. Does this mean that a Rule 45 subpoena to produce must not be filed as a discovery request to produce documents? (4) The separation of the certificate requirement from its place in the present rule creates an ambiguity. Present Rule 5(d) directs that the certificate be filed when the paper is filed, a reasonable time after service. That means that the certificate is never filed if the paper is never filed, given the direction that disclosures and most discovery papers are to be filed only when the court orders filing or when used in the action. Proposed Rule 5(d)(1)(B) says that the certificate must be filed within a reasonable time after service; on its face it contemplates filing the certificate even though the paper has not been, and may never be, filed.

Michael Rosman, Esq., 0049: As written, Rule 5(d)(1)(B) is ambiguous: the Notice of Electronic Filing constitutes a certificate of service, but must the filer separately file the NEF? It would be better to follow the lead of Appellate Rule 25(d)(1)(B), dispensing with the proof-of-service requirement as to any person served through the court’s system.

Federal Magistrate Judges Association, 0094: With paper, the practice has been to file with the court after making service. With e-filing, filing effects service. If the language of the current rule is retained, something should be added to reflect e-filing: “Any paper after the complaint that is required to be served, **but is served by means other than filing on the court’s electronic filing system**, must be filed within a reasonable time after service.”

Rule 5(d)(2)

Sai, 0074: The core message, elaborated over many pages, is direct: The proposed rule impairs the right to appear pro se “by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants.” “This inequity in access and delays results in two procedurally different systems * * *.” “Before the law sit many gatekeepers. Let this not be one of them.”

A pro se litigant who completes whatever training is required for an attorney to become a registered user should be allowed to be a registered user without seeking additional permission, beginning with the right to file a complaint, motion to intervene, or amicus brief. If given access the ability to file a case initiation should prove the filer’s capacity. Inappropriate burdens are

entailed by requiring a preliminary motion for permission, burdens that are particularly inappropriate if the filer is already a CM/ECF filer in the same court. Indeed the rule, as written, would prohibit e-filing even by a registered attorney user who appears pro se as a party. Still worse, a motion cannot be filed unless the case has already been initiated—a pro se plaintiff must always file a paper complaint. The problems that arise when a pro se litigant is not able to use the court’s system effectively can be solved by finding good cause to deny e-filing. But the inevitable small problems can be fixed: “docket clerks routinely screen incoming filings and will correct clear deficiencies or errors.”

At the same time, it should be presumed that a pro se litigant has good cause to file on paper, not in the electronic system. The presumption should be irrebuttable for a pro se prisoner, who should always have the option of paper filing.

The advantages of e-filing are detailed at length. It is virtually instantaneous, and makes the most of applicable time limits. A complaint can be perfected up to the very end of a limitations period. After-hours filing is simple. Only e-filing may be feasible for emergency matters, particularly a request for a TRO or a preliminary injunction—the harm may be done before a paper filing can be prepared and filed. A pro se defendant must wait to be served by non-electronic means.” For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks. This is just to *receive* filings; one must also respond.”

E-filing also is important for litigants with disabilities, particularly those with impaired vision. A document scanned into the court file from a paper original is more difficult to use, in some settings much more difficult. E-documents “are more readable on a screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.” “Being required to file on paper hinders *everyone’s* access to the litigant’s filings * * *.”

E-filing also is less expensive, and much less expensive for long filings. Courts often “require multiple duplicates of case initiation documents for service, chambers, etc.” These costs are particularly burdensome for i.f.p. litigants.

A registered user of the CM/ECF system can receive the same notices of electronic filing as the parties to a case. That can support tracking for an eventual motion to intervene or an amicus brief. It can give access to arguments that can be cribbed or anticipated and opposed, evidence found by litigants to other cases, or information of “journalistic interest, where immediate notification of developments is critical to presenting timely news to one’s audience.” (There are other references to citizen journalists and observations that denying access of right to e-filing operates as a prior restraint. The prior restraint observations seem to extend beyond the citizen-journalist concern to the broader themes of burden.) A nonparty pro se can be allowed to file only an initiating document, such as a motion for leave to file; improper filings can be summarily denied or sanctioned.

Nov. 3 Hearing, Sai, pp. 112-124: The argument is clearly made: pro se litigants should be allowed to choose for themselves whether to e-file. There should be no need to ask either for permission or for exemption. This argument is supported by recounting the many advantages Sai has experienced as a pro se litigant when allowed to e-file, and the many disadvantages experienced when not allowed to e-file. (1) Even in courts that allow a pro se litigant to e-file, generally the litigant must first commence the action on paper and then seek leave to e-file. That adds to delay and expense. (2) e-filing is faster and less expensive. Last-minute extensions, for example, can be sought after the clerk’s office has closed. A request for a TRO can be filed instantly, as compared to the cost and delay of mail. And filings by other parties are communicated instantly by the Notice of Electronic Filing, as compared to the cost and delay of periodic access to the court file through PACER. Sai is an IFP litigant, and the costs of printing and mailing are inconsistent with the IFP policy. (3) When paper filings are scanned into the court’s e-files readability suffers, and it is not possible to include links to exhibits, court decisions, and like e-materials. “The structure of a PDF is harmed.” (4) The fears that underlie the “presumption” against pro se e-filing are exaggerated. It should not be presumed that pro se litigants are vexatious. Pro se litigants are not the only ones who occasionally make mistakes in docketing — clerks do it too. Many pro se litigants are fully capable of e-filing; Sai has done it successfully in several cases after going through the chore of getting permission.

Rule 5(d)(3): Electronic Filing

Michael Rosman, Esq., 0061: (1) The rule text does not define “user name” or “password.” It could be read to require that they be included in the paper that is filed. But the only way to file electronically is by entering the user name and password. It would be better to say: “For all papers filed electronically by attorneys who are registered users of the Court’s electronic filing system, the attorney’s name on a signature block serves as the attorney’s signature.” (2) What about papers that are not filed at the time of service—disclosures and discovery materials? Rule 26(g) requires that they be signed. They may be served by electronic means outside the court’s system. Some provision should be made. (3) An attorney who files a complaint is not yet an attorney of record, so the filing and name do not satisfy the draft rule text. Why not substitute “attorney registered with the Court’s electronic filing system” for “attorney of record”?

Pennsylvania Bar Association, CV-0064: The proposed text on signing should be clarified—the attorney’s name on a signature block serves as the attorney’s signature if a paper is filed in the court’s system. Beyond that, something should be said about the circumstance in which a paper is filed using an attorney’s name and password, but a different signature appears on the block.

Heather Dixon, Esq., 0067: The signature provision should be revised to make it clear that the attorney’s user name and password are not to be included in the signature block.

New York City Bar Association, 0070: Again, the rule text should be clear that the attorney’s user name and password are not to appear on the signature block.

Federal Magistrate Judges Association, 0094: The risk that the published proposal will be read to require supplying the filer's user name and password on the signature block can be addressed like this: "For documents filed utilizing the court's electronic filing system, inserting the attorney's name on the signature block and filing the document using the attorney's user name and password will constitute that attorney's signature."

B. RULE 23

The great majority of the comments and testimony during the public comment period addressed the Rule 23 package. The summary of comments and testimony is included in this agenda book.

The published preliminary draft principally addressed issues related to settlement of class actions. After study, the Advisory Committee decided not to pursue several additional topics. Some of those topics were nonetheless urged during the public comment period. In addition, comments urged certain additional measures that had not been considered during the Advisory Committee's review of the rule. Comments about these topics are included at the end of the summary of comments.

Regarding the proposed amendments included in the preliminary draft, the Advisory Committee received much commentary about the modernization of notice methods and about the handling of class member objections to proposed class-action settlements. These matters are also presented in the summary of comments.

After the conclusion of the public comment period, the Rule 23 Subcommittee met by conference call to review and consider the comments received about the published preliminary draft. Very few changes were made in the rule language, and Committee Note language was clarified and shortened during this review.

Notes from the first of those conference calls are included in this agenda book. The second conference call revolved almost entirely around wording choices for the Committee Note, and the materials below reflect those wording choices.

- 1 **Rule 23. Class Actions**
2
3 * * * * *
4
5 (c) **Certification Order; Notice to Class Members; Judgment; Issues Classes;**
6 **Subclasses**
7
8 * * * * *
9
10 (2) *Notice.*
11
12 * * * * *
13
14 (B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon
15 ordering notice under Rule 23(e)(1) to a class proposed to be certified for
16 purposes of settlement under Rule 23(b)(3)—the court must direct to class
17 members the best notice that is practicable under the circumstances,

18 including individual notice to all members who can be identified through
19 reasonable effort. The notice may be by one or more of the following:
20 United States mail, electronic means, or other appropriate means. The
21 notice must clearly and concisely state in plain, easily understood
22 language:

23 * * * * *

24
25
26 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a
27 certified class—or a class proposed to be certified for purposes of settlement—may be
28 settled, voluntarily dismissed, or compromised only with the court's approval. The
29 following procedures apply to a proposed settlement, voluntary dismissal, or
30 compromise:

31
32 (1) Notice to the Class

33
34 (A) Information That Parties Must Provide to the Court. The parties must
35 provide the court with information sufficient to enable it to determine
36 whether to give notice of the proposal to the class.

37
38 (B) Grounds for a Decision to Give Notice. The court must direct notice in a
39 reasonable manner to all class members who would be bound by the
40 proposal if giving notice is justified by the parties' showing that the court
41 will likely be able to:

42
43 (i) approve the proposal under Rule 23(e)(2); and

44
45 (ii) certify the class for purposes of judgment on the proposal.

46
47 (2) Approval of the Proposal. If the proposal would bind class members under
48 Rule 23(e)(3), the court may approve it only after a hearing and only on finding
49 that it is fair, reasonable, and adequate after considering whether:-

50
51 (A) the class representatives and class counsel have adequately represented the
52 class;

53
54 (B) the proposal was negotiated at arm's length;

55
56 (C) the relief provided for the class is adequate, taking into account:

57 (i) the costs, risks, and delay of trial and appeal;
58

- 59 **(ii)** the effectiveness of ~~any~~ the proposed method of distributing relief
60 to the class, including the method of processing class-member
61 claims, if required;
62
63 **(iii)** the terms of any proposed award of attorney's fees, including
64 timing of payment; and
65
66 **(iv)** any agreement required to be identified under Rule 23(e)(3); and
67
68 **(D)** the proposal treats class members ~~are treated~~ equitably relative to each
69 other.
70
71 **(3)** Identification of Side Agreements. The parties seeking approval must file a
72 statement identifying any agreement made in connection with the proposal.
73
74 **(4)** New Opportunity to Be Excluded. If the class action was previously certified
75 under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords
76 a new opportunity to request exclusion to individual class members who had an
77 earlier opportunity to request exclusion but did not do so.
78
79 **(5)** Class-Member Objections.
80
81 **(A)** In General. Any class member may object to the proposal if it requires
82 court approval under this subdivision (e); ~~the objection may be withdrawn~~
83 only with the court's approval. The objection must state whether it applies
84 only to the objector, to a specific subset of the class, or to the entire class,
85 and also state with specificity the grounds for the objection.
86
87 **(B)** Court Approval Required for Payment In Connection With an Objection ~~to~~
88 ~~an Objector or Objector's Counsel.~~ Unless approved by the court after a
89 hearing, no payment or other consideration may be provided ~~to an objector~~
90 ~~or objector's counsel~~ in connection with:
91
92 **(i)** forgoing or withdrawing an objection, or
93
94 **(ii)** forgoing, dismissing, or abandoning an appeal from a judgment
95 approving the proposal.
96
97 **(C)** Procedure for Approval After an Appeal. If approval under
98 Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the
99 court of appeals, the procedure of Rule 62.1 applies while the appeal
100 remains pending.
101

102 (f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying
103 class-action certification under this rule, ~~but not from an order under Rule 23(e)(1), if a~~
104 ~~petition for to appeal is filed~~ A party must file a petition for permission to appeal with
105 the circuit clerk within 14 days after the order is entered, or within 45 days after the order
106 is entered if any party is the United States, a United States agency, or a United States
107 officer or employee sued for an act or omission occurring in connection with duties
108 performed on the United States' behalf. An appeal does not stay proceedings in the
109 district court unless the district judge or the court of appeals so orders.

110 * * * * *

111
1 COMMITTEE NOTE

2
3 Rule 23 is amended mainly to address issues related to settlement, and also to take
4 account of issues that have emerged since the rule was last amended in 2003.

5
6 **Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice
7 to the class regarding a proposed class-action settlement only after determining that the prospect
8 of class certification and approval of the proposed settlement justifies giving notice. This
9 decision ~~has been is sometimes inaccurately~~ called “preliminary approval” of the proposed class
10 certification in Rule 23(b)(3) actions, ~~and~~ it is common to send notice to the class
11 simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class
12 members to decide by a certain date whether to opt out. This amendment recognizes the
13 propriety of this combined notice practice. ~~Requiring repeat notices to the class can be wasteful~~
14 ~~and confusing to class members, and costly as well.~~

15
16 Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice
17 to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the
18 individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have
19 read the rule to require notice by first class mail in every case. But technological change since
20 1974 has introduced ~~meant that~~ other means ~~forms~~ of communication that may sometimes
21 provide a ~~be more~~ reliable additional or alternative method for giving notice and important to
22 many. Although first class mail may often be the preferred primary method of giving notice,
23 cCourts and counsel have begun to employ new technology to make notice more effective, and
24 sometimes less costly. Because there is no reason to expect that technological change will cease
25 halt soon, when selecting a method or methods of giving notice courts giving notice under this
26 rule should consider the capacity and limits of current technology, including class members'
27 likely access to such technology, ~~when selecting a method of giving notice.~~

28 Rule 23(c)(2)(B) is amended to take account of these changes, ~~and to call attention to~~
29 ~~them.~~ The rule continues to call for giving class members “the best notice that is practicable.” It
30 does not specify any particular means as preferred. Although it may sometimes ~~often~~ be true that
31 electronic methods of notice, for example ~~by~~ email, are the most promising, it is important to

32 keep in mind that a significant portion of class members in certain cases may have limited or no
33 access to email or the Internet.
34

35 Instead of preferring any one means of notice, therefore, the amended rule relies on
36 courts and counsel to should focus on the means or combination of means most likely to be
37 effective in the case before the court. ~~The amended rule emphasizes that t~~The court should must
38 exercise its discretion to select appropriate means of giving notice. Courts should take account
39 not only of anticipated actual delivery rates, but also of the extent to which members of a
40 particular class are likely to pay attention to messages delivered by different means. In providing
41 the court with sufficient information to enable it to decide whether to give notice to the class of a
42 proposed class-action settlement under Rule 23(e)(1), it would ordinarily may be important to
43 include details a report about the proposed method of giving notice ~~to the class~~ and to provide
44 the court with a copy of each notice the parties propose to use.
45

46 In determining whether the proposed means of giving notice is appropriate, the court
47 should also give careful attention to the content and format of the notice and, if notice is given
48 under both Rule 23(e)(1) and as well as Rule 23(c)(2)(B), any claim form class members must
49 submit to obtain relief. ~~Particularly if the notice is by electronic means, care is necessary~~
50 ~~regarding access to online resources, the manner of presentation, and any response expected of~~
51 ~~class members.~~
52

53 Counsel should consider which method or methods of giving notice will be most
54 effective; simply assuming that the “traditional” methods are best may disregard contemporary
55 communication realities. ~~As the rule directs, the notice should be the “best * * * that is~~
56 ~~practicable” in the given case.~~ The ultimate goal of giving notice is to enable class members to
57 make informed decisions about whether to opt out or, in instances where a proposed settlement is
58 involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily
59 understood language.” Means, format, and content that would be appropriate for class members
60 likely to be sophisticated, for example in a securities fraud class action, might not be appropriate
61 for a class having many made up in significant part of members likely to be less sophisticated.
62 ~~As with the method of notice, the form of notice should be tailored to the class members’~~
63 ~~anticipated understanding and capabilities.~~ The court and counsel may wish to consider the use
64 of class notice experts or professional claims administrators.
65

66 Attention should focus also on the method of opting out provided in the notice. The
67 proposed method should be as convenient as possible, while protecting against unauthorized opt-
68 out notices. ~~The process of opting out should not be unduly difficult or cumbersome. As with~~
69 ~~other aspects of the notice process, there is no single method that is suitable for all cases.~~
70

71 **Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit
72 that its procedural requirements apply in instances in which the court has not certified a class at
73 the time that a proposed settlement is presented to the court. The notice required under Rule
74 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class
75 to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion.

76 Information about the opt-out rate could then be available to the court when it considers final
77 approval of the proposed settlement.

78
79 **Subdivision (e)(1).** The decision to give notice of a proposed settlement to the class is an
80 important event. It should be based on a solid record supporting the conclusion that the proposed
81 settlement will likely earn final approval after notice and an opportunity to object. The ~~amended~~
82 ~~rule makes clear that the~~ parties must provide the court with information sufficient to determine
83 ~~enable it to decide~~ whether notice should be sent. At the time they seek notice to the class, the
84 proponents of the settlement should ordinarily provide the court with all available materials they
85 intend to submit ~~to in support of approval under Rule 23(e)(2) and that they intend to make~~
86 available to class members. ~~That would give the court a full picture and make this information~~
87 ~~available to the members of the class~~. The amended rule also specifies the standard the court
88 should use in deciding whether to send notice -- that it likely will be able both to approve the
89 settlement proposal under Rule 23(c)(2) and, if it has not previously certified a class, to certify
90 the class for purposes of judgment on the proposal.

91
92 ~~There are many types of class actions and class action settlements. As a consequence, no~~
93 ~~single list of topics to be addressed in the submission to the court would apply to each case.~~
94 ~~Instead,~~ The subjects to be addressed depend on the specifics of the particular class action and
95 proposed settlement. But some general observations can be made.

96
97 One key element is class certification. If the court has already certified a class, the only
98 information ordinarily necessary ~~in regard to a proposed settlement~~ is whether the proposed
99 settlement proposal calls for any change in the class certified, or of the claims, defenses, or
100 issues regarding which certification was granted. But if a class has not been certified, the parties
101 must ensure that the court has a basis for concluding that it likely will be able, after the final
102 hearing, to certify the class. Although the standards for certification differ for settlement and
103 litigation purposes, the court cannot make the decision regarding the prospects for certification
104 without a suitable basis in the record. The ultimate decision to certify the class for purposes of
105 settlement cannot be made until the hearing on final approval of the proposed settlement. If the
106 settlement is not approved ~~and certification for purposes of litigation is later sought~~, the parties'
107 earlier positions submissions in regarding to the proposed certification for settlement should not
108 be considered if certification is later sought for purposes of litigation in deciding on certification.

109
110 Regarding the proposed settlement, many a great variety of types of information might
111 appropriately be provided included in the submission to the court. A basic focus is the extent
112 and type of benefits that the settlement will confer on the members of the class. Depending on
113 the nature of the proposed relief, that showing may include details of the contemplated claims
114 process ~~that is contemplated~~ and the anticipated rate of claims by class members. ~~If the notice to~~
115 ~~the class calls for submission of claims before the court decides whether to approve the proposal~~
116 ~~under Rule 23(e)(2), it may be important to provide that the parties will report back to the court~~
117 ~~on the actual claims experience. And B~~because some funds are frequently left unclaimed, ~~it is~~
118 ~~often important for the settlement agreement~~ ordinarily should to address the distribution use of

119 those funds. ~~Many courts have found guidance on this subject in § 3.07 of the American Law~~
120 ~~Institute, Principles of Aggregate Litigation (2010).~~

121
122 ~~It is important for t~~The parties should also ~~to~~ supply the court with information about the
123 likely range of litigated outcomes, and about the risks that might attend full litigation. ~~In that~~
124 ~~connection,~~ Information about the extent of discovery completed in the litigation or in parallel
125 actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the parties should
126 provide information about the existence of other pending or anticipated litigation on behalf of
127 class members involving claims that would be released under the proposal ~~—including the~~
128 ~~breadth of any such release—may be important.~~

129
130 The proposed handling of an award of attorney's fees under Rule 23(h) ~~is another topic~~
131 ~~that~~ ordinarily should be addressed in the parties' submission to the court. In some cases, it will
132 be important to relate the amount of an award of attorney's fees to the expected benefits to the
133 class, ~~and to take account of the likely claims rate.~~ One way to method of addressing this issue is
134 to defer some or all of the award of attorney's fees until the court is advised of the actual claims
135 rate and results.

136
137 Another topic that normally should be considered is any agreement that must be
138 identified under Rule 23(e)(3).

139
140 The parties may supply information to the court on any other topic that they regard as
141 pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court
142 may direct the parties to supply further information about the topics they do address, or to supply
143 information on topics they do not address. The court should ~~It must~~ not direct notice to the class
144 until the parties' submissions show it is likely that the court will be able to approve the proposal
145 after notice to the class and a final approval hearing.

146
147 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement
148 is that it be fair, reasonable, and adequate. ~~This standard emerged from case law implementing~~
149 ~~Rule 23(e)'s requirement of court approval for class action settlements. It was formally~~
150 ~~recognized in the rule through the 2003 amendments. By then, Ceourts have~~d generated lists of
151 factors to shed light on this ~~central~~ concern. Overall, these factors focused on comparable
152 considerations, but each circuit has developed its own vocabulary for expressing these concerns.
153 In some circuits, these lists have remained essentially unchanged for thirty or forty years. The
154 goal of this amendment is not to displace any ~~of these~~ factors, but rather to focus the court and
155 the lawyers on the core concerns of procedure and substance that should guide the decision
156 whether to approve the proposal.

157
158 ~~One reason for this amendment is that~~ A lengthy list of factors can take on an
159 independent life, potentially distracting attention from the central concerns that inform the
160 settlement-review process. A circuit's list might include a dozen or more separately articulated
161 factors. Some of those factors—perhaps many—may not be relevant to a particular case or
162 settlement proposal. Those that are relevant may be more or less important to the particular case.

163 Yet counsel and courts may feel it necessary to address every ~~single~~ factor on a given circuit's
164 list in every case. The sheer number of factors can distract both the court and the parties from
165 the central concerns that bear on review under Rule 23(e)(2).
166

167 This amendment therefore directs the parties to present the settlement to the court in
168 terms of a shorter list of core concerns, by focusing on the primary procedural considerations and
169 substantive qualities that should always matter to the decision whether to approve the proposal.
170

171 Approval under Rule 23(e)(2) is required only when class members would be bound
172 under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must
173 determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes
174 of judgment based on the proposal.
175

176 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
177 “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up
178 to the proposed settlement. Attention to these matters is an important foundation for scrutinizing
179 the substance ~~specifies~~ of the proposed settlement. If the court has appointed class counsel or
180 interim class counsel, it will have made an initial evaluation of counsel's capacities and
181 experience. But the focus at this point is on the actual performance of counsel acting on behalf
182 of the class.
183

184 The information submitted under Rule 23(e)(1) may provide a useful starting point in
185 assessing these topics. For example, the nature and amount of discovery in this or other cases, or
186 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the
187 class had an adequate information base. The pendency of other litigation about the same general
188 subject on behalf of class members may also be pertinent. The conduct of the negotiations may
189 be important as well. For example, the involvement of a neutral or court-affiliated mediator or
190 facilitator in those negotiations may bear on whether they were conducted in a manner that
191 would protect and further the class interests. ~~In undertaking this analysis, the court may also~~
192 ~~refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual~~
193 ~~conduct of counsel has been consistent with what Rule 23(g) seeks to ensure.~~ Particular attention
194 might focus on the treatment of any award of attorney's fees, with respect to both the manner of
195 negotiating the fee award and its terms.

196 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a
197 “substantive” review of the terms of the proposed settlement. The relief that the settlement is
198 expected to provide to class members is a central concern. Measuring the proposed relief may
199 require evaluation of any ~~the~~ proposed claims process; directing that the parties report back to
200 the court about ~~and a prediction of how many claims will be made; if the notice to the class calls~~
201 ~~for pre-approval submission of claims;~~ actual claims experience may be important. The contents
202 of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed
203 relief, particularly regarding the equitable treatment of all members of the class.
204

205 Another central concern will relate to the cost and risk involved in pursuing a litigated
206 outcome. Often, courts may need to forecast ~~what~~ the likely range of possible classwide
207 recoveries ~~might be~~ and the likelihood of success in obtaining such results. That forecast cannot
208 be done with arithmetic accuracy, but it can provide a benchmark for comparison with the
209 settlement figure.

210
211 If the class has not yet been certified for trial, the court may consider whether
212 certification for litigation would be granted were the settlement not approved.

213
214 Examination of the attorney-fee provisions may also be valuable in ~~important to~~ assessing
215 the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be
216 evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief
217 actually delivered to the class can be a significant ~~an important~~ factor in determining the
218 appropriate fee award. ~~Provisions for reporting back to the court about actual claims experience,~~
219 ~~and deferring a portion of the fee award until the claims experience is known, may bear on the~~
220 ~~fairness of the overall proposed settlement.~~

221
222 Often it will be important for the court to scrutinize the method of claims processing to
223 ensure that it facilitates filing legitimate claims. A claims processing method should deter or
224 defeat unjustified claims, but ~~unduly demanding claims procedures can impede legitimate~~
225 ~~claims. Particularly if some or all of any funds remaining at the end of the claims process must~~
226 ~~be returned to the defendant, the court should ~~must~~ be alert to whether the claims process is~~
227 ~~unduly demanding.~~

228
229 Paragraph (D) calls attention to a concern that may apply to some class action
230 settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern
231 could include whether the apportionment of relief among class members takes appropriate
232 account of differences among their claims, and whether the scope of the release may affect class
233 members in different ways that bear on ~~affect~~ the apportionment of relief.

234
235 **Subdivisions (e)(3) and (e)(4).** ~~A Heading are is added to subdivisions (e)(3) and~~
236 ~~(e)(4) in accord with style conventions. These is additions are is intended to be stylistic only.~~

237 ~~**Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style~~
238 ~~conventions. This addition is intended to be stylistic only.~~

239
240 **Subdivision (e)(5).** ~~Objecting class members can play a critical role in the settlement-~~
241 ~~approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit~~
242 ~~objections to the proposal. The submissions required by Rule 23(e)(1) may provide information~~
243 ~~critical important to decisions whether to object or opt out. Objections by class members can~~
244 ~~provide the court with important information bearing on its determination under Rule 23(e)(2)~~
245 ~~whether to approve the proposal.~~

246

247 **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval
248 for every withdrawal of an objection. An objector should be free to withdraw on concluding that
249 an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or
250 other consideration in connection with withdrawing the objection.

251
252 The rule is also amended to clarify that objections must provide sufficient specifics to
253 enable the parties to respond to them and the court to evaluate them. One feature required of
254 objections is specification whether the objection asserts interests of only the objector, or of some
255 subset of the class, or of all class members. Beyond that, the rule directs that the objection state
256 its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting
257 an objection. Courts should take care, however, to avoid unduly burdening class members who
258 wish to object, and to recognize that a class member who is not represented by counsel may
259 present objections that do not adhere to technical legal standards.

260
261 **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a
262 proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such
263 assistance under Rule 23(h). ~~As recognized in the 2003 Committee Note to Rule 23(h): “In~~
264 ~~some situations, there may be a basis for making an award to other counsel whose work~~
265 ~~produced a beneficial result for the class, such as * * * attorneys who represented objectors to a~~
266 ~~proposed settlement under Rule 23(e).”~~

267
268 But some objectors may be seeking only personal gain, and using objections to obtain
269 benefits for themselves rather than assisting in the settlement-review process. At least in some
270 instances, it seems that objectors—or their counsel—have sought to obtain consideration for
271 ~~extract tribute to~~ withdrawing their objections or dismissing appeals from judgments approving
272 class settlements. And class counsel sometimes may feel that avoiding the delay produced by an
273 appeal justifies providing payment or other consideration to these objectors. Although the
274 payment may advance class interests in a particular case, allowing payment perpetuates a system
275 that can encourage objections advanced for improper purposes.

276
277 The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.
278 Because the concern only applies when consideration is given in connection with withdrawal of
279 an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when
280 consideration is involved. Although such payment is usually made to objectors or their counsel,
281 the rule also requires court approval if a payment in connection with forgoing or withdrawing an
282 objection or appeal is instead to another recipient. The term “consideration” should be broadly
283 interpreted, particularly when the withdrawal includes some arrangements beneficial to objector
284 counsel. If the consideration involves a payment to counsel for an objector, the proper procedure
285 is by motion under Rule 23(h) for an award of fees; ~~the court may approve the fee if the~~
286 ~~objection assisted the court in understanding and evaluating the settlement even though the~~
287 ~~settlement was approved as proposed.~~

288
289 Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or
290 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-

291 action objector may produce much longer delay than an objection before the district court, it is
292 important to extend the court-approval requirement to apply in the appellate context. The district
293 court is best positioned to determine whether to approve such arrangements; hence, the rule
294 requires that the motion seeking approval be made to the district court.

295
296 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal
297 on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter,
298 the court of appeals has authority to decide whether to dismiss the appeal. This rule's
299 requirement of district court approval of any consideration in connection with such dismissal by
300 the court of appeals has no effect on the authority of the court of appeals to decide whether to
301 dismiss ~~over~~ the appeal. It is, instead, a requirement that applies only to providing consideration
302 in connection with forgoing, dismissing, or abandoning an appeal. ~~A party dissatisfied with the~~
303 ~~district court's order under Rule 23(e)(5)(B) may appeal the order.~~

304
305 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's
306 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1
307 applies. That procedure does not apply after the court of appeals' mandate returns the case to the
308 district court.

309
310 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must ~~should~~ direct
311 notice to the class regarding a proposed class-action settlement ~~in cases in which class~~
312 ~~certification has not yet been granted~~ only after determining that the prospect of eventual class
313 certification justifies giving notice. ~~This decision is sometimes inaccurately characterized as~~
314 ~~"preliminary approval" of the proposed class certification.~~ But this decision ~~it~~ does not grant or
315 deny class certification, and review under Rule 23(f) would be premature. This amendment
316 makes it clear that an appeal under this rule is not permitted until the district court decides
317 whether to certify the class.

318
319 The rule is also amended to extend the time to file a petition for review of a class-action
320 certification order to 45 days whenever a party is the United States, one of its agencies, or a
321 United States officer or employee sued for an act or omission occurring in connection with duties
322 performed on the United States' behalf. In such a case, the extension applies to a petition for
323 permission to appeal by any party. The extension of time recognizes—as under Rules 4(i) and
324 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for
325 additional time in regard to these matters. The extension applies whether the officer or employee
326 is sued in an official capacity or an individual capacity; ~~the defense is usually conducted by the~~
327 ~~United States even though the action asserts claims against the officer or employee in an~~
328 ~~individual capacity.~~ An action against a former officer or employee of the United States is
329 covered by this provision in the same way as an action against a present officer or employee.
330 Termination of the relationship between the individual defendant and the United States does not
331 reduce the need for additional time.

“Clean” Rule and Note

[In order to facilitate comprehension of the revised proposed Rule and Note language, below is what they would look like if adopted.]

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) Notice.

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the

proposal if giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
 - (ii) certify the class for purposes of judgment on the proposal.
- (2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
 - (A) the class representatives and class counsel have adequately represented the class;
 - (B) the proposal was negotiated at arm's length;
 - (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
 - (D) the proposal treats class members equitably relative to each other.
- (3) *Identification of Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) *Class-Member Objections.*
 - (A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or

to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment In Connection With an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

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

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

COMMITTEE NOTE

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called “preliminary approval” of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the

individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members “the best notice that is practicable.” It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the “traditional” methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily understood language.” Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(c)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In

addition, as suggested by Rule 23(b)(3)(A), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must

determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a “substantive” review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or

defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term “consideration” should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official

capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Gap Report

At several points, the rule language was revised to shorten it or to shift to active voice. In Rule 23(c)(2)(B), the amendment proposal was revised to state that individual notice in Rule 23(b)(3) class actions be sent by “one or more of the following” before inviting use of United States mail, electronic means, or other appropriate means. In Rule 23(e)(2), the phrase “under Rule 23(c)(3),” originally proposed to be added, was removed from the proposed amendment in light of concerns that it might prove misleading in practice. The language of Rule 23(e)(2)(C)(ii) was adjusted to better parallel that of the following subsections. Rule 23(e)(5)(B) was modified to require court approval of any payments or other consideration provided in connection with forgoing, withdrawing or abandoning an objection to a class-action settlement or an appeal from rejection of such an objection. The Committee Note was revised to take account of these modifications in the rule language, to respond to some concerns raised during the public comment period, and to shorten the Note.

SUMMARY OF COMMENTS
Rule 23 Package
2016-17

Commentary on the following issues is presented:

Overall assessment

Rule 23(c)

Rule 23(e)(1) -- "frontloading"

Rule 23(e)(1) -- grounds for decision to give notice

Rule 23(e)(2) -- standards for approval

Rule 23(e)(5)(A) -- objector disclosure and specificity

Rule 23(e)(5)(B) and (C) -- court approval of payment to
objectors or objector counsel

Rule 23(f) -- forbidding appeal from notice of settlement
proposal

Rule 23(f) -- additional time for appeal in government cases

Ascertainability

Pick off

Other issues raised

Overall assessment

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): The amendment package is, generally speaking, addressing areas of concern.

Mark Chalos (Tenn. Trial Lawyers Ass'n): Overall, the organization supports the proposed amendments. The "road show" was particularly helpful to the bar in developing an appreciation of these issues. Deferring consideration of ascertainability and pick-off is sensible.

John Beisner (Skadden Arps): The proposed amendments are "directionally correct." They find the right spot as a general matter. But some clarification or reorientation in the Committee Note would be desirable. He will submit written comments.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): His organization has put out three editions of Standards and Guidelines for Litigation and Settling Consumer Class Actions. The third edition was published at 299 F.R.D. 160 (2014). It may be a resource for the Committee's work.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL generally supports the majority of the proposed amendments. They either codify or clarify existing case law.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony and CV-2016-0004-0063): The Subcommittee's outreach efforts were very valuable, and enabled many to be involved in the process. We are extremely enthusiastic about this package of proposals.

Annika Martin: The Committee's "listening tour" provided a great opportunity to be heard. We are enthusiastic about these efforts.

Paul Bland (Public Justice); I echo the other comments about the process used. The outreach was desirable, and there is consensus in favor of most of the provisions in the amendment package.

Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Since the 2003 amendments to Rule 23 went into effect, we have found that the rule generally has worked well. Nonetheless, the changes proposed in this package will improve class action practice even though they are modest.

Public Citizen Litigation Group (CV-2016-0004-081): We are pleased that the amendments proposed take a moderate, consensus-based approach and generally avoid changes that would disrupt existing practices. In particular, we are pleased that the proposed approach to objectors is similar to the one we proposed in 2015.

Prof. Suzette Malveaux (CV-2016-0004-082): Prof. Malveaux attaches a copy of a draft of an article entitled "The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today." The draft article is mainly about Rule 23(b)(2), but makes some mention of pick-off.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): The Committee's hearing, along with the meetings the Committee had with various stakeholders nationwide, fostered a shared sense of purpose and a feeling of participation that have led to a strong process. The decision to abstain from proposing changes that are yet unripe for implementation is particularly appreciated. Ascertainability and pick-off fit in that category.

Public Justice (CV-2016-0004-089): "Public Justice believes that class actions are one of the most powerful tools for victims of corporate and governmental misconduct to seek and achieve justice." It strongly supports the vast majority of the proposed amendments, subject to a few qualifications. We believe that the proposals are useful and appropriate and should be adopted subject to the changes we suggest.

Rule 23(c)

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 219 should be strengthened about the settling parties advising the court about the planned method of giving notice. The last sentence in the full paragraph on p. 219 should be strengthened to make it mandatory that the parties provide the court with their plan. For one thing, that will ensure that there is a plan. It has happened in the past that the parties do not start thinking about that until later. It should be up front. Regarding the form of notice, the Committee Note has it about right. The problem is to get the parties and the court to focus on the particulars of the case and what will likely work with the class. This is somewhat like advertizing. The parties should dig into the issue up front, and the court should attend to it then also. For the court to do this analysis, it will often be necessary to submit an expert report. Marketing experts can look at the demographic makeup of the class and explain how to give notice and why a given method is calculated or likely to work. It is important to go beyond generalities.

Alan Morrison (George Washington Univ. Law School) (with written testimony CV-2026-0004-0042): The words "under Rule 23(b)(3)" should be deleted from line 12 on p. 211 of the draft. The "best notice practicable" should be sent to class members in (b)(1) and (b)(2) cases as well.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Class actions are critical to effective relief for the clients represented by his groups. For many of these people -- those who are elderly or poor, for example -- the Internet access that may be commonplace for middle class Americans does not exist. The Census Bureau, the FTC, and other governmental agencies recognize that relying solely on electronic means to reach such people is not effective. So it is critical that the court focus closely on the manner in which notice will be given to ensure that it is suitable to the class sought to be represented. For consumer class actions, often a summary notice that is relatively brief is better than a detailed and full description. And it can show how to get more information. The disappointing reality is that the average American reads at about the fifth grade level. Beyond that, we are a multilingual society, so often giving notice in more than one language is critical.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The requirement of individualized notice in (b)(3) cases should be relaxed in cases involving small value claims. For example, if the claims are for less than \$100

individual notice should be unnecessary, or handled on a randomized rather than universal basis. I proposed this in a 2006 article in the NYU Law Review. But don't weaken the means of individual (or other) notice. Banner ads simply do not provide individualized notice. Indeed, it is hard to imagine a case in which electronic notice is best. Instead, it would be best to recognize that individualized notice is unwarranted in small-claim cases. Todd Hilsee is right that electronic means are less effective. But with claims of \$1000, in one case he handled, the payout went to 94% of class members. So the current rule can be made to work. The amendment is not needed, and could be read in a harmful way. The current rule does not say U.S. mail, and there is no empirical basis for saying that banner ads work. Perhaps some form of electronic notice would supplement other methods. For example, consider a product uniquely tied to the use of email, or the members of a professional organization that ordinarily communicates by email. Judges should not be given too much discretion in approving the means of notice.

Hassan Zavareei (testimony and prepared statement): I disagree with Wolfman. I have experienced the benefits of electronic notice. Most organizations communicate with their members this way. This change to the rule does no harm and some good.

Phoenix hearing

Jennie Lee Anderson: We support the allowance of mixed notice. This amendment is practical and provides needed flexibility. The right way to design a notice program is to focus on the demographics of the class. For example, if it's made up of young professionals the means for giving notice might be quite different than for elderly low income class members. It is true that U.S. mail may often be the best way, but not always. Social media can be very useful. Even banner ads may be a valuable way to augment notice in some cases. True, banner ads would not be sufficient alone. One way to support effective notice programs might be to link the attorney fee award to the claims rate. Particularly if there were a reversion provision, that could be important to provide an incentive. Technology can sometimes help in achieving that result. But no matter how good the program is, it won't reach 100% distribution; there will always be some checks that are not negotiated.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): We favor the expansion of means for notice. The selection of a notice method must take account of demographics. We particularly endorse the language in the draft Note recognizing that many still do not have access to a computer or the Internet. We think that the Note should highlight the need to ensure that electronic class notices are digitally accessible.

And important work should be done on readability of notices. The Committee Note should be strengthened to stress readability, and stress it in terms that take account of the educational attainment of the class members. For example, graphics can be very helpful. But there is no reason to favor paper over electronic methods of giving notice. We think that the Note should be strengthened in four ways: (1) the judge should be presented with the various forms of notice formatted exactly as the notice will appear either in print or electronically; (2) counsel should be required to make an affirmative showing that the notice is in fact readable to the vast majority of class members; (3) the Note should encourage the use of good design and infographics and, for electronic methods, hyperlinks to definitions or other clarifying materia; (4) electronic notice should be carefully vetted to ensure compliance with the obligation to ensure digital accessibility for people with disabilities. We also think that the FJC should update its Model Class Action notices. They should be build from the bottom up using suggestions and feedback from ordinary people rather than "dumbing down" dense legalese.

Annika Martin: The amendment takes the right approach. There is a need for flexibility, and the court should focus on what is right for the particular case. But the draft does not go far enough. It is preoccupied with the means of notice. That is important, but more effort should be made to address the content of the notice. Regarding the form of notice, it may often be that banner ads are unreliable, but getting into the weeds at this level of detail in a rule would not be justified. It is better to draft broadly, emphasizing the goal -- best practicable notice -- and avoiding embracing or denouncing specific means.

Todd Hilsee: He is a class action notice expert. He has already submitted material to the Committee, and will provide more material later. The basic point, however, is that there is no need for this proposed amendment, and that it will send the wrong signal. There should continue to be a preference for notice by U.S. mail. Although no means of communicating is certain to get the attention of all recipients, mail is most likely. 78% of mail is received or scanned. Electronic communications are often screened out by a spam filter or similar device. Yet there is a race to the bottom in class action notice; unscrupulous plaintiff counsel will seek the cheapest provider who can supply an affidavit claiming to be effective, and defendants will embrace this because it will save them money by minimizing claims. "This rule will foster reverse auctions." The Remington case is an example. Deadly consequences could flow from failure to solve the problem with these rifles, but only a small number of class members responded to a notice program that offered significant relief and provided a basis for cutting off their rights to sue in the event that serious injury or death

resulted from malfunction of the product. In effect, this proposal will be read as urging that courts forgo regular mail in giving notice. There should be a categorical preference for mailed notice.

Paul Bland (Public Justice); We challenged the secrecy in the Remington case, but the problems there do not show that the proposal here is unwise. We support the proposed amendment. There will be settings where electronic notice is best. One example is a case involving a defective app on iPhones. Another involved a cable company; using electronic means got more responses than would have been true with U.S. mail. Communications methods are changing at great speed. Don't presume we can guess now what will be prevalent means of communication in five or ten years. The risk of a reverse auction is overstated. Reversion provisions are rare; judges are alert to their risks. And plaintiff counsel know that judges are also alert to making sure that the notice methods will really work. Cy pres provisions can sometimes mitigate. But the reality is that the plaintiff lawyers are trying to get the money to the class members, and the judges are scrutinizing their efforts.

Dallas/Fort Worth (telephonic) hearing

Ariana Tadler (Milberg): I support the proposed amendment. It helpfully clarifies that notice can be provided by various and multiple means. In today's world, mail and print are not the go-to media for communicating. In class actions, the pertinent question is what method will provide the best notice practicable. There is a "dizzying array" of options for doing so in this digital age. One thing is abundantly clear -- one size does not fit all for this purpose. Some assert that this proposed amendment somehow prefers electronic notice, but it really does not do that. The Committee was right to take something of a "minimalist" approach in its Note. Trying to foresee future developments in electronic communications and offer a hierarchy of what is preferred would be an impossible task. Other comments assume that the amendment would somehow endorse using "banner ads" as the only means of giving notice. But that attitude fails to take account of modern realities. Unlike U.S. mail, electronic means can facilitate multiple efforts at giving notice, and also provide specific feedback on how successful the notice effort has been. Any effective notice effort must now begin by considering the best ways to reach the target audience. My family illustrates the dramatic ways in which communications habits have changed and are changing. My grandmother, born in 1916, has never used a computer. My mother, born in 1943, got her first computer in 2008, but uses no social media. My husband, born in 1966, is mainly a Facebook user, and "does not open postal mail." My two sons, though they are only three years

apart in age, have dramatically different habits. The older one, born in 1997, relies primarily on Facebook and social media. He has "tens of thousands of unread emails," and checks his postal mail perhaps once a month. The younger son, born in 2000, has a Facebook account that is dormant, and presently relies mainly on Instagram and Snapchat, relying also on news feeds through these sources. He rarely and reluctantly uses email, and will use texts for his family. Therefore, for both the court and counsel, the task of designing an effective notice program must be tailored to the case. And multiple means may be the best choice. She therefore endorses the submission of AAJ on this topic. She also thinks that adding "one or more of the following" to the last sentence in the preliminary draft could be an improvement. She was thinking of recommending that the draft be revised to say "and/or" between U.S. mail and electronic means, but recognizes that trying to do so might be inconsistent with the style of the rules.

Steven Weisbrot (Angeion Group) (testimony and CV-2016-0004-0062): I am a partner and Executive Vice President of Notice & Strategy at Angeion, which is a national class action notice and claims administration company. I support the proposed amendment to the notice provision, for it is rooted in common sense and progressive logic that mirrors the current media landscape, and remains flexible enough to accommodate the changes in technology that are currently happening and will inevitably continue to occur for years into the future. Each settlement has its own unique media fingerprint, which is what should guide the preferred dissemination of notice, including individual notice. This individual tailoring of notice programs is critical, given the breakneck speed with which advertising is changing. A "one size fits all" solution that ignores modern communication realities will not work; it is essential to maintain the level of flexibility that the proposed amendment provides. But it is also critical to recognize that the amendment will be counter-productive without more rigorous judicial analysis of any proposed notice plan during the preliminary approval process. We think that no one factor (even "reach") should be given primacy in that assessment. I recently met with representatives of the FJC and suggested a comprehensive approach to fashioning a robust class notice program at the preliminary approval stage of class litigation. the media environment has changed vastly since *Mullane* was decided in 1950, and in class actions it is often true that defendants are in regular contact with class members via email. Indeed, "U.S. mail is becoming less customary in our society." For example, in a recent Telephone Consumer Protection Act settlement, we found a significantly higher claim filing rate amongst those noticed by email compared to those noticed by traditional U.S. mail. For those noticed by email, it was relatively simple to link to the claims filing webpage and finalize a claim, as compared with the extra steps required to

complete a claim via the U.S. mail notice program. But the key point is that notice programs should be evaluated one by one, using the following criteria: (1) how does the defendant typically communicate with class members; (2) what are the class member demographics; (3) what are the class members' psychographics; (4) what is the amount of the overall settlement in relation to the cost of the notice; and (5) what are the age and media habits of class members? In view of these current realities, adding the phrase "one or more of the following" to the rule-amendment proposal would be a good change. It reflects the value of repeated efforts to give notice, sometimes by multiple methods.

Written Comments

Todd Hilsee (16-CV-E & supplemented by CV-2016-0004-080):
The Committee Note on p. 219 is wrong in stating that electronic means of giving notice can be "more reliable" There should be a presumption in favor of first class mail. The current rule allows all forms of individual notice, and does not need to be changed. The change wrongly equates electronic forms of notice with first class mail. In particular, banner ads are not effective. Various industry sources and governmental entities (e.g., the FTC) show that the rate of opening email ranges from a low of 7% to a high of less than 25%. The FTC study (attached) shows that physical mailings outstrip email, and far outstrip other forms of notice such as internet banners. According to a booklet published by another claims administrator (attached): "Email notices tend to generate a lower claims rate than direct-mail notice." According to Google, only 44% of banners typically included in "impression" statistics are actually viewable, and for more than half of banner impressions half of the banner is not on the screen for a human to see for more than one second. (Google report attached.) New revelations show that millions of internet banner "impressions" purchased for very low prices are seen not by human beings but by robots or are outright fakes. A Bloomberg report states:

The most startling finding: Only 20 percent of the campaign's "ad impressions" -- ads that appear on a computer or smartphone screen -- were even seen by actual people. . . . As an advertiser we were paying for eyeballs and thought that we were buying views. But in the digital world, you're just paying for the ad to be served, and there's no guarantee who will see it, or whether a human will see it at all. . . . Increasingly, digital ad viewers aren't human.

Some claims administrators have sworn to courts that extremely low claims rates are not normal. Hilsee concludes:

Numerous notice professionals tell me they have assessed

false promises that unscrupulous and untrained vendors have been pitching. But credible notice professionals may speak out only at their own peril. They have been told outright that major firms will not work with them if they publicly oppose notice plans. They face pressure to dial-back effective notice proposals to compete with falsely-effective inexpensive from affiants who are untrained in mass communications. Thus, despite the rule requiring "best practicable" notice, courts are too often presented with the least notice a vendor is willing to sign off on if awarded the contract to disseminate notice and administer the case. We should not compound the problems by making this unnecessary and counter-productive rule change.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We appreciate and applaud the efforts to update notice practices and to recognize that the ability to give individual notice by mail may not always be available, and that, even when it is, notice to certain class members may be better effectuated by email or other means. We also believe that the Note does an excellent job recognizing that different methods of individual notice may be better able to reach different audiences, and that the specific targeted audience must be considered in each case. We think, however, that a modest change could beneficially be made to Rule 23(c)(2)(B) as follows:

The notice may be by one or more of United States mail, electronic means, or other appropriate means . . .

This change would communicate more clearly that multiple methods of notice may be appropriate to better ensure reaching different subsets of the class. Using multiple methods of notice is commonly done today, and would enhance the likelihood of reaching the same constituents.

Katherine Kinsela (CV-2016-0004-0060): Based on my 24 years experience with class notice, I oppose the proposed changes regarding class notice. The changes are harmful because they (1) remove any clear standard for notice regardless of class injury; (2) equate all forms of media with individual notice; (3) evidence no understanding of the effectiveness of different forms of class communication; and (4) fail to address the most significant issue -- should all class actions be held to the same notice standard? Moreover, the changes are unnecessary, since courts have for years approved notice in hundreds of cases using media other than U.S. mail. The language of the proposal is vague and sweeps too broadly; "electronic means" can conflate email with electronic display advertising. Making this change "will likely open the floodgates to any and all notice methods."

There cannot be individual notice through mass media. Due to the amendment, the "best notice practicable" may evolve into "cheapest notice possible," and usher in banner ads rather than individual mailed notice even in cases involving substantial recoveries and easy methods of identifying class members. Already, settling parties often demand the cheapest notice possible, and they sometimes enshrine an arbitrary notice budget in the settlement agreement. So-called "experts" with little or no media training routinely submit affidavits stating that a notice program meets due process standards even though a review by trained and experienced experts indicates that it does not. There has been a sea change in what is considered satisfactory reach for a notice program. Where formerly 85% or 90% reach was an ordinary goal, more recently the goal has slipped to 70% and there is a "race to the bottom." Email can work as a notice method if the email list is based on a transactional relationship between the sender and the recipient, but that is not true of all email lists. Even with such a list, there is no reliable way to update the list and deliverability rates are low compared to U.S. mail. Moreover, the average American receives 88 emails a day but only about a dozen pieces of U.S. mail per week. The best solution would be to calibrate notice efforts with class injury. "A class action alleging false advertising regarding the organic content of a food product that settles for \$5 million is wholly different from cases alleging serious money damages." In cases involving serious money damages, the Note should make clear that in most cases with mailing data the preferred notice should be by U.S. mail. The new proposed sentence to Rule 23(c)(2)(B) should be replaced with the following:

When class members are partially or wholly unidentifiable, or the individual or aggregate class injuries are not significant, notice may include media or other appropriate means.

Moreover, the Note should specify that notice experts should be used in most cases. Although the Note now refers also to "professional claims administrators," that is not the same thing as a class notice expert. Judges should require that testifying notice experts possess the following traits: (1) recognition by courts of expert status; (2) credentials that meet the standards of *Daubert* and *Kumho*; (3) training or in-depth experience in media planning; (4) thorough knowledge of Rule 23; (4) the ability to translate complicated legal issues into accurate plain language; (5) the ability to create effective print, Internet, radio, and television notices consistent with best advertising practices; (6) an understanding of direct notice deliverability issues; and (7) the ability to combine direct notice reach, when known, with media reach to ascertain overall unduplicated reach to class members. These requirements should be included in written guidelines and disseminated by the FJC for judicial

education purposes. Otherwise the "watering down" of notice efforts will continue to occur. "In the 24 years I have designed and implemented notice programs, I have never heard a comment or seen a formal objection that a case had 'too much notice,' or that the notice was 'too expensive.' There is no ground swell of consumers clamoring for less access to their legal rights to keep costs down."

Pennsylvania Bar Association (CV-2016-0004-0064): The amendment is designed to adopt a more pragmatic approach to class notice in light of modern technological advances. By using the broad phrase "electronic means," the amendment would give the court discretion to use the best practicable notice in each case. There may, however, be a concern that recipients would be unwilling to open or click on a message from an unknown sender. In light of this concern, the Note should be revised to say that all emailed notices should provide an option for a class member who is unsure whether to click the link to go instead to the assigned court's webpage, or to call the district court clerk directly, for more information. Using class counsel's website or phone number seems more problematical because a government website would seem more secure.

American Association for Justice (CV-2016-0004-0066): AAJ supports this proposed amendment. It would continue the requirement that the court direct the best notice that is practicable under the circumstances, but remind courts that first-class mail is not the only option. The Committee properly recognizes that the vast technological changes in the past three decades mean that U.S. mail is not the best choice in all cases. AAJ recommends that the Note be revised to suggest that "mixed notice" or "a mix of different types of notice" be suggested. In some cases the use of multiple types of notice would be the most effective way of notifying class members. Nowadays a number of cases involve contact information that would make mixed notice not only feasible but also the most cost-effective method of notice. For instance, many companies collect email addresses as well as mailing addresses for their customers. AAJ also recommends acknowledging that electronic notice can take forms other than email. The statement that "email is the most promising" may not always be correct. Younger consumers, in particular, may interact with the marketplace through other electronic means. Referring to "email" implies a limited ability to keep up with the evolution of technology. There is no mention of other electronic platforms, such as Facebook Twitter, and Instagram, or other smart phone applications or notification options. For example, consider a case against a ride-share company such as Uber in which notifying class members using the application might be the best choice.

Joe Juenger & Donna-lyn Braun (Signal Interactive Media) (CV-2016-0004-078): We believe that amending the rule is not necessary. We advocate the use of digital media where suitable, but believe the current language of the rule adequately authorizes such efforts. Courts are already approving settlements that rely on electronic notice. Changing the rule might be urged to make electronic means the preferred or predominant means even though not justified. Existing Rule 23(c) is adequate and therefore should not be amended. Instead, the Note should be revised to say that electronic means are allowable where required to achieve the most effective notice.

Public Citizen Litigation Group (CV-2016-0004-081): In light of the concerns raised by Todd Hilsee and Katherine Kinsella, it seems prudent to proceed cautiously. We suggest that the Committee refrain from any suggestion that courts dispense with mailed notice in cases where it is practicable. At a minimum, the Note should emphasize that courts should generally continue to use mailed notice when it is feasible and that other means of notice should supplement rather than displace it. Whether there should be any change to the rule is a difficult question. The best practices in this area surely deserve further study. If the amendment goes forward, we urge that the Note say that the objective is not to encourage courts to rush to adopt electronic or other alternatives means of notice that are not demonstrated to be superior to mail.

Richard Simmons (Analytics) (CV-2016-0004-084): I have over 26 years of experience in designing and implementing class notification and claims programs. I can report that the use of digital notice, where appropriate, is common practice. Digital notice provides fundamentally different opportunities and challenges than traditional mailed notices. Existing practices, rules, and guidance that have been used to evaluate whether or not a notice program provides the "best practicable" notice are still necessary, but they are no longer sufficient to address the complexities of digital media. To address evolving methods of providing notice, the rules and Note should be modified to recommend that courts take account not only of the likelihood that members of the class will receive a message but also the extent to which they are likely to act in response to messages delivered by different means. The 2016 FTC orders to class action claims administrators about forms of notice is, to my knowledge, the first independent analysis of the effectiveness of alternative forms of class notice. When designing notice programs, a key question beyond initial "reach" is that the program actually prompt responses. It is possible to design a program that has great reach but actually minimizes the likelihood of claims being submitted. Digital notice is fundamentally different from traditional mailed notice because it can be targeted, calibrated, limited or expanded and because it

can provide data regarding how recipients interact with the notice materials. Unfortunately, some in this business do not fully exploit the information-gathering characteristics of digital notice by gathering and reporting data on how many of the notices were actually opened, how many links were clicked, etc. Another strategy is to exploit those digital capacities to design a notice program that is actually more effective. Unfortunately, market forces in class action practice often seem to favor the lowest cost provider, while overlooking the critical questions of real effectiveness of the notice. Active management of a notice campaign, for example, often generates additional costs. In light of these realities, my view is that the amendments and Note are necessary, but no longer sufficient to deal with the advent of digital notice campaigns.

Public Justice (CV-2016-0004-089): We endorse the proposed amendment because it wisely permits courts to adopt the best notice practices available for different types of cases. Methods of communication are evolving, and are very likely to continue to do so. In many instances, first class mail will remain the best practicable form of notice. But in a case in which the defendant communicates with class members by electronic means, as in privacy litigation relating to some apps or electronic product or service, first class mail may not be the best approach. We therefore applaud the Note at p. 219, which says that "courts giving notice under this rule should consider current technology, including class members' likely access to such technology, when selecting a method of giving notice." We believe the proposed amendment will help judges do their job.

Rule 23(e)(1)(A) -- "frontloading"

Washington D.C. hearing

Alan Morrison (George Washington Univ. Law School)
(testimony & CV-2016-0004-0040): This provision will aid the court and aid unnamed class members. It is very important that the rule require full details to be submitted well in advance of the deadline for objecting or opting out. In the NFL concussion litigation, the proponents of the settlement filed about 1,000 pages of material after that deadline for action by class members (e.g., opting out or objecting) had passed. And the specifics about the attorney fee application should be included. That should be submitted at least 21 days before objections and opting out must be done. But it need not be filed with the settlement notice. The filing need not be in detail comparable to the final fee request, but at a minimum it should state the maximum amount of the proposed fee award. In addition, it is important to bring in others at the point the court is considering approving the giving of notice to get additional views on the quality of the settlement proposal. Later the parties' and court's views may harden if a massive notice effort has already occurred before objections are heard. At least in some cases it is not difficult to identify additional people to notify. If there is an MDL proceeding on the same general set of issues, that provides a ready list of those who could be notified rather easily -- the attorneys for the litigants involved in the MDL. Some potential problems can be eased at this point. For example, simplifying the claim form may produce substantial benefits but not be easy to do later.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): One concern might be about disclosure of the details of side agreements, particularly "blow up" provisions that permit the settling defendant to withdraw from the settlement if more than a certain number of class members have opted out. If that is not intended by the statement that the parties must submit all the things they intend to rely upon when seeking approval under Rule 23(e)(2), it should be clarified that "identifying" these agreements under Rule 23(e)(3) does not require such disclosures. One way to do that would be to revise the sentence in the Note on p. 221 of the pamphlet to read: "That would give the court a full picture and make non-confidential ~~this~~ information available to the members of the class." [It might be noted that the Note accompanying the 2003 amendment to Rule 23(e) said the following with regard to the requirement that other agreements be identified: "A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure."]

Written comments

Public Justice (CV-2016-0004-089): We believe that the frontloading requirement is a positive change that would assist both judges and class members. We particularly applaud the Note at 221: "The decision to give notice . . . should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object."

Rule 23(e)(1)(B) -- grounds for decision to give notice

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 222 should be strengthened. At present it says that if the proposal to certify for purposes of settlement is not approved, "the parties' earlier submissions in regard to the proposed certification should not be considered in deciding on certification." The possibility of such use of submissions supporting the settlement will make defendants very nervous. A way should be found to avoid this deterrent to settlement.

Alan Morrison (George Washington Univ. Law School)
(testimony & CV-2016-0004-0040): Even though the draft wisely avoids the term "preliminary approval" because that makes the task of objectors too difficult, it should be revised because the standards for approving notice sound too much like a decision that the settlement will be approved and the class certified. His preferred locution would be something like "a sufficient possibility the proposal will warrant approval." In addition, the inclusion of "under Rule 23(c)(3)" on p. 213 at line 45 is unnecessary and possibly confusing. Readers may think that the phrase applies only to classes under (b)(3), which is not correct. In addition, subparagraphs (i) and (ii) should be reversed if they are retained. They are not necessary, but the point of reversing them is to recognize that class certification logically precedes settlement approval.

Phoenix hearing

James Weatherholtz: He is concerned about Note language about the standard for directing notice to the class and for approving a proposed settlement after notice to the class. One concern focuses on p. 222 of the published draft, where the Note says "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." That seems too strong. Does that mean the court may not take any action based on the expectation that the settlement will be approved? How about enjoining collateral litigation by class members? The decision to send notice should be recognized as a final judgment for some purposes (such as supporting an injunction against collateral litigation by class members). But that could be seen as inconsistent with the proposed change to Rule 23(f) regarding immediate review of decisions under Rule 23(e)(1), and might foster efforts to obtain immediate review under Rule 23(f). Another concern is that, later in the Note on p. 222 it is said that the court should concern itself with the claims rate. That should not be made dispositive, for people may have many reasons for declining to submit claims. Some may simply oppose the idea of class actions.

That should not prevent approval of a settlement. Finally, the sentence citing § 3.07 of the ALI Principles on p. 223 should be removed because it seems tacitly to endorse the cy pres doctrine. The prior sentence of the draft ("And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.") is not problematic. But the parties should be free simply agree to disposition of those funds; the court should not be involved in reviewing or rejecting that agreement.

Dallas/Fort Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission):
The Committee Note, p. 222, contains the following statement "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." This "sweeping prohibition" is too broad. It might interfere with necessary actions like enjoining suit by class members who have not opted out. Moreover, it could be read to mean that class counsel is not really representing the class until the final approval of the settlement and certification for that purpose. It might also have implications for judicial restrictions on communications between class counsel and class members during the time the proposed settlement is under consideration. It is difficult to determine why certification for settlement purposes before the final settlement approval hearing can never be appropriate. DRI recommends softening the statement to take account of the possibility of settlement-only certification on proper evidence before the final hearing.

Timothy Pratt (Boston Scientific): Unlike all the other witnesses, he is a client. Boston Scientific is a party to a large amount and range of litigation. Pratt is Executive Vice President. Pratt is also involved with Lawyers for Civil Justice and the Federation of Corporate Counsel. He wishes to rebut the narrative put forward by others -- that defendants always want to draw things out. To the contrary, his experience is that he wants to get to the merits and get the matter resolved so his company can move on. We commend the changes in terms of general direction regarding settlement processing and review. But there is one change that should be made. In the Note, at p. 223, there is a reference to the ALI Principles of Aggregate Litigation § 3.07. That appears to endorse, or perhaps to create, a right to rely on cy pres in class actions in federal court. The Committee considered whether to adopt a rule provision addressing cy pres, and wisely decided to back away from that idea. But this comment in the Note "back into" the same problem. This should be left to party agreement, and not burdened with the restrictions that the ALI found desirable. Beyond that, the Note says that reversion of funds to the defendant should not be allowed, and mentions deterrence as a reason for that. That's

not proper, and those statements should be removed or modified.

Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our concerns relate to two issues:

(1) Disapproval of the term "preliminary approval." We are troubled by statements in the Note seemingly disavowing the use of the term "preliminary approval." The amendment instead calls the decision under Rule 23(e)(1) a "decision to give notice." But "preliminary approval" is the existing term and practice for the juncture at which the court first reviews a proposal for settlement. The term "preliminary approval" means simply that the court has determined that the proposed settlement is deserving of the expense and effort of class notice. Most forms of order submitted to the court are called "Preliminary Approval Orders." Class action practitioners understand that when the court orders notice it is not substantively approving either class certification (assuming that has not already happened) or the terms of the settlement. We recommend that the title reflect existing practice by using the title "Preliminary Approval -- the Decision to Give Notice" or simply "Preliminary Approval." As an alternative, perhaps it could instead be labelled "Preliminary Review." If that were done, Rule 23(e)(2) could be renamed "Final Approval of the Proposal." We understand that the Committee is concerned about making it appear that the decision to give notice means that approval of the proposal is inevitable. But the explicit findings the amendment required before notice can be authorized may increase, rather than decrease, the risk of settled expectations that the court will approve the settlement. Requiring that the judge specifically *find* that (1) the court will "likely" approve the proposal, and (2) the court will "likely" certify the class for purposes of settlement may make approval seem even more likely than under the rule's current language. The proposed phrasing could deter objectors from objecting because they would assume under that standard that certification and settlement approval is a "done deal." Compare the experience we have had with litigating before a judge who has made findings about likelihood of success in regard to a preliminary injunction -- a very difficult task. Our proposed solution would be to make clear that the preliminary findings are of a "prima facie" nature, either by using that term or using words to the effect that the court has found preliminarily, based on the materials submitted, that the class may ultimately be certified for settlement purposes and that the

proposed settlement appears worthy of approval.

(2) Reference to attorney's fees arrangement as part of the preliminary approval decision. The draft says that the court should order notice unless the parties show that it will likely be able to "approve the proposal under Rule 23(e)(2)." That provision, in turn, includes (iii) -- "the terms of any proposed award of attorney's fees, including timing of payment." We understand that under existing law, and in common practice, the decision on attorney's fees is not made until final approval. The separation between the attorney's fees question and the approval of the settlement on the merits therefore should make it clear that the preliminary approval does not extend to the attorney's fees aspect. One solution would be to revise proposed 23(e)(1)(B)(i) as follows:

- (i) approve the proposal under Rule 23(e)(2) except (C)(iii); and

Relabelling this decision "preliminary approval" or "preliminary review" would assist in making this distinction.

Pennsylvania Bar Association (CV-2016-0004-0064): We support adoption of this provision. The information involved would be useful to avoid problems in the case later on.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(1) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases it may be appropriate to consider ~~will be important to relate~~ the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. However, the settlement's fairness may also be judged by the opportunity created for class members. ~~One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.~~ (p. 223)

New York City Bar (CV-2016-0005-070): The Committee Note suggests twice that the court review claims rates in assessing settlements. We agree that such review is generally appropriate, but believe the Note should be edited to make it clear that such review is not always appropriate. We agree that is generally a good idea to assess the likely claims rates in class settlements, and to treat that information as a data point in determining whether a settlement delivers meaningful relief. Tying "actual claims experience" to fees incentivizes the parties to implement automatic distribution of settlement proceeds where possible, to implement a robust notice program to reach class members, if automatic distribution is not possible, and to create a simple, easy-to-understand claim form. But in some cases the claims rate is difficult to determine in part because the number of class members -- the denominator -- is difficult to determine with precision. We recommend modifying the note on p. 223 as follows:

It may in some cases, it will be important for the court to consider to relate the amount of an award of attorney's fees in relation to the expected benefits to the class, and, when it is feasible and cost-effective to measure the claims rate, to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Similarly, we recommend the following changes to the Note on p. 227:

Provisions for reporting back to the court about actual claims experience, where it is feasible and cost-effective to, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Defense Research Institute (CV-2016-0004-072): There are a number of references in the Note to the claims rate. Although some courts do take that into account in determining an appropriate attorney's fee award, we do not think it is an appropriate consideration in evaluating the fairness of the settlement itself. The Note should be revised to make it clear that this factor does not bear on the fairness of the settlement. To be sure, a claims process should be based on the need for information from class members to process claims. It should never be used simply to diminish payouts. But when a court determines that such a process is justified under a given settlement and finds that the notice proposed is satisfactory, the actual response should not have any bearing on the fairness of the settlement. What matters is the relief offered, not how often it is claimed. Class members may decide not to make claims for a variety of reasons. The object of such settlements is not

to deter defendants from certain conduct; they have not admitted any wrongdoing. A settlement can be fair, reasonable, and adequate, and class members may nonetheless decide, for some reason, not to pursue relief. In addition, on p. 222 the Note says that the court cannot certify the class for purposes of settlement until the final hearing. That sweeping prohibition could inhibit the court from taking needed actions, such as enjoining litigation about the same claims by class members. It might also weaken efforts to regulate communications with the class if it meant that class counsel are not yet the lawyers for the class. DRI recommends softening that statement. On p. 223, the Note also refers to the ALI Principles of Aggregate Litigation. That reference introduces a substantive matter that offers a windfall to a nonlitigant in place of relief for a litigant.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073): The citation to the ALI Principles of Aggregate Litigation on p. 223 of the Note should be removed. Contrary to the implication of the draft Note, judicial citation to § 3.07 of that publication does not evidence a broad approval of cy pres provisions in class action settlement agreements. Instead, it urges a broadening or redefinition of the law, and does not presume merely to restate the law as it stood at the time of publication in 2010. The Note's reference to cy pres is also unnecessary and premature. Private agreements regarding the disbursement of unclaimed funds to non-litigants who have suffered no harm are not necessary for the approval of proposed settlement agreements.

Aaron D. Van Oort (CV-2016-0004-075): Using the standard "likely to be able to" approve the settlement and (where needed) class certification is a sound addition to the rule because it will help prevent one of the most harmful scenarios in class action practice -- rejection of settlement only after notice is sent and class members have submitted claims. Guarding against this risk is important, and the rule change is a good step in that direction. The factors identified in the proposed rule are sound, but I am concerned that the rule does not address the concept of proportionality -- the question of how much review is enough in a given case. The Note likewise does not address this concept. Many class action settlements involve low value claims or defendants in financial distress, or both. Courts should be given flexibility to adapt the burden of review to match the complexity and value of the case. I propose adding the following to the paragraph at pp. 223-24 of the Note:

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply

further information about the topics they do address, or to supply information on topics they do not address. In determining the amount and detail of information it requires the parties to submit at the notice stage under Rule 23(e)(1) and the approval stage under Rule 23(e)(2), the court should consider whether the burden of generating and submitting the information is proportional to the value of the claims, the amount of the settlement, and other factors informing the scope of review. The court ~~It~~ must not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Public Citizen Litigation Group (CV-2016-0004-081): We strongly support the approach of replacing the prevailing non-rule-based concept of "preliminary settlement approval" and "conditional certification" of settlement classes with a rule requiring that the court give early consideration to whether the parties have made a sufficient showing to justify giving notice. We are worried, however, about the use of the word "if" in the amendment to (e)(1) because that might imply that sometimes courts can approve settlements without giving notice. Although this misunderstanding may seem unlikely, we urge the Committee to make the rule clear to avoid any risk of misinterpretation. In addition, the "likely to be approved" standard seems likely to revive the disfavored "preliminary approval" idea sometimes in vogue. We favor the use instead of "reasonable likelihood" of approval. Accordingly, we would replace the proposed new language in (e)(1)(B) with the following:

The court shall direct such notice if it finds that consideration of the proposal is justified by the parties' showing that there is a reasonable likelihood that the court will be able to (i) certify the class for purpose of judgment on the proposal, if the class has not previously eeg certified; and (ii) approve the proposal under Rule 23(e)(2).

This proposal is similar to the one submitted by Prof. Alan Morrison, and we would also support the proposal he made in his Oct. 10, 2016, comments at pp. 6-7.

Diane Webb (Legal Aid at Work) (CV-2016-0004-086): We are program that was founded more than 100 years ago to provide legal aid to low-wage workers. We rely on charitable gifts, foundation grants, money from the California State Bar Legal Services Trust Fund, and cy pres distributions. These sources of funding have been drying up. The State Bar trust fund, for example, has had reduced funds for a long time due to low interest rates. Currently, we rely on cy pres funds to support our Workers'

Rights Clinic activities, including expanded services in rural areas of California. To save money, we rely on "virtual clinics" using video-call technology. In 2016, our Workers' Rights Clinic served more than 1200 clients. We wish to emphasize that cy pres funding is essential to our organization's mission and its continued sustainability. We believe that including a reference to the availability and appropriateness of cy pres in the Notes to the Rule 23 amendments will provide valuable guidance to litigants and the courts alike.

Washington Legal Foundation (CV-2016-0004-087): WLF believes that any proposed reference to cy pres awards should be eliminated. Cy pres is a highly controversial mechanism used to justify class actions even though the remotely situated class members cannot feasibly be identified or when identifying them would be more expensive than any potential recovery would warrant. With increasing frequency, cy pres has been utilized in federal class actions to award unclaimed funds to one or another charities supposedly relevant in some way to the issues presented in the case. Although the Committee prudently withdrew the idea of a rule provision addressing use of cy pres, the Note at pp. 222-23 still contains a reference to cy pres and also cites the ALI Aggregate Litigation Principles on this subject. WLF believes there is no basis to enshrine cy pres in the rules. More often than not, the primary function of cy pres is to ensure that a settlement fund is large enough to guarantee substantial attorney's fees or to make the bringing of the class action economically feasible. And cy pres distributions can contribute to a significant potential conflict of interest between class counsel and class members, because class counsel has no incentive to work hard to get the recoveries to class members as a way to justify reference to the overall class "recovery" as a basis for a large attorney's fee. There are serious Article III implications of unrestrained use of cy pres, and these "awards" are akin to punitive damages, which generally are permitted only where the courts have legislative authorization for them. Instead of citing cy pres approvingly, the rule amendments should clarify that Rule 23 provides no basis whatsoever for cy pres awards.

Rule 23(e)(2) -- standards for approval

Washington D.C. hearing

John Beisner (Skadden Arps): The Note fails to address what the court should do if it concludes that the proposed settlement should not be approved. This could apply either at the stage of deciding whether to give notice or at the final settlement-approval stage. It would be very helpful to have a discussion of what to do at that point. There could be some tension with the line of cases saying that the court may not rewrite the parties' agreement "for" them. So the Note should warn against being too specific about what changes would be likely to earn the court's approval. But at the moment this is a void in the Note. In addition, regarding the Note on p. 227, it is critical that the reference to the "relief actually delivered" specify that payment of a significant part or all of the attorney fee award ordinarily should await a report to the court about the results of the payout effort. If the lawyers are paid in full and it turns out that only 5% of the settlement funds have actually been claimed, it may be too late to do anything about it.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL is concerned that proposed 23(e)(2)(C)(ii) could be used to support something like an ascertainability obstacle to class certification. The use of the word "effectiveness" as a criterion there might prompt some courts to conclude that a class action is not proper unless a heightened ascertainability standard is met. Ascertainability has split the circuits, and should not be insinuated here. Instead, the rule should say that "best methods" for distribution are the court's focus at this point.

Phoenix hearing

Thomas Sobol: I represent plaintiffs in pharmaceutical pricing and other health cases. It is good that the amendment addresses the distribution of relief. Responsible class counsel make efforts to ensure that money actually gets to class members. Judges also take an active role in doing so. One example was a case in Boston where Judge William Young would not authorize payment of our counsel fees until we improved the effectiveness of our payout. The first effort drew only 10,000 claims, and we were able to develop a list of 250,000 class members and improve the claims rate. Nevertheless, Rule 23(e)(2)(C)(ii) is phrased in a way that creates ambiguity. One interpretation is that it sets an absolute standard of distribution effectiveness. There is a risk it would be interpreted to say that, for all cases, there is an absolute standard of distribution effectiveness, and that the court should reject the proposal if it does not satisfy that absolute standard. On the other hand, it might only call

for focusing on the comparative effectiveness of reasonably selected alternative methods of affording relief. The first interpretation would work mischief. That risk could be avoided by revising the factor:

- (ii) the effectiveness of the proposed method of distributing relief to the class as compared to other, reasonably available methods of distribution under the circumstances, including the method of processing class-member claims, if any.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): Factor (D) is very important; I am frequently asked whether different segments of the class can be treated differently. But it would be better to phrase (iv) in active voice -- "the proposal treats class members equitably relative to the value of their claims." Also, it might be good to add something like "relative to the value of their claims."

Paul Bland (Public Justice); I agree with Sobol that there is a risk the proposed rule language could be misinterpreted. But the solution probably is to make changes in the Note, not the rule, to clarify what is meant.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): There are a number of references in the Committee Note suggesting that the court should focus on the anticipated or actual claim rate as an appropriate measure of whether the settlement itself is reasonable. Claims rates will always be lower than 100%. And class members may have a variety of reasons for not making claims, including being philosophically opposed to class actions, not feeling that they have a claim against the defendant, or not thinking that the payoff is worth the effort. Although the court might properly take an interest in whether the claiming process was fair or, instead, too burdensome, that determination can be made well before the claims process is engaged. The approval of the settlement should not depend on how many class members choose to avail themselves of the benefits offered. Treating a low claims rate as a "red flag" of problems with the settlement is using 20/20 hindsight. The settlement should be judged in terms of its provisions, and that judgment is not dependent on the subsequent developments.

Prof. Judith Resnik (Yale Law School) (testimony & CV-2016-0004-092): The amendments make a desirable effort to improve the settlement process, but more needs to be done. The key improvement is more explicit recognition of the court's responsibility for assuring that relief is really delivered to class members. I believe these changes are consistent with the

proposals already made and could be added without the need for republication and a further public comment period. Already the Note to (e)(1) and (e)(2) addresses the importance of judicial scrutiny of the proposed means for giving notice and making claims. The preliminary draft also suggests that reporting back to the court on the actual claims experience is desirable, and that the amount or timing of attorney fee payments to class counsel depend in part on the success of the claims program in delivering relief to class members. At present, the lack of court involvement in the phase after the settlement has been approved has resulted in a paucity of information on the public record about the actual success of the class action in delivering relief to the class. The rules should recognize that courts have responsibilities as "fiduciaries" of the class to ensure that class members receive the intended relief. Courts have done that in the context of structural injunctions, but not other cases. Learning about the intended methods of inviting and processing class member claims (as the current draft suggests) is desirable, but it is not enough. The rule should create a presumption that the parties file a statement about actual claims experience. Presently the Note only says that it may be important to provide that the parties do that. Courts should be directed to require that settlement agreements provide for regular reporting back to the court about distribution decisions, and also that, if conflicts about distribution across sets of claimants emerge, there is a method to return to court. Periodic reports to the court should be required, with regard to both structural relief and dollars distributed. It would also be desirable to impose sliding-scale fee awards for class counsel keyed to the success of the settlement in delivering actual relief to class members. That would build in an incentive for class counsel to make distribution a priority.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These changes are not explicit enough to achieve the desired result of ensuring that attorney fee awards are proportional to the benefits actually delivered to class members. In the 2003 amendments, the Committee Note to Rule 23(h) clearly stated that the benefits to class members should be a major factor in determining the amount of the fee award. But the reality is that the courts have too often disregarded this idea. Even after the adoption of CAFA, with its focus on coupon settlements, counsel still manage to camouflage coupons behind some other title, such as "vouchers," and justify over-large attorney fee awards by invoking the alleged total value of the coupons available to class members. The courts of appeals have split on whether courts are required to pierce these showings and make certain that the attorney fee awards do not exceed the benefits actually delivered to the class. The Seventh Circuit has been a leader in insisting that district courts make certain of proportionality. But if this amendment is adopted,

that may not only fail to bring the other courts into line, but prompt the courts that heeded the Committee's advice in 2003 to back off their requirement of proportionality. Under these circumstances, the right course would be to revise the amendment and adopt the Seventh Circuit's view. To achieve this result, the Rule 23(e)(2)(C)(iii) proposal should be revised as follows:

- (iii) the terms of any proposed aware of attorney's fees, including timing of payments, and, if class members are being required to compromise their claims, the ratio of (a) attorney's fees to (b) the amount of relief actually delivered to class members; and

In addition, the settlement approval provisions should explicitly prohibit clear sailing and reversion provisions in class action settlements. Claims administrators can very accurately forecast the take-up rate, and defendants rest assured that they will not face large actual pay-outs. Indeed, they can even buy insurance against the risk of over-high pay-outs.

Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should abandon this provision because unifying the standards is unlikely to provide genuine uniformity and it may instead cause increased litigation. Because the amendment only allows courts to "consider" these criteria, it is not likely to produce genuine uniformity. One criterion that has been useful -- the number and strength of objections of class members -- is not on the Committee's list. Because there is no catch-all provision, it is possible that important factors will be overlooked. But any catch-all provision must be limited. The limit could be to make it clear that any additional factor must go to whether the settlement is "fair, reasonable, and adequate." The current reality is that courts need flexibility. "Although there is clearly variation among the circuits, there is no indication that differences in settlement approval criteria are responsible for the rejection of settlements that should have been approved or the approval of settlements that should have been rejected." Moreover, some criteria are not adequately explained. For example, the timing of the payment of attorney fee awards is mentioned but not explained. Counsel sometimes press for a "quick pay" provision to ward off objectors. Is that what is meant? Defendants are unlikely to consent to such a provision absent a guarantee of repayment in the event of appellate reversal. Similarly, the "method of processing class-member claims, if required" is vague and ambiguous. This is a new requirement. Does it mean that arrangements in which a third-party processes claims are inherently more fair? Also, the new header for Rule 23(e)(3) -- "identification of side agreements" -- is likely to raise questions due to the use of the word "side."

For example, if the parties agree to pursue settlement approval in a jurisdiction where the law is clear on how that is to be done, is that a "side" agreement subject to disclosure? The word "side" should be deleted.

Gregory Joseph (CV-2016-0004-0040): The phrase "proposed to be certified for purposes of settlement" raises a question -- proposed to be settled where? Currently, if the parties want to settle a case originally filed in federal court in a state court instead, they can dismiss the federal action because it is uncertified and refile in state court. Is this change intended to prevent that result? That seems unwarranted, and is not hinted at in the Committee Note. Does the amendment change that if the federal court decides for some reason not to approve the proposal for settlement? Again, it does not seem that the federal court has a reason to prevent the parties from seeking approval in another court.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our comments focus on three matters:

(1) The adequacy of relief to the class: We believe the first factor in the rule text should be moved up to (C), rather than included in subpart (i). Although the likelihood of success is mentioned in the Note, we believe it is often a dominant consideration, and one that should be balanced against the costs, risks and delay of further proceedings. If the plaintiffs' claims are strong, the court should expect that fact to be reflected in the relief to the class. But sometimes plaintiffs' claims are weak, or the defenses are strong also, and sometimes the law is uncertain. The point should be that the likelihood of success factor will support a settlement that otherwise might not be viewed as adequate, but is reasonable in light of the circumstances. Moreover, the costs of trial and appeal are not the only matters to be taken into account; the prospect of motions to dismiss or for summary judgment, and discovery costs, should be considered also. Thus, we would favor revising (C) and (i) as follows:

- (C) the relief provided to the class is adequate, taking into account the likelihood of success and the following:
 - (i) the costs, risks, and delay of further proceedings, including trial and appeal;

(2) Timing of notice under (e)(1): Under (e)(2), the court

may approve the proposal only "after a hearing." Some practitioners believe there is an ambiguity regarding whether notice must be given under (e)(1) before a hearing to approve the settlement under (e)(2) is scheduled. To clarify this matter, we propose that (e)(2) be revised, perhaps in one of the following ways:

Alternative 1

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after notice and a hearing . . .

Alternative 2

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after directing notice as provided in Rule 23(e)(1), a hearing . . .

(3) Reference in Note to extent of discovery as a factor bearing on approval of the proposal: More than once, the Note speaks of informing the court about the nature and amount of discovery in this and other cases, suggested that it is an important consideration in approval of the proposal. Although the extent of discovery could be relevant, we believe the Note should balance this discussion with language suggesting that early settlements before discovery has commenced should not be discouraged. The 2015 amendments emphasized the importance of proportionality in discovery, but some lawyers nevertheless take the position that they cannot approach settlement until a requisite amount of discovery is taken. Others will negotiate an early settlement but insist upon "confirmatory discovery" after the terms of settlement have been reached. As currently written, the Note might be seen to encourage wasteful discovery. Particularly in cases involving mergers and acquisitions, this would be an undesirable thing.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment, but think it is important to state that the factors are not exclusive. Some of the factors seem redundant. For example, adequacy of representation has already been addressed under Rule 23(a)(4). Although the amendment reflects an effort to clarify the factors already used by courts, by focusing on some and not mentioning others it may be interpreted to confine courts' discretion. To avoid that result, it would be desirable to say in the rule that the list is not exclusive.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(2) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. The number of claims submitted may not be a significant factor in cases where the award of attorney's fees is based on lodestar or is determined based on the full benefits made available by the settlement. Nevertheless, the relief actually delivered to the class ~~may~~ can be an important factor in determining the appropriate fee award. ~~In some cases, the Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known,~~ may bear on the fairness of the overall proposed settlement. (p. 227)

American Association for Justice (CV-2016-0004-0066): AAJ applauds and supports the effort to streamline the information courts consider when determining whether to approve a proposed class-action settlement. The addition of the word "only" regarding the existing criteria (fair, reasonable, and adequate) is more emphatic. The rewrite of the rule focuses the courts and litigants properly on the core concerns regarding settlement and move away from focusing on other lists of circuit-specific factors, which may be irrelevant to particular cases and may have remained unchanged in certain circuits for over 30 years. AAJ is concerned, however, about the two references to attorney's fees (on pp. 223 and 227) may complicate the review process and confuse courts and litigants with regard to settlement review. The suggestion that the reference to "claims rate" and the suggestion of deferring fee awards could be misconstrued by courts to have broad application. We offer the following views:

(1) Although the proposed attorney's fee award is a factor that bears on sending notice to the class, the reference to this factor on p. 223 seems unduly to stress this issue. Emphasizing this one factor, and not others, could be interpreted in limiting the courts' flexibility. Deferral of some or all attorney's fees seems to us out of place in regard to giving notice (the focus on p. 223). Even in regard to application of the 23(e)(2) approval factors, the emphasis seems unwarranted to us because it likely matters

in a minority of settlements. Focusing on claims rates may overlook important deterrence and other benefits provided by the settlement. AAJ thinks that the paragraph on p. 223 so that only the first sentence remains:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court.

Alternatively, if a reference to "claims rate" remains in the Note, we think that the Note on p. 223 should be rewritten as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties submission to the court. In a small number of some cases, it may will be appropriate important to evaluate the expected benefits to the class or to take into account the likely claims rate relate the amount of an award of attorney's fees when considering the settlement and the award of attorney's fees. In such cases, other consideration may predominant, such as the difficult of the work, the quality of the representation and the results obtained, deterrence of violations of the law, and appropriate use of unclaimed funds, such as cy pres awards. Further, it may be appropriate to allow for inclusion of fees for significant additional work class counsel performs after notice is disseminated. to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

(2) The topic of attorney's fees comes up again in the Note on p. 227. The first two sentences of the second full paragraph on that page are accurate. But AAJ is concerned about the further discussion of "the relief actually delivered to the class" and possible deferral of fees until the claim experience is reported. This seems to reinforce the minority of cases where the settlement is a "claims made" settlement as opposed to a common fund. By referring to this special consideration, without providing other equally important factors, the Note could be interpreted as making claims rate experience both a general and exclusive concern. But some cases have low claims rates are only one factor in assessing the overall value of the case. Even if there is a low claims rate, the case may have considerable deterrent value. Other factors come into play, including

whether the underlying statute has an attorney's fee provision that indicates that the legislature has determined that a fully compensatory fee should be paid somewhat without regard to compensation in the individual case. But AAJ recognizes also that listing all these factors might overburden the Note. If the Committee deems it necessary to retain reference to claims experience, it favors revising the paragraph on p. 227 as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, evaluation of the relief actually delivered to the class can be an important factor in determining the appropriate fee award. In these cases, Provisions for reporting back to the court about actual claims experience is not an exclusive factor and other relevant factors, including, but not limited to, deterrent effect, legislative intent, and alternative use of the unclaimed funds, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

(3) AAJ is also concerned about factor (D) regarding equitable treatment of class members relative to each other. If that provision remains, it is important that courts not interpret "equitable" to be the same as "equal." Careened law does not require that a class action settlement benefit all class members equally. For example, if there are statute of limitations problems that affect the claims of some class members but not others, that would justify different treatment. To avoid misunderstanding, AAJ strongly urges revision of the Note on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Equitable treatment does not mean that all class members benefit equally from the settlement, but rather that the settlement be objectively fair to all members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief.

Yvonne McKenzie (Pepper Hamilton) (CV-2016-0004-0069): We have two comments that focus on Rule 23(e)(2):

(1) We agree with the following statement in the Note on p. 226: "The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made" But we are concerned that the rule does not address a related concern that courts may not take adequate measures to define the class or otherwise to ensure that uninjured class members do not recover. This concern is particularly significant in the growing number of consumer class actions that are being brought based on technical violations of state and federal statutes with no concrete injury common to all class members. In *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), the Supreme Court has held that a bare procedural violation does not satisfy Article III. The rule should be clarified to state that the class representative must show that all class members have Article III standing. One way to do this would be to amend Rule 23(a)(3) to clarify that typicality means that all class members have an injury similar to the one alleged by the class representative. Chief Justice Roberts recognized the importance of this issue in his concurring opinion in *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1051 (2016): "I am not convinced that the District Court will be able to devise a means of distributing the award only to injured class members."

(2) The second comment is related to the first. Proposed Rule 23(e)(2)(C)(ii) addresses in part the concern with compensating uninjured parties by requiring the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." The Note adds that the "claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims." We believe that this concern is better addressed at the class-certification stage. To illustrate, consider the recent Ninth Circuit decision in *Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017), where the court affirmed class certification in a case involving an allegedly misleading label claim that cooking oil was "all natural," even though many class members would likely be unable to recall what brand of cooking oil they purchased, much less whether the label claimed to be all natural. But the Ninth Circuit decision simply kicked the issue whether these class members could satisfy Article III down the road, an impractical result that could be avoided by a rigorous analysis at the class-certification stage.

Since it is not resolved at the certification stage, things are kicked down the line until the settlement stage. But the proposed Note to (e)(1) and (e)(2) do little to address this problem. Instead, they only call for attention to the method of processing class member claims and concern about the "claims rate." This comes close to endorsing diversion of the defendant's money to uninjured cy pres recipients. That is a mistake. Cy pres simultaneously facilitates the flaws and in modern class actions and creates the illusion of class compensation.

New York City Bar (CV-2016-0005-070): We are generally in favor of this proposal and believe it is helpful to lay out a specific framework for evaluating whether to approve a class settlement. The articulation of these criteria should minimize distinctions among the circuits, which we support. We do propose some edits, however:

(1) On p. 224, the Note says that the purpose of the amendment is "not to displace any of [the circuits'] factors." We fear that this may cause confusion. Instead, we suggest that the Note read as follows:

The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal the case law developed by the circuits because that case law remains relevant to determining whether a settlement meets the criteria for approval detailed in Rule 23(e)(2) itself. Because those same central concerns are embodied in the factors listed in Rule 23(e)(2), the amendment directs the parties to principally address the fairness, reasonableness and adequacy of the settlement to the court in terms that encompass the shorter list of core concerns, when all of those factors are appropriate.

(2) We are concerned that the amendment may be taken to direct consideration of all the factors even in cases in which they are not apposite. We think that the rule language on p. 213 at line 47-48 should be revised as follows:

only after finding that it is fair, reasonable, and adequate after considering factors including, where appropriate, whether:

(3) We offer the following comments on two of the factors in 23(e)(2):

23(e)(2)(C)(ii) focuses on "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." This type of factor has not regularly been addressed by the courts of appeals, and we are concerned that the district courts could apply it inconsistently. The Note should say that this factor does not require a specific method or absolute standard for distribution. Moreover, with regard to non-monetary relief, we worry that this standard might restrict creativity in tailoring relief before the method has been used. At a minimum, the Note should indicate that this factor may be inapposite for non-monetary settlements.

23(e)(2)(D) calls for the court to focus on whether "class members are treated equitably relative to each other." The Note should make clear that "equitable" is not the same as "equal," and that subclassing may often lead to different relief for different subclasses.

(4) We believe that another factor should be added -- "the nature of the class members' and objectors' reaction." We think this factor is not included in the proposed list, and that it is important. We say the focus should be on "the nature" of the reaction because otherwise there may be a risk courts will simply engage in nose-counting. A qualitative analysis of the class members' reaction is more important than an quantitative one.

Aaron D. Van Oort (CV-2016-0004-075): The provision in Rule 23(e)(2)(D) regarding equitable treatment of class members vis-a-vis each other is an important instruction for courts and lawyers. My concern is that the Note does not explain this important concept, and recognize that settlements must smooth out differences between class members in order to achieve speed, simplicity, efficiency, and finality. In a way, this point focuses on the differences between common and individual questions, particularly pertinent in this day of increased use of Rule 23(c)(4). "Because of the limitations imposed by the Rules Enabling Act, nearly all litigation classes are issue classes under Rule 23(c)(4), whether they are designated such or not." This is not to open a debate on a topic the Committee has put aside, but designed to make the point that when they settle parties can compromise on some of those individual questions even though courts might be unable to resolve them via litigation. Courts should therefore recognize as common for purposes of settlement issues that -- if litigated fully -- would be individual. I would therefore add to the Note paragraph on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief. In applying Rule 23(c)(2)(D), courts may give due regard to the parties' ability to compromise and simplify the treatment of claims to achieve speed, simplicity, efficiency, and finality.

Public Citizen Litigation Group (CV-2016-0004-081): We generally support these changes. But we also support the suggestions of COSAL and Thomas Sobol that the criterion concerning the distribution of relief should be clarified. Rather than suggesting that all settlements must meet some absolute standard of efficacy of distribution of the settlement's benefits, the rule should recognize that the question is one of available alternatives. We suggest that proposed (e)(2)(C)(ii) be revised as follows:

- (ii) ~~the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required, is~~ reasonable in relation to other practicable methods of distribution under the circumstances;

Public Justice (CV-2016-0004-089): We have concerns about the focus of proposed Rule 23(e)(2)(C)(ii). In the first place, the rule seems to assume that class actions generally include claims systems. In our experience there are a great many class actions where every member of the class is sent a check, or receives a credit or otherwise automatically gets relief. That reality should not be overlooked. Second, particularly when the defendant has dragged out the case, the settling class representatives and class counsel may encounter great difficulty in locating many class members. When that happens, the right solution is a cy pres use of the remaining funds that addresses the grievance raised by the suit. We know that the Note to Rule 23(e)(1) makes a brief reference to this possibility at pp. 222-23. We urge the Committee to expand on this point. In cases we have handled involving illegal debt collection practices, residual funds were properly committed to support organizations that protect the rights of debtors in the same geographic area as the class members. The inclusion of that possibility is and should be a factor in support of approval of the settlement.

Rule 23(e)(5)(A) -- objector disclosure and specificity

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): District courts routinely allow discovery about prior objections by objectors before them. It would be desirable to include a requirement that all objectors disclose how many times in the past they have objected. This listing should include case name, the court in which the case was pending, the docket number of all other cases in which the objector has submitted objections.

Alan Morrison (George Washington Univ. Law School) (testimony & CV-2016-00004-0040): This provision is not objectionable. But it is worth noting that sometimes settlement proponents go too far in policing the objections process. For example, in the NFL concussion case the parties required that all objections be personally signed by all the objectors and not just their lawyers even though they had pending cases in the MDL proceeding. That violates 28 U.S.C. § 1654 and was burdensome to lawyers who had more than one or two clients. On occasion it resulted in lawyers being unable to file objections on behalf of all of their clients.

Phoenix hearing

Thomas Sobol: The amendment does not go far enough. Keep in mind what is required of the class representative and class counsel. The representative must demonstrate typicality and adequacy. Class counsel must satisfy Rule 23(g). These requirements are essential to ensure that the court does not improvidently authorize somebody inappropriate to take actions that impair the legal rights of others. Yet objectors can put at risk the rights of the other class members by simply objecting. If they are doing so only on their own behalf, that should be their right, but if they assert that their objections are submitted on behalf of others, or perhaps the entire class, the court should consider insisting that they satisfy the same requirements that the class representative and class counsel must satisfy. The court should not consider the objection until this scrutiny of the objector and objector counsel is completed. The court has inherent power to do this, but the power should be made explicit. The following could be added at the end of proposed (e)(5)(A):

If an objection applies to a specific subset of the class or to the entire class, the court may require the class member filing such an objection to make a factual showing sufficient to permit the court to find (i) that the class member is a member of the affected class or a subset of the class; (ii) that the class member will fairly and adequately

represent the interests of the class; and/or (iii) that the counsel for each class member is qualified to fairly and adequately represent the interests of the class. Absent such a finding, a court may overrule the objection without considering it further.

Annika Martin: The required disclosures for objectors are a good idea, but they should be augmented. In addition, objectors should be required to disclose whether they have previously objected to a proposed settlement and, if so, to provide specifics about when those prior objections were made and the outcome. This might facilitate additional discovery about the objector. This might also call for some information about objector counsel's prior objections.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): Proposed (e)(5)(A) says that the objector should specify whether the objection is offered only on behalf of the objector, on behalf of a specific subset of the class, or on behalf of the entire class. This provision invites class members to assert objections on behalf of other people. But those objectors have not been appointed to represent the class (as the class representative has been so appointed -- at least conditionally -- in connection with the proposed settlement). Moreover, this provision may create confusion about how much real opposition there is to the settlement. We have seen instances in which objectors have purported to "opt out" an entire state's population from a class action. But they have not been authorized to take any such action. There is no empirical need to have objectors instruct a district court how to interpret their various objections, and adding this invitation would only complicate an already-complicated settlement review process.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These standards for objector submissions are going to produce harmful results. The change to the rule is unnecessary because district courts already effectively manage such submissions. Adopting more formal requirements will only encourage arguments that objections should be rejected for failure to adhere to the favored form. Presently, the courts of appeals direct district judges to provide a reasoned response to all non-frivolous objections. But suggesting that some such objections can be rejected out of hand for being in the wrong form invites district courts not to address the merits of the objections. I agree with Mr. Isaacson that -- though there may be some unjustified objections -- there is no significant problem of frivolous, bad-faith objectors. There is a much more important problem of class counsel collaborating in faux settlements that benefit them but not the class, and allow the

defendant off cheaply. The goal of the amendment is to give class counsel a stick to use against the rare bad-faith objector, but what will happen is that the stick will be used against good-faith objectors. But if the Committee insists on proceeding with this rule change, it should ensure that class notice includes advising class members of these requirements. At the end of proposed (e)(5)(A) the following should be added:

The notice to the class must notify class members of the requirements contained in this paragraph. An objector's failure to satisfy technical standards is not a basis for dismissal of an objection. An objector does not waive an objection nor any rights to proceed on appeal for failure to meet the requirements of this paragraph.

Written comments

Alex Owens (CV-2016-0004-0036): The changes regarding serial objectors are wise. Professional objectors are the vast majority of class action objectors, and they tend to behave unethically. These attorneys generally have retainer agreements that limit the client to receiving no more than \$5,000. There should be guidance concerning the disclosure of such retainer agreements in that they effectively provide a contingency fee that often approaches 95%. There should be clearer standards not just regarding the details of the objection but also the manner in which the objector came to object and the bona fides of the objection. An additional subsection setting out a standard for when objectors or their counsel engage in sanctionable behavior would also help ensure that the objectors that object are not engaged in extortionate activity. Judges may often be unaware of this sort of activity.

Defense Research Institute (CV-2016-0004-072): The rule invites class members to object on behalf of others. That is not justified and should be changed. DRI agrees that the grounds of the objection should be stated with specificity, but sees no reason affirmatively to invite class members to raise objections "on behalf" of others. The court certainly can determine whether the objection has ramifications with regard to other class members without this invitation to class members to volunteer objections for others. This invitation could lead to side disputes and needless litigation.

Public Citizen Litigation Group (CV-2016-0004-081): We agree with the requirement that objections be stated specifically. In our experience, courts routinely disregard objections that are not stated specifically. But we think that the language should be modified to add the word "reasonable" between "with" and "specificity." This addition would provide support in the rule for the comment in the Note that pro se

objectors should not be held to "technical legal standards." In addition, we find the rule requirement that the objection specify whether it is on behalf only of the individual class member confusing. What does it mean for an objection to "apply to" all or part of the class is unclear. Because the court can only approve the settlement as presented to it, any valid objection in some sense "applies to" the entire class because it will, if accepted, be a ground to refusal approval of the settlement. We would therefore delete that language. This would result in (e)(5)(A) reading:

Any class member may object to the proposal if it requires approval under this subdivision (e). The objection must state its grounds with reasonable specificity.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We believe that Rule 23(e)(5)(A) regarding the objector's submission should be amplified with the following sentence:

Objector and Objector's counsel, if any, must list by case name, court, and docket number all other cases in which she or he filed an objection.

This information should be discoverable in any event, but getting to that point takes considerable motion practice. This addition would streamline that process.

Rule 23(e)(5)(B) and (C) -- court approval of payment to objectors or objector counsel

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): DRI completely agrees with the idea that bad faith objectors should be deterred. But it is not certain that this proposal will accomplish that objective. Courts seem presently to be able to tell the "good" from the "bad" objectors. But many objectors tend to blend some "good" and some "bad" features.

Mark Chalos (Tenn. Trial Lawyers Ass'n): The draft should be improved to cover a possible loophole. Sometimes these deals involve payment to a recipient other than the objector or objector counsel. For example, the payment may be to an organization with which the objector is associated. The rule should forbid any payment "directly or indirectly" to the objector. In addition, there is a risk of payments that escape the court-approval requirement. There should be a requirement that, whenever an objector withdraws and objection, the objector must file with the court a certification saying that there has been no payment made in connection with the withdrawal of the objection.

Alan Morrison (George Washington Univ. Law School) (testimony & CV-2016-00004-0040): He strongly supports adding the court-approval requirement. Indeed, he would apply the court-approval requirement of Rule 23(e) to all settlements in putative class actions whether or not the court has ruled on class certification, or whether the settlement purported to bind others in the class (as was the general rule before the 2003 amendments). Regarding the Note on p. 229 about the possibility class counsel will believe that paying off objectors to avoid delay is worth the price, it might be added that defendants may also succumb to this sort of pressure. In at least one case, he understands that a defendant paid off an objector after an appeal was filed. Defendants may, at least subconsciously, agree to a larger attorney fee for class counsel in anticipation that some of it will be used to pay off objectors.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): He strongly supports this effort to prevent bad faith objectors from profiting. But it is important also to ensure that if objectors are paid the payment should come either from the defendant or from class counsel. If the objection results in a substantial increase in the settlement amount, however, that increase should not become a bonus for class counsel, and it could produce funds that would cover the payment to the objector who produced the increase.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): I have represented objectors in about 30 national class-action settlements. I support this proposed rule. Indeed, in 1999, I proposed a very similar rule to this Committee. But the rule has a gap -- it says nothing about the standards for approving such a payment. I think that a court should approve a payment to an objector different from the payout via the settlement only in the rarest circumstances. In effect, proposed 23(e)(2)(D) -- regarding equitable treatment among class members -- essentially says that. The solution is an addition to proposed 23(e)(5)(B):

The court may not approve a payment or a transfer of other consideration to an objector or objector's counsel unless it finds that (1) the objector's circumstances relative to other class members clearly justify treatment different from the treatment accorded to other class members under the proposal; and (2) the objector lacked a realistic opportunity to prosecute a separate action.

In addition, the Committee Note at p. 229 says that class counsel may conclude that a payoff to an objector is justified in order to get relief to the class. That is true, but may be taken to be a justification a court could adopt to support approval of a payment to an objector. This should never be a justification for a payoff. I propose that the Note be augmented by adding: "That is not a proper reason for providing payment or other consideration to these objectors. Rule 23(e)(5)(B)(ii) seeks to eliminate any incentive for providing such payment or consideration in the first place."

Phoenix hearing

Jennie Lee Anderson: We applaud this proposal. The bad faith objector problem affects both sides of the "v." The right of class members to object is important and should be protected. But the activities of these people have no bearing on that. This amendment should improve the situation, although it may not, by itself, be a complete solution. It will be important to monitor what happens. There may later be a need to involve the appellate rules also.

Jocelyn Larkin (The Impact Fund): The draft might be improved by providing examples to illustrate the grounds for approving a payment to an objector.

Annika Martin: It is good to require court approval for payments to drop an objection, or desist from making one. But there is a risk that this proposal has a loophole. Counsel may simply create a nonprofit organization that can be the recipient of the payment, thereby sidestepping the rule as presently

written. Revising proposed (e)(5)(B) to add this possibility would be a good idea. Alternatively, it might be sufficient to achieve a similar result by removing words from the rule proposal:

Unless approved by the court after a hearing, no payment or other consideration may be provided ~~to an objector or objector's counsel~~ in connection with:

- (i) forgoing or withdrawing an objection or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal;

Dallas/Ft. Worth (telephonic) hearing

Eric Alan Isaacson (testimony and CV-2016-0004-0076): I have 26 years' experience with the plaintiff class action bar. I have never seen a payment offered to an objector for a groundless objection. To the contrary, when objectors are offered money that is a sign that their objections are justified. Class counsel use payoffs to avoid appellate review that would likely lead to reversal of the approval of the settlement. There simply is no groundless objector problem. But there is a problem with payoffs that curtail appellate review. Consider a school teacher who has at best a \$1,000 claim and objects to an inadequate settlement. Suppose she is offered \$25,000 to drop the objection or an appeal. It is very difficult for average people to turn down such a payment, particularly in a time when so many people have trouble making ends meet. The requirement of court approval is not a solution to this problem, particularly because the proposed amendment does not state a standard for whether to approve the payment. One judge might think that paying objectors for dropping frivolous objections is bad, while another might think it makes perfect sense as a way to expedite completion of the settlement claims process. A better idea would be to provide explicitly in the rule for paying objector counsel. As things now stand, what frequently happens is that objectors become the target of harassment from class counsel. Suddenly they are subpoenaed to provide testimony about their lives as part of an effort to discredit them. That will become a bigger problem due to the removal of the current requirement (added in 2003) for court approval of objections without payment to objectors.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): Proposed (B) and (C) should be deleted because they will only increase extortionate payments to bad-faith objectors. By requiring that payoffs be disclosed to the court and approved, it will encourage other entrepreneurial attorneys catch on. "Newcomers to the objector blackmail market will see that they too can file a boilerplate objection with

conclusory allegations and be paid to go away." Moreover, class counsel can use this process to protect their bad settlements from appellate review. What should be done is to build in the right incentives by stating explicitly in the rule that objectors can recover an attorney's fee award for providing a benefit to the class. (B) should be rewritten as follows:

The court may approve an objector's request for an award of reasonable attorney's fees and nontaxable costs after a hearing and on a finding that the objection realized a material benefit for the class. An objector may not receive payment or consideration in connection with ~~Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:~~

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

If the Committee proceeds with (B) and (C) as currently formulated, it should add an enforcement mechanism. The remedial concept of disgorgement should be invoked along the following lines in a new (D):

(D) Enforcement. Any party or class members may initiate an action to enforce paragraph (B) and (C) by filing a motion for disgorgement of any consideration received by an objector in connection with forgoing or dismissing an objection or appeal.

Written comments

Gregory Joseph (CV-2016-0004-0040): Is it possible that this court-approval requirement will merely make it more expensive to buy off the objector? In addition, it is not clear how the limitation on payment for "forgoing" an objection is to be enforced. How will the court become aware of this event that leaves no blemish in the court's docket?

Hassan Zavereei (CV-2016-0004-0048): I am concerned that this rule will not actually deter bad faith objectors, who are unethical and unlikely to abide by its provisions. Class counsel sometimes feel they must give in to objectors in order to get relief to the class. The court approval requirement would effectively remove the decision whether to do so from class counsel's toolbox, for they would be unwilling to subject themselves to the public embarrassment of being on the record as having paid a professional objector. I am also concerned that the narrowness of retained district-court jurisdiction after an

appeal has been docketed may mean that changes to the Appellate Rules are also needed. Requiring approval by the district court is contrary to traditional notions of appellate jurisdiction. To avoid these jurisdictional difficulties, a better approach would be to add something along the following lines to Rule 23(e):

Request for Finding that Objection Was Filed in Bad Faith.
At the request of any party to consider whether an objection has been filed in bad faith, the court may consider all surrounding facts and circumstances -- including whether the objector complied with Rule 23(e)(5)(A), whether the objector complied with all noticed requirements for the submission of an objection, whether grounds for the objection have legal support, conduct by the objector or objector's counsel in the instant case, and previous findings that the objector or objector's counsel has pursued an objection in bad faith -- and, if it deems it appropriate, make a finding that an objection was brought in bad faith.

Pennsylvania Bar Association (CV-2016-0004-0064): This amendment is a good start in addressing frivolous or meritless objections, which can impact the settlement of a class action. We recommend adoption.

New York City Bar (CV-2016-0005-070): We agree with the decision to require court approval before payment to objectors or objector counsel. But we do not believe that it should always require a hearing to obtain that approval. Accordingly, we think that the rule language at lines 90-94 on p. 216 should be revised as follows:

Unless approved by the court after a hearing or, if the Court deems it appropriate, based solely on written submission on notice to all interested parties, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

Public Citizen Litigation Group (CV-2016-0004-081): The proposed amendment requiring court approval is along the lines we proposed in 2015. We do think two modifications would improve it. First, we think that the words "to an objector or objector's counsel" should be removed from the rule to deal with the risk that some might direct payment to third parties affiliated with the objector or lawyer. Second, we are concerned about the absence of any standard for approving payments. Courts may conclude that paying off objectors is justified to finalize the settlement without regard to the validity of their objections. We think that the Note should make it clear that this sort of reason does not justify approval. We think that the standard should be whether the payment would be approved as fair and

reasonable from the standpoint of the class as a whole, which would incorporate the standard in (D) about treating class members equitably relative to each other. We propose that the following be added to (e)(5)(B):

The court may approve such payment or consideration only upon finding that it is fair and reasonable from the standpoint of the class as a whole, taking into considerations the factors set forth in Rule 23(e)(2).

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We urge that the proposed rule be revised to close a potential loophole for clever objectors and lawyers to set up entities to receive the payment. We suggest that the phrase "directly or indirectly" be added before "to an objector or objector's counsel." We know of objectors who have demanded that payments be made to a non-profit or "think tank" by which the objector is employed. We think also that a sentence should be added to the rule requiring that any objector who withdraws an objection or appeal without compensation file a notice with the court so stating. An explicit certification requirement would give the courts a method to enforce the rule.

Public Justice (CV-2016-0004-089): We endorse the proposal to require court approval for payment to an objector or objector counsel. We believe this provision will help deter so-called "professional objectors" from holding up an otherwise valid class action settlement.

Richard Kerger (CV-2016-0004-090) (letter initially sent to Chief Judge Guy Cole of the Sixth Circuit): I understand that a rule proposal has been made to deal with the problem of professional objectors, and write to report on an experience I have encountered in an MDL proceedings in which I was involved. After four and a half years of hard-fought litigation, both the direct purchaser and the indirect purchaser classes in these cases reached settlements. The indirect purchaser settlement, on which I was working, was attacked by several objectors including a particular pro se objector. For a year or more, this objector ignored directives from the district judge and also repeatedly accused the judge and the Sixth Circuit of conspiring with counsel to approve the settlement. The settlement was for more than \$151 million, but the objector asserted (without an iota of evidence) that it was fraudulent and done solely to line the pockets of lawyers. Even though the district judge eventually imposed an appeal bond requirement, this objector appealed without paying the bond. Eventually the appeal was dismissed. The objector's conduct delayed the settlement and caused the class to lose money because one of the defendants was not obligated to make its \$43.5 million deposit into escrow until all appeals had been resolved and the settlement upheld. Finally,

the district judge imposed a financial sanction on the objector. We tried to take his deposition, but he objected to the timing and then failed to appear. At this point, the district judge found him in contempt and had him arrested in Michigan at a motel and transported to the courthouse in Ohio by two marshalls. This man has been found to be a professional and serial objector and a vexatious litigator. In the past, he has received at least \$67,000 in payments for his objections. "The concern is that the history of this case is an advertisement for him as to why class counsel should cave in to professional objectors and pay them the relatively nominal amount they want to just 'go away'." Besides the current amendment proposal, other ideas occur to me: (1) insist that there be some proportionality between the amount of the class members' claim and the overall settlement; (2) amending Rule 23 to shorten the time by which a notice of appeal from denial of an objection must be filed; (3) making appellate review of objections discretionary, as is true under Rule 23(f) for class-certification orders; and (4) some sort of deterrent to prevent frivolous objections and appeals. "No objector with a minuscule claims, such as what [this objector] has in this case or others in which he has filed objections, should be allowed to go undeterred to prevent hard-fought class action settlements to proceed to finality. Without some degree of risk imposed on serial objectors, they will continue to obstruct the judicial process and our orderly system will remain broken."

Rule 23(f) -- forbidding appeal from notice of settlement
proposal

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal makes sense. Indeed, it seems implicit, but it makes sense to make it explicit.

Written comments

Frederick Longer (CV-2016-0004-0038): This change is very welcome. Rule 23(f) appeals can be very disruptive, but appeals from the sending of notice exacerbate this potential disruption. That notice occurs when the court and the parties clearly contemplate further proceedings that may significantly affect what the appellate court may see if the proposal is approved. Codifying the result reached by the Third Circuit in the NFL case relieves other litigants and judges of the need to worry about this point.

Rule 23(f) -- additional time for appeal in government cases

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal does not go far enough. The class certification decision is, by far, the most important in the case. There should be an appeal as of right. Although 23(f) was a good idea, the reality has been that the rate of taking appeals has fallen. Most circuits seem to think that appeals should be allowed only when there is an open legal question to be answered. The rule should take the view of the ALI Aggregate Litigation project, and ensure appellate review of right in all cases.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission): We have no problem with extending the time for seeking review in cases in which the United States is a party. But we think it should be recognized that the 14-day time limit in the current rule is too short for many others. There is often no way to know when a class certification decision will be rendered. It happens on occasion that counsel simply cannot free up the time to focus on that issue when the court's decision is made. What if counsel is in trial, for example? Certainly counsel should put the matter on the front burner, but there are limits to being able to do that. We are not advocating an extension to 45 days for all cases, but extending to 21 or 28 days would relieve a serious pressure point without creating significant risks of delay. It could also provide courts of appeal with better fashioned presentations; as things now stand, the submissions they receive are of necessity often the product of rushed work.

Written comments

Benjamin Mizer (U.S. Dep't of Justice) (CV-2016-0004-0037 and 0041): The Department strongly supports the amendment to Rule 23(f), which it initially proposed, to extend the time for seeking appellate review of a class-certification decision in cases in which the U.S. is a party. Any appeal by the U.S. government must be authorized by the Solicitor General, which depends on a deliberative process that typically requires substantial time. Multiple agencies and offices within the government might have different interests implicated in a specific case. Those interests are sometimes in tension, particularly in cases involving class actions. The current 14-day period for seeking review is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether a district court might have the authority to extend the deadline. And unlike a notice of appeal, a petition under Rule 23(f) is not a mere

placeholder. Instead, it is a substantive filing that must set forth arguments for reversing the class certification decision. Like the decision to seek review, the petition must be drafted by DOJ attorneys and authorized by the Solicitor General. Allowing additional time for the government is consistent with various provisions of the Appellate Rules. For example, Appellate Rule 4(a)(1)(B) provides 60 days (rather than the usual 30) for filing a notice of appeal in a case in which the government is a party. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing *en banc* in a civil case may be filed within 45 days (instead of 14 days) when the government is a party. The extension to 45 days in Rule 23(f) is a reasonable resolution of the timing problem for the government. Though it extends the current 14-day period, it is short of the full 60 days permitted to file a notice of appeal.

Lawyers for Civil Justice (CV-2016-0004-0039): There should be a right to interlocutory review of every certification decision. Rule 23(f) has not achieved its goal of increased uniformity of district court practice regarding class certification. Actually, the number of grants of petitions for review is modest -- about 5.2 grants per Circuit per year. And even where there is a grant, there is an opinion in only a fraction of the cases, a total of 47 opinions during a seven-year period studied in a 2008 report. On average, that works out to less than one opinion per Circuit per year. The problem is that the rule now says that the decision whether to allow an appeal is in the "sole discretion of the court of appeals." And the courts of appeals have developed criteria that are so flexible that they provide little guidance beyond "unfettered" decision-making. There is a simple remedy -- providing appeal as of right from decisions whether to certify a class.

Cheryl Siler (Aderant CompuLaw Court Rules Department) (CV-2016-0004-0058): The extension of the period for filing a petition for review in cases in which the United States or its officer is a party is sensible. this amendment would bring Rule 23 in line with other rules setting deadlines for appeal.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment. It affords all parties the extended period to seek review in cases in which the U.S. government is a party.

Defense Research Institute (CV-2016-0004-072): DRI has no problem with the extension of time for cases in which the government is a party. But in other cases as well, 14 days is really not enough time. That deadline is so short that it hinders the best advocacy and thus impairs the presentation to the court of appeals. Both sides of the "v" would appreciate have a bit more time. Without that needed time, the lawyers best

situated to work on the petition may be unavailable due to other professional commitments (in trial, for example) when the ruling on class certification is made. A 28 day period would be much fairer, and more in keeping with what lawyers are accustomed to have for such complicated matters.

Ascertainability

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This should be addressed in the rule. There is an open circuit split. DRI proposes that Rule 23(a)(1) be amended as follows:

(1) the class is so numerous that joinder of all members is impossible the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficiently numerous that joinder of all class members is impracticable;

This is an issue of fundamental fairness. The proposal may be a bit beyond what any court has required so far, but perhaps that's because it's more succinct. But doing this would require a separate amendment package or republication because it is not included in the current package.

Dallas/Ft. Worth (telephonic) hearing

Peter Martin (State Farm Mutual Ins.): The Committee should amend the rule to ensure that class definitions provide an administratively feasible way to identify every class member. The Third Circuit has been in front of this issue, and its lead should be followed. This is a matter of fundamental fairness; the defendant is entitled to know who is on the other side.

Written comments

Frederick Longer (CV-2016-0004-0038): As a lawyer who has directly confronted the Third Circuit's evolving doctrine of ascertainability, I believe that the restraint demonstrated by the Committee in refraining from putting out a proposed rule provision is wise. "I commend the Committee's decision to await further developments in the lower courts, rather than attempt to draft a cure that may create more problems than it solves."

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should add an explicit ascertainability requirement to the rule. Courts will almost certainly continue to find an implicit requirement, but it makes sense to add it explicitly to the rule. The way to do that is to add a Rule 23(a)(5) as follows:

(5) the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial

administrative burden.

Alternatively, Rule 23(b)(3) could be amended as follows:

(3) the court finds that questions of law or fact common to class members, including but not limited to the type and scope of injury, predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on ascertainability was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): In the wake of the Supreme Court's denial of certiorari in cases addressing ascertainability, it is disappointing that the Committee has declined to propose draft language to provide guidance on these issues. A distinct split now exists among the circuits. The First, Second, Third, Fourth, and Eleventh Circuits require courts to consider whether there is an administratively feasible way to distribute relief. But the Sixth, Seventh, and Eighth use a less rigorous standard. The unsettled state of the law leads to inconsistent results.

Defense Research Institute (CV-2016-0004-072): DRI urges the Committee to move forward on ascertainability. Recent decisions in the Sixth, Seventh, and Ninth Circuits have created a clear need for addressing this issue by rejecting the view of the Second, Third, Fourth, and Eleventh Circuits. It may be that the Supreme Court will one day resolve the dispute in terms of the present rule. DRI believes that the Committee should pretermitt the need for such a ruling by adopting a express and robust ascertainability. The need for such guidance in the rule is clear. Class actions that bog down in efforts to determine class membership are as inefficient as those that bog down in making individual determinations of liability. The Sixth and Seventh Circuits' views really result from the absence of language in the rule itself. One way would be to adopt the method DRI proposed to the Committee in September, 2015, by amending Rule 23(a)(1) as follows:

~~the class is so numerous that joinder of all members is impracticable~~ the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficient numerous that joinder of all class members is

impractical;

Among many benefits of this approach, it would indirectly reduce the need to resort to cy pres remedies.

Washington Legal Foundation (CV-2016-0004-087): Nothing in the rule now explicitly requires that class members be ascertainable. Such a requirement would not only protect defendants by ensuring that all people who will be bound by the judgment are clearly identifiable, but it would also safeguard the rights of absent class members to receive fair notice. WLF believes that an unascertainable class is no class at all. Adding the requirement to the rule would bring it into conformity with the widespread practice of many federal courts. Forcing defendants to guess how many people will claim, for example, to have purchased a product, cannot comport with due process or the purpose of Rule 23. Class certification surely cannot require a defendant to forfeit its right to litigate substantive defenses to the claims. As the ALI Aggregate Litigation project recognized, there is no point in aggregate litigation if the same issues will have to be revisited in other proceedings. See ALI § 2.02 comment (e).

Pick off

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): He is not aware of pick-off problems arising since the Supreme Court's Campbell-Ewald decision.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony, supplemented by CV-2016-0004-079): There have been a number of cases since the Supreme Court's Campbell-Ewald decision, but no major problems. The courts are handling this just fine by themselves. Even before the Supreme Court's decision, the courts were handling the matter without difficulty.

Written Comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on pick off was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Supreme Court's decision in Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663 (2016), left open the possibility that a defendant could moot a class action by consenting to the entry of judgment against it and depositing money in escrow with the court. This open question has generated confusion with the lower courts. Although the Ninth Circuit rejected a tender of payment in Chen v. Allstate, 819 F.3d 1136, 1145 (9th Cir. 2016), district courts have demonstrated a greater degree of uncertainty. This uncertainty poses a real risk of a continued split among the lower courts and, consequently, forum shopping. Should a consensus not emerge, the Committee should consider amending the rule.

Other issues raised

Washington D.C. hearing

John Parker Sweeney (DRI): He would focus his comments on no injury classes. The Supreme Court's decision in Spokeo confirmed the basic Article III principle that one must suffer a concrete harm to file a suit. But American businesses face class actions on behalf of large numbers of people who have not suffered any injury. Nonetheless, the lawyers who file these cases seek to recover the statutory minimum for every member of the class, leading to such enormous exposure that businesses have no choice but to settle. In effect, this results in punishing companies for technical violations that really did no harm to anyone. Prof. Joanna Shepard of Vanderbilt recently did a study showing that during the period 2005 through 2015 there were some 454 "no injury" class actions resulting in total settlement payments of \$4 billion. The sensible solution would be a rule requiring that classes be defined in a way that limits the class in (b)(3) cases to those who have suffered an actual injury. Surveys show that Americans broadly regard that sort of requirement as appropriate in class actions. But this idea is not in the current amendment package, and the current package should not be held up to add this idea.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Another problem that has arisen in cases involving consumer issues is that on occasion courts will entertain defense motions to strike class action allegations based only on the complaint. It would be desirable for the rule to say somewhere that certification decisions should not be based solely on the complaint. But that issue is not one that should hold up this amendment package. The Supreme Court has made it clear that these decisions should not be based only on the pleadings. Sufficient time for needed discovery must be allowed. That is also consistent with the 2003 amendments to Rule 23(c), removing that prior provision that the decision be made "as soon as practicable after commencement of an action." In addition, his groups agree that citation in the Note to ALI § 3.07 is a good and productive way of dealing with the contentious cy pres issue.

Mary Massaron (President of Lawyers for Civil Justice): The reference to § 3.07 of the ALI Principles of Aggregate Litigation should be removed. LCJ has sought an outright ban in the rule on use of cy pres. But this citation to the ALI section essentially puts the rule's imprimatur on the practice. This is a substantive change that raises Rules Enabling Act issues. Courts do cite the ALI treatment, so there is no need to do so here in the Note. In addition, LCJ favors revising Rule 23(a)(3) so that typicality requires the court to focus on the "type and

scope" of injury sustained by class members and ensure that all within the class have the same type and scope of alleged injury as the named plaintiff. More generally, cy pres should be banned; although a residue after distribution to the class might justify a second distribution, if the class members who make claims have been fully compensated making other uses of the money is essentially punitive and beyond the authority of the procedure rules.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The reference in the Note to the ALI treatment of cy pres is not an endorsement and should be retained.

Phoenix hearing

Thomas Sobol: Some who have made proposals for amendment to Rule 23 are seeking to curtail the legitimate authority of federal judges. Rule 23 is a tool for increasing that power in appropriate cases. Attacks on that power should be rejected unless supported by a clear and convincing showing of need for change.

Michael Nelson (testimony & CV-2016-9994-077): The time has come to recognize that Rule 23(f) is not working. Some circuits almost never allow interlocutory review of district court orders granting class certification. Something stronger than the unbridled discretion built into the current rule should be adopted. For example, courts may insist that the petition show that failure to review at this point will be the "death knell" of the case. How does one do that for a defendant? Yet interlocutory review is very valuable. What would we do, for example, without the Third Circuit decision in Hydrogen Peroxide? So the rule should be revised to say that the court of appeals "should," or perhaps "must" grant the request for review. True, there are not any statistics about cases in which review was denied, and the court later reversed certification after entry of final judgment. But that's because there is always a settlement. If the verb is not as strong as "must," however, it is not certain what standard should be employed to guide the courts in making this decision.

Scott Smith: There should be an absolute right to appeal under Rule 23(f). Indeed, this should be classified as a final judgment, although there should not be a requirement to appeal immediately if the defendant does not want to do so. In addition, Rule 23 should be amended to solve the problem created by Shady Grove, and provide that a federal court may not certify a class if the state law on which the claims are based forbids class treatment of such claims. This is the point made by Justice Ginsburg in Shady Grove (in dissent). A number of states

have statutes like the New York statute involved in that case and the deserve respect.

Dallas/Ft. Worth (telephonic) hearing

Timothy Pratt (Boston Scientific): There should be an automatic right to appeal. Certification is a pivotal decision in a case. From the defendant's perspective, it "turns a snowstorm into an avalanche." Delaying review of that decision until final judgment on the merits builds in more delay than allowing immediate review at that point. It also provides plaintiffs with a powerful settlement weapon. And this could be added to the rule without the need for republication because it has been brought up throughout the process. Many speakers have endorsed this addition to the rule in public fora. There would be no need to re-publish.

Gerald Maatman (Seyfarth Shaw): The Committee Note to the 2003 amendments to Rule 23(c)(1)(A) recognized that a trial plan is a valuable item to consider in making a class certification decision. Experience since then has made this proposition indisputable because it sheds light on whether the case is manageable for purposes of class-wide adjudication. A simple change to Rule 23 requiring the presentation of a viable trial plan in connection with any motion for class certification would therefore be very beneficial. This is the approach adopted by the California Supreme Court in *Duran v. U.S. Bank Nat. Ass'n*, 59 Cal. 4th 1, 27 (2014), which dealt with statistical proof. This requirement should be applied to all class actions, not only those dealing with statistical proof. Deferring serious consideration of these issues until the eve of trial can produce a considerable waste of resources. In light of the central importance of certification decisions, Rule 23(f) should be amended to guarantee appellate review of all decisions certifying classes. In addition, Rule 23 should be amended to address the proper application of proportionality to pre-certification discovery. It is true that the certification decision looms as the most important one in many cases (for which reason I favor amending Rule 23(f) to enable an immediate appeal of class-certification orders), but that does not necessarily mean that expansive discovery is per se proportional. Finally, it would be desirable for a rule amendment to address the standards for certification for purposes of settlement. The Rule 23 Subcommittee initially considered that possibility, but did not proceed with a proposed amendment. Manageability should not matter to settlement certification, even in a case involving the laws of multiple states, and the rule should say so.

Prof. Judith Resnik (Yale Law School) (testimony and CV-2016-0004-092): Amending Rule 23(f) to guarantee immediate appellate review of all class-certification orders would not be

desirable. There are a lot of routes to appeal in addition to 23(f), such as mandamus. Opening more routes leads to delay for plaintiffs and burden for the courts.

Peter Martin (State Farm Mut. Ins. Co.): I favor amending Rule 23(f) to guarantee an immediate appeal. The rule has not fulfilled its promise. The rate of grants of review has fallen. In 2007, it was around 40%, but now it is about 20%. As the Fifth Circuit pointed out in *Castano*, class certification tends to draw claims to the action. Consistency in class-certification rulings is a paramount concern, and making appellate review available as a matter of course is a way to assure consistency. In addition, the Committee should amend the rule to eliminate the possibility of a no injury class action. That violates Article III. In addition, the rule should be amended to make it clear that certification under Rule 23(c)(4) is allowed only when common issues predominate in the case as a whole. That is the position that the Fifth Circuit took in *Castano*, but since then other courts have moved away from that.

Patrick Paul (Snell & Wilmer): Rule 23(f) should be amended to guarantee a right to appellate review of any order granting or denying class certification. If the class is certified, the settlement pressure becomes extreme. If certification is denied, similar pressures apply to the plaintiff, who almost certainly cannot support litigation on the merits in an individual action.

Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): LCJ favors rule changes to deal with the problem of no injury class actions. Prof. Shepherd's study of such cases shows that some \$4 billion was paid to settle such cases during the period 2005-15, but that only about 9% of this huge amount went to class members. An average of 37.9% went to class counsel. A simple solution would be amend Rule 23(a)(3) as follows:

(3) the claims or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class . . .

The Committee should also remove the reference to § 3.07 of the ALI Aggregate Litigation Project from the Committee Note. This is an implicit endorsement of cy pres, which the Committee has chosen not to add to the rule. If the Committee is going to do anything about cy pres, it should be to clarify that Rule 23 provides no basis for such arrangements.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the

Committee's decision to defer any action on cy pres was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Committee should monitor the issue of the no-injury class action. Many hoped that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), would clarify the issues, but the decision did not do so. Should the current confusion about what is a "concrete and particularized" injury continue or deepen, the Committee should consider an amendment to address the question. A bright-line rule is necessary to guide lower courts, particularly as data breach litigation has grown in importance. Those data breach cases tend to be filed so shortly after notice of a data breach that there will rarely be sufficient time for consumers to suffer actual harm. Allowing data breach plaintiffs to claim "concrete and particularized" damages before any real harm has occurred is inconsistent with much long-standing precedent, but the *Spokeo* decision provides little guidance for how to handle these cases.

Defense Research Institute (CV-2016-0004-072): Rule 23(f) should provide an automatic right to review of all class-certification decisions at the request of any party. The conundrum facing plaintiffs and defendants due to the absence of appeal of right was recognized by the Note to the 23(f) amendment that is now in force. The actual operation of the current rule shows that it is not up to the task. The circuits are uneven in their exercise of their discretion in deciding when to entertain appeals. In recent years, fewer than 25% of the petitions for review have been granted. Rule 23 should also prohibit class certification in federal court for claims that are based on statutes that expressly prohibit class treatment. The Supreme Court's *Shady Grove* decision created a paradoxical, unintended, and unjustifiable policy result. The problem results from the Court's reading of the rule as mandating class certification when ever the rule's provisions are satisfied, and without regard to the limitations of underlying law. A good solution would be to reword Rule 23 so that it clearly vests discretion in the district court to grant or deny certification. DRI recommends, however, that the following new Rule 23(a)(5) be added:

- (5) the action is not brought under a state statute that (i) confers a substantive right; and (ii) prohibits class action treatment or classwide recoveries.

DRI also urges the Committee to address "no injury" classes. Today plaintiffs who admit they have suffered no harm regularly sue businesses, and act on behalf of large classes made up of similarly uninjured people. DRI recommends that Rule 23(b)(3) be amended to solve this problem:

- (3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member's injury, as well as the amount of monetary relief due each class members, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member's claims were adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings of predominance and superiority include:

The Supreme Court's Spokeo decision has not reduced the need for this amendment.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073):
We support amending Rule 23(f) to provide appellate review as of right. The certification decision is the tipping point in litigation. Given its centrality, immediate review should be available. Instead, the current rule has permitted divergent approaches across circuits on when or whether to allow review.

Washington Legal Foundation (CV-2016-0004-087): Rule 23 should be amended to prevent plaintiffs who are denied class certification from an end run around Rule 23(f) by dismissing the individual plaintiff's suit and appealing from that dismissal. The Supreme Court has granted certiorari on that issue in *Microsoft v. Baker*, but if it does not resolve the issue this inequitable possibility should be foreclosed by rule amendment.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
March 1, 2017

On March 1, 2017, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Lauren Gailey (Rules Law Clerk).

The purpose of the call was to review ideas emerging from the public comment period about modifying the preliminary draft published in August, 2016. Before the call, Prof. Marcus circulated a marked up version of the preliminary draft, including draft changes to parts of the rule and Note, and footnotes explaining some draft changes and raising issues about other things that might be changed. There were 33 footnotes in this document.

Based on a review of the redraft, Judge Dow circulated an email in advance of the call identifying a number of footnotes that seemed to present "consent" issues that could be adopted without the need for discussion by the Subcommittee. In addition, he identified six topical areas for discussion and a number of "miscellaneous" footnotes that seemed to warrant discussion but not to fit within the six topical categories.

At the beginning of the call, the question was posed whether any on the call wanted to discuss the "consent" items. There was no interest in discussing any of those, so they would be considered consented to.

Discussion then turned to Judge Dow's six categories:

(1) Notice methods

The proposed amendment do Rule 23(c)(2)(B) regarding individual notice in Rule 23(b)(3) class actions had received considerable attention during the public comment period. Concerns were expressed that it might be taken to authorize online methods of notice that would not really be effective. Others said that the amendment was not necessary because courts have already begun using methods of notice other than first class mail. But strong support for amending the rule had also been expressed, on the ground that it is necessary to recognize that methods of communication are changing and that it is important for the rule to take note of that major development.

The first proposed change was to the rule amendment itself - adding a phrase to the new sentence at the end of the rule provision:

The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

This addition was initially suggested by Judge Jesse Fuhrman (S.D.N.Y.) a new member of the Standing Committee who attended the hearing in Phoenix on the amendment package. Several others who commented supported this change, and supported the idea of "mixed notice" or using multiple methods. Using some electronic methods, for example, could be augmented by also using other electronic means.

The consensus was to add the above words to the rule-amendment proposal, and discussion shifted to modifications to the Note that addresses this rule change. One change is to soften the draft Note language saying that forms other than first class mail are "more reliable" ways of giving notice. Instead, the Note can say:

But technological change since 1974 has introduced ~~meant~~ ~~that~~ other forms of communication that may sometimes provide a ~~be more~~ reliable additional or alternative method for giving notice and important to many. Although it may often be that first class mail is the preferred primary method of giving notice, ~~c~~ourts and counsel have begun to employ new technology to make notice more effective, ~~and sometimes less costly.~~

This change was approved, except that the published phrase "and sometimes less costly" seemed unnecessary and might best be removed due to sensitivity about excessive concern with the cost of notice undermining its effectiveness. (That phrase is therefore overstricken in the quotation above.)

Attention shifted to the reference in the redraft of the Note to the "likely reading ability of the class" and "arcane" legal terminology. It was noted that Rule 23(c)(2)(B) already directs that notice "clearly and concisely state in plain, easily understood language" a variety of things listed in the rule. We are only clarifying the methods of giving notice that satisfies that rule provision. Restoring that language to the version of the rule included in the package may be helpful. It would also be useful to include in the Note a reminder of what the rule has said since 2003, adding attention to the likely capacities of the class in understanding and using the form of notice recommended to the court. This clarifications may improve practice. Prof. Marcus is to try to revise the Note language on this point.

Attention shifted to draft language concerning the need to attend more closely to the array of choices presented in the current environment than in the past, when first class mail was probably conceived as the default method. The draft language was:

This amendment recognizes that courts may need to attend more closely than in the past to the method or methods of giving notice; simply assuming that the "traditional" methods are best may disregard contemporary communication realities.

It was objected that this seemed to criticize courts for what they had done in the past, which should not be the goal. Indeed, as recognized elsewhere in the Note, the courts had already begun to use alternative means of notice without a change to the rule. The focus, instead, should be on the lawyers, and their obligation to advise the court about what is most effective for this class in today's media world. Perhaps a reference to the Comment on Rule 1.1 of the ABA Ethics Code regarding competence including familiarity with technological change would be in order. Again, Prof. Marcus is to try to devise superior substitute language, and perhaps to relocate some of the added language.

A caution was raised: This is a very long Note. We are mainly talking about adding more to it. We should be cautious about doing that unless really needed. A reaction was that, though it is generally worthwhile to say relevant things in the Note it is also important to be aware of how long the Note can get. Although there is a question about whether most lawyers attend to what's in the Note, it can be a "treasure trove."

There was some discussion of ways in which a longer Note may be helpful to the profession. There is also the temptation to say things in the Note about subjects related to the rule change but not precisely about it. For example, the content of the notice to the class is not really the focus of the rule change we have been discussing, which is the method of giving notice, but it is fairly closely related to that subject, and may actually be pertinent to the form of notice. So saying something about it can be useful.

In this instance, the goal is to link the method to the message. One need not go as far as Marshall McLuhan ("The medium is the message.") to say that there is a link between the medium and the message.

(2) Rule 23(e)(1) concerns

The second set of issues focused on comments submitted by the ABA about the way in which the decision to send notice to the class is handled. The ABA submission urged that the term "preliminary approval" should not be disapproved because it has been in use for a long time and is widely recognized. Others, however, urged that the standard for sending notice should be softened because it would result in a de facto signal of approval even though the term "preliminary approval" was not used.

The discussion focused on the terminology used in the beginning of the Note regarding the decision to send notice. As published, the Note said that the decision to send notice "is sometimes inaccurately called 'preliminary approval.'" Is it really necessary to say this is inaccurate? One view was that this seems needlessly tendentious. Another view was that it would be useful to foster what should be a learning process for the bar about what this decision is. Another idea was to cite the ALI Aggregate Litigation principles on this subject; they oppose use of the term "preliminary approval."

The consensus was that Professor Marcus should try to reword that portion of the Note to avoid calling the current practice "inaccurate" but also convey the idea that the decision is a tentative one, and does not signify that approval is a done deal.

Discussion shifted to what has been called the Prandini issue -- the idea that the negotiation of the substance of the proposed settlement and the negotiation of the attorney fees should be done separately. The ABA submission urged that proposed 23(e)(1)(B)(i) be amended to exclude attention at the 23(e)(1) stage to Rule 23(e)(2)(C)(iii) (the terms of any attorney fee award), in recognition of this practice.

The reaction to this idea was that the court should focus on attorney fees at the time it is deciding whether it is likely to approve the overall deal and that notice is therefore warranted. Whether or not that topic is the subject of combined or separate negotiation, it is an important part of the overall package that will be sent to the class if notice goes out. Objectors often focus on attorney's fees, so the court should too. Indeed, Rule 23(h) directs that the class receive notice of the attorney fee application, so that would ordinarily be included with the other notices required by Rules 23(c)(2) and (e)(1). The consensus was not to exclude that from (e)(1).

(3) Citing ALI § 3.07

Several comments raised questions about the sentence in the Note citing § 3.07 of the ALI Aggregate Litigation Principles. One possibility would be to cite cases that rely on that section rather than the section itself, but citing cases is generally not desirable in a Note because they may be superseded by other cases.

The question, then, was whether citing § 3.07 really added much. Courts seem to have found that section on their own; indeed, §3.07 may be the section of the Principles that is most frequently cited by courts. The consensus was to remove the sentence citing § 3.07.

Discussion shifted to the previous sentence. In the current Note, it is as follows:

And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.

For one thing, the word "use" seems unduly vague. In its place, "disposition" was suggested. Attention then focused on the word "often." Actually, this is a dynamic area but that qualifier seems not useful. There almost always are going to be funds left over, and we should not be saying this is only "often" a concern. It is virtually always a concern. If it is necessary to re-notice the class then regarding their disposition, that is hardly a positive. So that word should probably come out. But the idea is important, and it is important that this issue be included before notice is directed to the class.

(4) Claims rate
(5) Relative success of distribution

These two topics were combined for discussion. The starting point was that proposed 23(e)(2)(C)(ii) tells the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required" when assessing the adequacy of the relief provided by the settlement. The concern was that this might become "an absolute." One suggestion was that the rule itself be revised to add the words "as compared to other, reasonably available methods of distribution under the circumstances" after "to the class."

The consensus was that adding this language to the rule itself was not justified. It should be clear that the rule does not require perfection. Indeed, that is why the Note emphasizes making provision for disposition of the residue. What the Note

says is that the parties should demonstrate to the court that they have employed a method of delivering relief to the class that is likely to deliver relief to the class. It does not say the method must result in 100% success on that score. But being attentive to being effective is worth emphasizing.

Instead of changing the rule, attention to the Note's treatment of the claims rate question seemed the right way to approach these concerns. The first point at which claims rate appears was in the Note about (e)(1):

If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience.

This passage drew the observation that this is not how things usually happen. To the contrary, given the contingencies involved, it would be very unusual for the claims process to be completed before the approval decision under Rule 23(e)(2) occurs. Defendants will not be willing to fund the settlement until final approval has occurred. Indeed, they usually are not willing to fund the settlement until all objections and appeals are completely resolved. That's one of the reasons bad faith objectors can exert such pressure.

The reality, then, is that distribution usually does not occur until final approval has happened and all appeals are over. Then the question is whether or when the court learns about the results of that distribution effort. One witness urged that the courts should have a "fiduciary" obligation to follow up and ensure full distribution of relief. That requirement is not in this package.

The contemporary reality was described as regularly involving "continuing jurisdiction" for the district court during the administration of the claims process, something that might take quite a period of time. And reporting back about its success would normally be a feature of that continuing supervision. But that all had to come considerably later, and the Note material quoted above is about the Rule 26(e)(1) decision to send notice to the class. That's a premature discussion and the consensus was to delete the discussion at that point. That shortens the Note a little bit.

Another point at which "claims rate" appears in the 23(e)(1) Note is in regard to the proposed attorney's fees. That also seems premature at the point the decision to give notice must be made, and can be removed from the Note:

In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, ~~and to take account of the likely claims rate.~~

The court can have some justified expectation about the benefits to the class when the 23(e)(1) decision to give notice must be made, and it should consider the effectiveness of the method selected to give notice and, if necessary, to make claims. But beyond that it cannot sensibly forecast a likely claims rate. We do not want to make it seem necessary that the parties present expert evidence making such a forecast to support giving notice to the class.

Attention shifted to the reference to claims rate in the Note on final approval under Rule 23(e)(2). As published, that said:

Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important.

An initial reaction was that this seems a balanced treatment of the situation. But the idea of focusing on "a prediction of how many claims will be made" might be troublesome. In a sense, that gets at the usual reality that the payout to the class happens only after final approval and exhaustion of all appeals. So a forecast might make sense. But asking for one in the Note is likely to do more harm than good. Trying to make such a forecast is extremely difficult, could cost a lot, and might readily be wrong instead of right.

As noted earlier, district courts usually retain jurisdiction over the administration of the settlement. That commonly involves reporting back to the court on the results of that distribution effort. It may lead to a revised distribution effort. That does not lead to a "retroactive disapproval" of the settlement because of a low claims rate. How could one undo the settlement -- by making all the class members who had received relief pay it back and resuming the litigation?

A different concern is that the claims process itself might be set up in a way that obviously will deter or defeat claims. That is illusory relief to the class. But the Note does admonish the court to evaluate the proposed claims process; that seems to cover the point in terms of what the court can do at that point.

Attention turned to a bracketed proposal to add language about distribution to the Note:

Because 100% success in distribution can very rarely be achieved, the court should not insist on a distribution method that promises such success; the court's focus should instead be on whether the method proposed is justified in light of other reasonably available methods.

This Note language might ensure that courts do not treat perfection in distribution as a requirement or an expected result. The reality is that "it never happens that everyone cashes the check." There is always some money left over. That's why some provision in the settlement agreement for disposition of the residue is important. But saying "100% success in distribution can very rarely be achieved" is not useful.

The question was raised whether this addition really would be useful. As published for comment, the Note says that the court should scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. This does not seem to add usefully to that admonition already in the Note. This addition should be dropped.

(6) Objector issues

An initial question was whether proposed (e)(1)(A) should direct that objectors state whether they were objecting about their own assertedly unique problems, on behalf of a subset of the class, or on behalf of all class members. Objections to this provision have been that it (a) invites objections on behalf of others, and (b) should require that the objector satisfy something like Rule 23(a)(4) (on adequacy of representation) to represent anyone else.

The consensus was that these arguments do not present persuasive reasons for changing the amendment package. The rule already says that class members may object. It does not cabin what objections they make, and courts must consider those objections. It may well be that courts would look askance at objections by a class member who really had nothing at stake in regard to the matter raised by the objection. But if the objection is a cogent one, the court should consider it whether or not the objector has a direct stake in the resolution of the objection.

A second objection was that the rule does not state a standard for approving payment to an objector or objector counsel. It was noted that the Subcommittee discussed how to articulate such a standard in a useful way and did not find a good way to do so. The resolution of this objection to the text

of the rule was that this is a place to "let judges be judges."

A related question arose, however, in regard to the comment in the Note that "class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors." As pointed out during the public comment period, that statement might make it seem that this is a satisfactory reason to approve a payoff for such objectors. The redraft sought to prevent that interpretation and offered two ways of doing so. The consensus was to add the following to the Note after the material quoted above:

Although the payment may advance class interests in a particular case, allowing payments perpetuates a system that can encourage objections advanced for improper purposes.

A third question that arose during the public comment period was whether there was a major loophole in the amendment proposal because bad faith objectors or objector counsel might arrange that payments be made to organization with which they are affiliated, and contend that court approval is not required when they do that.

In response to this third problem, a change to proposed 23(e)(5)(B) deleted the words "to an objector or objector's counsel," and that phrase was eliminated from the tag line as well and replaced with the phrase "in connection with an objection." That would make the approval requirement apply no matter who was to get the payment so long as it was in connection with an objection.

Attention shifted to the Note material and there was consensus approval for addition of the following to the Note:

Although such payment is often made to objectors or their counsel, the rule also requires court approval if the payment is instead to an organization or other recipient, so long as it is made in connection with forgoing or withdrawing an objection or appeal.

A question was raised, however, about additional material that was included in the Note published for comment. Specifically, the following seemed to suggest a standard for approving a payment:

If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees; the court may approve the fee if the objection assisted the court in understanding and evaluating the settlement even though the settlement was approved as proposed.

This comment is about a Rule 23(h) motion, and Rule 23(h) has a Committee Note that addresses criteria for payments to objectors. There is no reason to get into that issue here, so the consensus was to delete the material after "award of fees."

Other matters

The final subject for discussion was the added language about maintaining confidentiality of information about agreements in connection with the proposal. During the public comment period one witness expressed concern that the risk that saying the class would have access to everything that the court received could require revelation of sensitive materials including such things as the number of opt outs that would trigger a right for the defendant to withdraw from the agreement. That was addressed in the draft as follows:

That would give the court a full picture and make ~~this~~ appropriate information available to the members of the class[, while maintaining confidentiality of sensitive information such as agreements that defendant may withdraw if more than a certain number of class members opt out].

The consensus was that the bracketed material above was not useful. The question whether substituting "appropriate" for "this" is helpful remained open. It was noted that ordinarily these matters are handled by separate agreements and not part of the settlement agreement. On the other hand, they are to be "identified" to the court reviewing the proposal, and thus might be subject to review by class members if submitted pursuant to the frontloading provisions of proposed Rule 23(e)(1).

Next steps

Prof. Marcus will attempt to make the changes agreed upon during this conference call and circulate by March 3 the next generation of the revisions of the published preliminary draft. The Subcommittee will attempt to confer by phone during the week of March 13 to resolve remaining matters. Ideally, many remaining issues can be resolved by email without the need to discuss in the next conference call. Final agenda materials will need to be at the A.O. by the first week of April.

C. RULES 62, 65.1: STAYS OF EXECUTION

The proposed amendments of Rule 62 aimed at three changes, described more fully in the Committee Note. The automatic-stay provision is changed to eliminate the “gap” in the current rule, which ends the automatic stay after 14 days but allows the court to order a stay “pending disposition of” post-judgment motions that may be made as late as 28 days after judgment. The changes also expressly authorize the court to dissolve or supersede the automatic stay. Express provision is made for security in a form other than a bond, and a single security can be provided to last through the disposition of all proceedings after judgment and until final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word “supersedeas.” The right to obtain a stay on providing a bond or other security is maintained without departing from interpretations of present Rule 62(d), but with changes that allow the security to be provided before an appeal is taken and that allow any party, not only an appellant, to obtain the stay. Subdivisions (a) through (d) are also rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The changes in Rule 65.1 are designed to reflect the expansion of Rule 62 to include forms of security other than a bond.

There was little comment, and no testimony, on Rule 62 or Rule 65.1. The summary of comments reflects only short and general statements approving the amendments. No one suggested the need for other changes.

The Committee recommends approval for adoption of amended Rules 62 and 65.1 substantially as published. One change is recommended to conform Rule 65.1 to proposed Appellate Rule 8(b), which is being amended to reflect the changes in Rules 62 and 65.1. These changes remove all references to “bond,” “undertaking,” and “surety” from Rule 65.1 (“bond” remains in Rule 62, in keeping with strong tradition). Focusing Rule 65.1 only on “security” and “security provider” is clean, and avoids any possible implication that a surety is not a security provider.

Rule 62 as Published

1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

- 2
3 (a) ~~AUTOMATIC STAY.;~~ ~~Exceptions for Injunctions, Receiverships, and Patent Accountings.~~
4 ~~Except as provided in Rule 62(c) and (d), stated in this rule, no execution may issue on a~~
5 ~~judgment, nor may and proceedings be taken to enforce it; are stayed for 30 days until 14~~
6 ~~days have passed after its entry, unless the court orders otherwise. But unless the court~~
7 ~~orders otherwise, the following are not stayed after being entered, even if an appeal is~~
8 ~~taken:~~
9 ~~(1) an interlocutory or final judgment in an action for an injunction or a receivership; or~~
10 ~~(2) a judgment or order that directs an accounting in an action for patent infringement.~~

11
12 ~~(b) Stay Pending the Disposition of a Motion.~~ On appropriate terms for the opposing party's
13 security, the court may stay the execution of a judgment—or any proceedings to enforce
14 it—pending disposition of any of the following motions:

- 15 (1) under Rule 50, for judgment as a matter of law;
16 (2) under Rule 52(b), to amend the findings or for additional findings;
17 (3) under Rule 59, for a new trial or to alter or amend a judgment; or
18 (4) under Rule 60, for relief from a judgment or order.
19

20 (b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may
21 obtain a stay by providing a bond or other security. The stay takes effect when the court
22 approves the bond or other security and remains in effect for the time specified in the
23 bond or security.
24

25 (c) STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER. Unless the court
26 orders otherwise, the following are not stayed after being entered, even if an appeal is
27 taken:

- 28 (1) an interlocutory or final judgment in an action for an injunction or receivership; or
29 (2) a judgment or order that directs an accounting in an action for patent infringement.
30

31 (de) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or
32 final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~ refuses to
33 dissolve or modify an injunction, the court may suspend, modify, restore, or grant an
34 injunction on terms for bond or other terms that secure the opposing party's rights. If the
35 judgment appealed from is rendered by a statutory three-judge district court, the order
36 must be made either:

- 37 (1) by that court sitting in open session; or
38 (2) by the assent of all its judges, as evidenced by their signatures.
39

40 ~~(d) STAY WITH BOND ON APPEAL.~~ If an appeal is taken, the appellant may obtain a stay by
41 supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be
42 given upon or after filing the notice of appeal or after obtaining the order allowing the
43 appeal. The stay takes effect when the court approves the bond.
44

45 * * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court’s authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor’s assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule’s text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to

- 44 secure a stay pending disposition of post-judgment proceedings after expiration of the automatic
45 stay, not yet knowing whether it will want to appeal.

RULE 62 CLEAN TEXT

Rule 62. Stay of Proceedings to Enforce a Judgment

- (a) **AUTOMATIC STAY.**; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.
- (b) **STAY BY BOND OR OTHER SECURITY.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.
- (c) **STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:
- (1) an interlocutory or final judgment in an action for an injunction or receivership; or
 - (2) a judgment or order that directs an accounting in an action for patent infringement.
- (d) **INJUNCTION PENDING AN APPEAL.** While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
- (1) by that court sitting in open session; or
 - (2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

Gap Report

No changes have been made in the Rule and Committee Note as published.

Rule 65.1 as Published

1 **Rule 65.1. Proceedings Against a Surety or Other Security Provider**

2
3 Whenever these rules (including the Supplemental Rules for Admiralty or Maritime
4 Claims and Asset Forfeiture Actions) require or allow a party to give security, and
5 security is given through a bond, other security, or other undertaking, with one or
6 more sureties or other security providers, each surety provider submits to the
7 court's jurisdiction and irrevocably appoints the court clerk as its agent for
8 receiving service of any papers that affect its liability on the bond, ~~or~~ undertaking,
9 or other security. The ~~surety's~~ security provider's liability may be enforced on
10 motion without an independent action. The motion and any notice that the court
11 orders may be served on the court clerk, who must promptly mail a copy of each
12 to every surety security provider whose address is known.

1 COMMITTEE NOTE

2
3 Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to
4 obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1
5 enforcement procedures to sureties might exclude use of those procedures against a security
6 provider that is not a surety. All security providers are brought into Rule 65.1 by these
7 amendments.

Revising Rule 65.1 as Published

The Committee recommends Rule 65.1 for adoption with changes designed to establish
uniformity with Appellate Rule 8(b). The changes remove all references to "bond,"
"undertaking," and "surety." "Security" and "security provider" include these forms of security
and sureties.

1 **Rule 65.1. Proceedings Against a Surety ~~or Other Security Provider~~**

2
3 Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and
4 Asset Forfeiture Actions) require or allow a party to give security, and security is given
5 ~~through a bond, other security, or other undertaking,~~ with one or more ~~sureties or other~~
6 security providers, each surety provider submits to the court's jurisdiction and
7 irrevocably appoints the court clerk as its agent for receiving service of any papers that
8 affect its liability on the ~~bond, or undertaking, or other security~~. The ~~surety's~~ security
9 provider's liability may be enforced on motion without an independent action. The
10 motion and any notice that the court orders may be served on the court clerk, who must
11 promptly mail a copy of each to every surety security provider whose address is known.

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COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

RULE 65.1 CLEAN TEXT

Rule 65.1. Proceedings Against a Security Provider

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

COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

Gap Report

The rule text was changed to eliminate references to “bond,” “undertaking,” and “surety.” An explanation was added to the Committee Note.

SUMMARY OF COMMENTS
RULE 62

In General

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: Changing Rule 62(a) to provide a 30-day automatic stay “makes sense, since that would be the appeal period in most matters.” The stay power established by Rule 62(a) makes present Rule 62(b) redundant; it is properly deleted. Adoption of the Rule 62 amendments is recommended.

RULE 65.1

In General

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: The amendments conform to the changes in Rule 62. Adoption is recommended.

II. SETTING PRIORITIES

Potential Civil Rules amendments come to the Committee from several sources. Some can be put aside, at least for the time being, without a great investment of Committee resources. Some deserve careful study but in the end are put aside because the opportunity to improve practice is outweighed by the risk of making practice worse. Others offer sufficient promise to justify substantial work, even acknowledging that in the end no amendment may prove satisfactory. Proposals worthy of substantial work may accumulate at a rate that requires the Committee to choose which to take on first. So it is now.

Five topics were discussed by the Committee to begin the process of setting priorities. Three of them are familiar from past reports: Whether the Rule 38 procedure for demanding a jury trial should be changed to eliminate or ease the demand procedure, both in cases initially filed in federal court and in removed cases; whether the means for serving Rule 45 subpoenas should be clarified and perhaps extended; and both broad and closely focused amendments of the Rule 68 offer-of-judgment procedure. Two others are new: Whether to adopt, in the Civil Rules or as a freestanding set of rules, provisions for district-court review of individual social security disability and like cases; and whether to amend Rule 47 to expand lawyers' rights to participate in voir dire examination of prospective jurors. No definite ranking has been set. The proposals are described here with a request for guidance on their relative importance and opportunities for successful amendments.

A. SOCIAL SECURITY DISABILITY REVIEW

42 U.S.C. § 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security “by a civil action.” Every year brings 17,000 to 18,000 of these review cases to the district courts. They account for approximately 7% of all civil filings. The national average remand rate is about 45%, a figure that includes rates as low as 20% in some districts and as high as 70% in others. Different districts employ a wide range of disparate procedures in deciding these actions.

The Administrative Conference of the United States, supported by admirably detailed work by Professors Jonah Gelbach and David Marcus, has submitted this proposal:

The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court’s consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

The proposal seems to contemplate action through the Rules Enabling Act. The suggestion of “consultation with Congress as appropriate” need not detract from that conclusion. Acting through the Enabling Act should involve at least the Judicial Conference and the Standing Committee. On balance it likely should involve the Civil Rules Committee as well. Section 405(g) review proceedings are civil actions. They are lodged in the district courts. The Civil Rules Committee has initial responsibility to study and to advise about rules for civil actions in the district courts. That holds whether in the end it seems better to adopt an independent set of review rules that are linked to the Civil Rules, instead to place the review rules directly in the Civil Rules, or even to recommend no action. Looking to the Civil Rules Committee also is indicated by the need to integrate with at least some provisions of the Civil Rules and with the overall modes of managing district-court dockets. In the end, it may be that any new rules will bear a striking resemblance to the Appellate Rules. The Appellate and Civil Rules Committees often work together, and can be expected to do so as proves useful in this project.

Any proposal to adopt rules specific to a particular substantive area must overcome well-founded reluctance. Detailed substantive knowledge may be required. In the setting of Social Security claims it also may be necessary to develop comprehensive knowledge of the ways in which the Social Security Administration and its lawyers interact in review proceedings with other government lawyers and claimants. There also is a risk that even rules that manage to strike a sound balance between competing interests will be perceived to favor one set of interests over another. Yet respect for the Administrative Conference suggests that this proposal should not be rejected without further work. It may prove possible to develop a uniform national procedure that benefits claimants, the government, and the courts.

If this task is taken on, it will be important to think about the means of gathering information necessary to do it well. Powerful institutional concerns counsel against such extraordinary measures as adding specialist members to the Advisory Committee or to a subcommittee. Those concerns are deepened by the prospect that it would not be enough to rely on one, or two, or three specialists. Some other means are likely to prove more appropriate. A rather widespread request addressed to professional groups, and perhaps to identifiable individuals, might prove a useful beginning. Experience with such requests has worked for projects focused on more traditional Civil Rules subjects, and might work here. So too, “miniconferences,” although expensive, have proved quite helpful. The only caution is that more than one miniconference might be needed to test proposals as they advance through successive stages.

The Committee has concluded that work on this proposal should begin now. The outcome may be a decision to put the task aside. It may be to develop a separate set of rules, with cross-incorporations between the separate set and the Civil Rules. Or it may be to develop a relatively short rule, or a few rules, lodged in the Civil Rules. The task will not be easy. The further it is pursued, the greater the expenditure of Committee resources.

The draft April Minutes reflect the Committee discussion. One issue that will have to be assessed is whether rules of the type suggested by the Administrative Conference—either as a separate set of rules or as part of the Civil Rules—will address the concerns focused by the Administrative Conference, particularly the high or divergent remand rates. The part of the April agenda that stimulated this discussion is set out here to give some sense of the issues as they first appear:

Unique, subject-specific, and intricate questions are raised by 17-CV-D, a submission by the Administrative Conference of the United States “for the consideration of the Judicial Conference of the United States.” The Administrative Conference “recommends that the Judicial Conference ‘develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).’”

Civil Rules or Something Else?

Two threshold issues intertwine. One is a potential ambiguity about the choice between stand-alone “special procedural rules” and adopting new and specialized Federal Rules of Civil Procedure. The other is whether the initial burden of developing either sort of specialized rules should be borne by the Civil Rules Committee, by the Civil Rules Committee as enlarged for this purpose by members well versed in Social Security review issues, by a new advisory committee, or by the Standing Committee itself with some other means of seeking advice.

Some uncertainty as to the nature of the special procedural rules springs from the recommendation's repeated references to special rules. In addition, there is a clear statement that many of the Civil Rules have no useful role to play in fashioning the means of appellate review on the administrative record. In the end, the recommendation is that:

The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

Setting aside for now the suggestion of consultation with Congress in developing Enabling Act Rules, the recommendation is compatible with adoption of a separate set of rules, akin to such models as the Habeas Corpus rules, or with adoption of new Civil Rules. Nor should the choice be deemed foreclosed by the study on which the recommendation is based. Professors Jonah Gelbach and David Marcus prepared for the Administrative Conference "A Study of Social Security Litigation in the Federal Courts" (July 28, 2016). The Study explicitly recommends "enabling legislation to clarify the U.S. Supreme Court's authority to promulgate procedural rules for social security litigation," with appointment of a social security rules advisory committee. Study, p. 148. The Study recognizes that the Enabling Act likely authorizes specific rules for social security appeals now, but prefers stand-alone rules because many Civil Rules are not suited to review on an administrative record. Something as simple as originating review by filing a complaint, Rule 3, is thought inappropriate, as are the general rules for pleading, discovery, and summary judgment. The poor fit of these rules with administrative review in turn has meant a riot of wildly disparate practices across district courts, many of them poorly suited to the task. All that need be done with the Civil Rules is to add to Rule 81(a) a new paragraph excluding cases governed by the new social-security review rules. Study, pp. 148-152.

The Study approaches the recommendations for review rules by establishing a richly detailed foundation in the structure and operation of the administrative proceedings that precede review in a district court. The details will command close attention when it comes time to begin framing specific review rules. They present a compelling picture of a system that, both in size and character, is quite unlike other administrative adjudications that come on for review either in a district court or in a court of appeals. One challenge will be to determine whether the many unique characteristics of this system will, in the end, have a significant bearing on the best procedures for review. One example is provided by requests

for voluntary remand. Office of General Counsel staff “typically requests voluntary remand in about 15% of appeals annually” when they conclude that a case “cannot be defended.” Study p. 31. Given the workloads involved, it would be good to adopt a review procedure that facilitates this practice. But it may be that this purpose can be served by rules that look a lot like the Appellate Rules for circuit-court review on an administrative record.

The Study also provides information about the outcomes on review. Part III, pp. 44-80, explores the statistic that “federal courts ruled for disability claimants in 45% of the 18,193 appeals they decided in FY 2014 * * *.” Part IV, pp. 81-126, explores variations in the remand rate across the district courts. The lowest rate of remand is 20.8% in one district; the highest is 70.6%. There is a significant clustering of remand rates among the district courts as aligned by circuit, and—perhaps surprisingly—a significant sameness among different judges in any single district. Without venturing any firm diagnosis, one hypothesis offered for further study is that there is a significant variation in the quality of the work done in different regions of the Social Security Administration. It does not seem likely that court rules for review can be framed with a purpose to address the remand rate directly. Section 405(g) establishes the familiar “substantial evidence” standard of review. But it may be that addressing the cacophony of local practices by establishing a uniform and good review procedure will have some impact on the quality of review decisions.

It is useful to begin work on these questions in the Civil Rules Committee, with advice from the Appellate Rules Committee as seems helpful. Although no firm answer can be given now, it seems likely that some provisions of the Civil Rules will remain useful. Explicit provisions for default, entry of judgment, motions to alter or amend, perhaps stays, reliance on magistrate judges, Rules 77 through 79 on conducting business, motions, and records, and yet others are examples. In addition, § 405(g) provides that an individual may obtain review of the Commissioner’s “final decision” “by a civil action” filed in a district court. If it is to be a civil action, and if it is right that some aspects of the civil action are usefully governed by the general Civil Rules, integration of the special review procedures with the Civil Rules may be accomplished better within the body of the Civil Rules as a whole rather than by making an exception—most likely in Rule 81(a)—that excludes application of the Civil Rules from matters governed by the potential RULES FOR REVIEW OF INDIVIDUAL BENEFIT DECISIONS UNDER 42 U.S.C. § 405(g).

Beginning initial consideration in the Civil Rules Committee need not imply a commitment to complete the task. A great deal must be learned, although the Gelbach and Marcus Study provides an outstanding point of departure. One way to begin the task is to wonder about the models that might be used to frame a new review procedure.

The model advanced by the Administrative Conference adopts the direct analogy to administrative review as an appeal procedure. Review would be initiated by a “complaint” that is “substantially equivalent to a notice of appeal.” (Remember that § 405(g) directs that review be sought by a “civil action” “commenced” within 60 days; Rule 3 directs that a civil action be commenced by filing a complaint.) The next step is modeled on the provision in § 405(g) that “[a]s part of the Commissioner’s answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.” This is translated as a direction that the Commissioner “file a certified copy of the administrative record as the main component of its answer.” The case would then be developed by the claimant’s opening brief, the agency’s response, and “appropriate subsequent proceedings and the filing of appropriate responses consistent with * * * § 405(g) and the appellate nature of the proceedings.” Appropriate deadlines and page limits would be added. And there would be “other rules” that promote efficiency and uniformity, “without favoring one class of litigants over another or impacting substantive rights.”

The appeal model is the obvious starting point. What counts is framing the issues clearly through submissions that bring together each point of agreement and each point of argument. As compared to an ordinary civil action that launches a new dispute, social security review comes at the end of an elaborate and multi-stage administrative and then adjudicatory procedure. There is little lost by a procedure that does not, at the time of complaint and answer, afford any idea of what the issues will be. Channeling the parties into a process that enables (or forces) them into a record-focused framing of the dispute suffices. The deadlines, word-count, and any like formal constraints can be shaped for the peculiar needs of this setting.

One question could be whether the benefits of this model should be generalized by adopting rules for all proceedings for review on an agency record, not for individual Social Security disputes alone. There may be reason for caution. The sheer number of Social Security review cases dwarfs all other district-court administrative review cases—there are something on the order of 18,000 social security review cases a year. The special character of the underlying claims and the distinctive administrative structure and operations also may be reasons to confine new rules to social security cases, as recommended by the Administrative Conference. In addition, § 405(g) specifies part of the procedure for review. Review is obtained “by a civil action.” “As part of the Commissioner’s answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.” There is a specific provision limiting review of administrative decisions based on failure to submit proof in conformity with regulations. The court may affirm, modify, or reverse, with or without remand. It may remand for

taking new evidence. And there is a special procedure for remanding on motion by the Commissioner.

A second question might be whether it would be simpler to adopt a Civil Rule that concisely absorbs by reference the Appellate Rules for administrative review. The answer may be that it would be more complicated, not simpler. The Study suggests different timing for briefing that responds to the special character of social-security review, and different word counts for briefs. Other parts of the Appellate Rules might also benefit from adaptation. These problems could be met by adopting special social-security review rules into the Appellate Rules, to be incorporated into the Civil Rules by simple cross-reference, but it seems better to use the Civil Rules to govern district-court proceedings. No one enjoys the process of beginning with a Civil Rule that directs attention elsewhere.

A different possibility would be to create a new procedure specifically tailored for administrative review in a district court. Although there may be rare exceptions, in the overwhelming majority of cases review is confined to the administrative record. The court does not decide the facts, and does not decide whether there are genuine disputes as to the facts. The only question is whether, in the standard phrase, the administrative decision is supported by substantial evidence on the record considered as a whole. If there is substantial evidence, the administrative decision is affirmed. If not, the administrative decision is set aside; if further proceedings are appropriate, the case is remanded to the agency. Because taking evidence is not part of the review, and for want of any obvious alternative in the Civil Rules, Professors Gelbach and Marcus report that many districts adapt summary-judgment procedures to decide social-security review cases. But they also find that this model is ill-suited. Many of the incidents of summary-judgment procedure, designed to determine whether there is a genuine dispute as to any material fact, are inapposite.

As with a Civil Rule based on analogy to the Appellate Rules, a new Civil Rule for review on an administrative record could be limited to Social Security review cases or made more general. Although there is likely to be a common core of provisions, caution may suggest limiting any new rule to Social Security cases, at least for the time being. The “civil action” specified by the statute might as well be commenced by filing a “complaint.” The statute ensures that the administrative record is supplied as part of the answer. The rule could provide for a claimant’s motion to reverse and for a Commissioner’s motion to affirm. Or it might provide that the complaint itself operates as a motion to reverse, to be met by a request to affirm in the answer or a motion by the Commissioner to remand under the statutory provision for remand.

The obvious danger in adopting a rule for a specific statutory framework is that the statute may be amended. The time required to amend the rule might leave a substantial period of confusion.

Discussion should begin with the broad questions: Where should new rules be lodged, and who should have primary initial responsibility for developing them. Thoughtful answers, carefully deliberated, are required. A request from the Administrative Conference should stimulate immediate study. It will be good to begin with at least an initial sense of direction.

Next Steps

The immediate question, then, is what direction to take in developing this complex set of questions for further work. It may be wise to defer the choice between stand-alone rules and new Civil Rules. That choice will be affected by the shape of any rules that may be proposed, and would be mooted if the decision is not to adopt any rules. The question cannot be deferred if it is found useful to create a new advisory committee within the Enabling Act structure, but that is not recommended. Instead, a subcommittee of the Civil Rules Committee will be formed to lead the work. It will be important to begin gathering information from people with as many perspectives as can be found, both within the Social Security Administration and beyond. Local rules for these cases will be consulted as potential models for national rules. Much work lies ahead.

Report to the Standing Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
May 18, 2017

Supreme Court of the United States
Washington, D. C. 20543

COUNSELOR TO
THE CHIEF JUSTICE

* Appropriate
Handling

February 10, 2017

Matthew Lee Wiener
Vice Chairman and Executive Director
Administrative Conference
of the United States
1120 20th Street, N.W., Suite 706 South
Washington, D.C. 20036

Dear Mr. Weiner:

I am writing in response to your letter of January 13, 2017, submitting the Administrative Conference’s recommendation that the Judicial Conference “develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).”

By copy of this letter, I am forwarding the Administrative Conference’s recommendation to James C. Duff, Director of the Administrative Office of the U.S. Courts and Judicial Conference Secretary, and to the Honorable David G. Campbell, U.S. District Judge and Chair of the Judicial Conference’s Committee on Rules of Practice and Procedure.

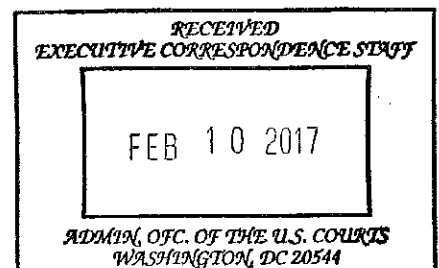
Thank you for your letter and for the analysis supplied on behalf of the Administrative Conference.

Sincerely,



Jeffrey P. Minear

Attachment



Report to the Standing Committee
Advisory Committee on Civil Rules
May 18, 2017

Page 126

cc: ✓ Director James C. Duff
Hon. David G. Campbell
Ms. Jill C. Sayenga
Professor Ronald M. Levin
Ms. Shawne McGibbon
Mr. Reeve T. Bull
Ms. Gisselle Bourns
Mr. Daniel J. Sheffner



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to the Standing Committee
Advisory Committee on Civil Rules

May 18, 2017

January 13, 2017

Page 127

Mr. Jeffrey Minear
Counselor to the Chief Justice
Supreme Court of the United States
1 First Street N.E.
Washington, DC 20543

Dear Mr. Minear:

I respectfully submit for the consideration of the Judicial Conference of the United States Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, 81 Fed. Reg. 94,312 (Dec. 23, 2016), of the Administrative Conference of the United States. It recommends that the Judicial Conference “develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).”

The Administrative Conference’s staff will be pleased to provide any assistance that the Judicial Conference may request in its consideration of the recommendation.

With my best.

Sincerely yours,

A handwritten signature in black ink that reads "Matthew Lee Wiener".

Matthew Lee Wiener
Vice Chairman and Executive Director

cc: Ms. Jill C. Sayenga
Professor Ronald M. Levin
Ms. Shawne McGibbon
Mr. Reeve T. Bull
Ms. Gisselle Bourns
Mr. Daniel J. Sheffner



Administrative Conference Recommendation 2016-3

Special Procedural Rules for Social Security Litigation in District Court

Adopted December 13, 2016

The Administrative Conference recommends that the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act¹ in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Rules Enabling Act delegates authority to the United States Supreme Court (acting initially through the Judicial Conference) to prescribe procedural rules for the lower federal courts.² The Act does not require that procedural rules be trans-substantive (that is, be the same for all types of cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules' general procedural governing scheme.³ In the case of social security litigation in the federal courts, several factors warrant an additional set of exceptions. These factors include the extraordinary volume of social security litigation, the Federal Rules' failure to account for numerous procedural issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by the various local rules fashioned to fill those procedural gaps.⁴

* * *

¹ 42 U.S.C. § 301 *et seq.* (2012).

² *See* 28 U.S.C. § 2072(a) (2012).

³ FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 (“Special Proceedings”).

⁴ This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the

The Social Security Administration (SSA) administers the Social Security Disability Insurance program and the Supplemental Security Income program, two of the largest disability programs in the United States. An individual who fails to obtain disability benefits under either of these programs, after proceeding through SSA's extensive administrative adjudication system, may appeal the agency's decision to a federal district court.⁵ In reviewing SSA's decision, the district court's inquiry is typically based on the administrative record developed by the agency.

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the federal district courts act as appellate tribunals in their review of disability decisions. That fact alone does not make these cases unique; appeals of agency actions generally go to district courts unless a statute expressly provides for direct review of an agency's actions by a court of appeals.⁶ However, social security appeals comprise approximately seven percent of district courts' dockets, generating substantially more litigation for district courts than any other type of appeal from a federal administrative agency. The high volume of social security cases in the federal courts is in no small part a result of the enormous magnitude of the social security disability program. The program, which is administered nationally, annually receives millions of applications for benefits. The magnitude of this judicial caseload suggests that a specialized approach in this area could bring about economies of scale that probably could not be achieved in other subject areas.

The Federal Rules were designed for cases litigated in the first instance, not for those reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules fail to account for a variety of procedural issues that arise when a disability case is appealed to district court. For example, the Rules require the parties to file a complaint and an answer. Because a social security case is in substance an appellate proceeding, the case could more

University of Arizona Rogers College of Law. *See* Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts 127–42, 148–59 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

⁵ 42 U.S.C. § 405(g) (2012).

⁶ *See* *Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007).



sensibly be initiated through a simple document akin to a notice of appeal or a petition for review. Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as “part of” the government’s answer, there is no functional need at that stage for the government to file anything more than the record. In addition, the lack of congruence between the structure of the Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants should file in order to get their cases resolved on the merits. In some districts, for instance, the agency files the certified transcript of administrative proceedings instead of an answer, whereas other districts require the agency to file an answer. In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,⁷ whereas such motions are considered “not appropriate” in others.⁸

Social security disability litigation is not the only type of specialized litigation district courts regularly review in an appellate capacity. District courts entertain an equivalent number of habeas corpus petitions,⁹ as well as numerous appeals from bankruptcy courts. But habeas and bankruptcy appeals are governed by specially crafted, national rules that address those cases’ specific issues.¹⁰ No particularized set of rules, however, accounts for the procedural gaps left by the Federal Rules in social security appeals.

When specialized litigation with unique procedural needs lacks a tailored set of national procedural rules for its governance, districts and even individual judges have to craft their own. This is precisely what has happened with social security litigation. The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic access of

⁷ See, e.g., E.D. Mo. L.R. 56-9.02; Order Setting Schedule, *Donvan-Terris v. Colvin*, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

⁸ See, e.g., S.D. Iowa Local R. 56(i).

⁹ During the twelve months that ended on September 30, 2014, the district courts received 19,185 “general” habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3–4.

¹⁰ See R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.

nonparties to filings in social security cases,¹¹ but, otherwise, they include no specialized procedures. As a result, numerous local rules, district-wide orders, and individual case management orders, addressing a multitude of issues at every stage in a social security case, have proliferated. Whether the agency must answer a complaint, what sort of merits briefs the parties are required to file, whether oral arguments are held, and the answers to a host of other questions differ considerably from district to district and, sometimes, judge to judge. Such local variations have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this fact reflects the district courts' own recognition that social security cases pose distinctive challenges.

Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous briefing—the practice in some districts that requires both parties to file cross motions for resolution of the merits and to respond to each other's briefs in simultaneously filed responses—effectively doubles the number of briefs the parties must file. Some judges employ a related practice whereby the *agency* is required to file the opening brief.¹² Because social security complaints are generally form complaints containing little specificity, courts that employ this practice (known as “affirmative briefing”) essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal. The questionable nature of some of these local variations may be attributable in part to the fact that they can be imposed without observance of procedures that would assure sufficient deliberation and opportunities for public feedback. Proposed amendments to the Federal Rules must go through several steps, each of which requires public input. So-called “general orders” and judge-specific orders, on the other hand, can be issued by a district or individual judge with very little process.

The disability program is a national program that is intended to be administered in a uniform fashion, yet procedural localism raises the possibility that like cases will not be treated

¹¹ FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

¹² See, e.g., Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, *Barnes v. Colvin*, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.

alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing schedules, can increase delays and litigation costs for some claimants, while leaving other similarly situated claimants free from bearing those costs. Further, many of the attorneys who litigate social security cases—agency lawyers and claimants’ representatives alike—maintain regional or even national practices. Localism, however, makes it difficult for those lawyers to economize their resources by, for instance, forcing them to refashion even successful arguments in order to fit several different courts’ unique page-limits or formatting requirements.

Procedural variation can thus impose a substantial burden on SSA as it attempts to administer a national program and can result in arbitrary delays and uneven costs for disability claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform rules that recognize the appellate nature of disability cases. Indeed, several districts already treat disability cases as appeals.¹³ Many of these districts provide, for example, for the use of merits briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

The Supreme Court has recognized that the exercise of rulemaking power to craft specialized procedural rules for particular areas of litigation can be appropriate under the Rules Enabling Act.¹⁴ Yet, in recommending the creation of special procedural rules for social security disability and related litigation, the Administrative Conference is cognizant that the Judicial Conference has in the past been hesitant about amending the Federal Rules to incorporate provisions pertaining to particular substantive areas of the law. That hesitation has been driven, at least in part, by reluctance to recommend changes that would give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends, such as heightened pleading standards that would disfavor litigants in particular subject areas. The proposals offered

¹³ See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm’r of Soc. Sec.’s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm’r of Soc. Sec.’s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.I.

¹⁴ See *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft procedural rules for habeas corpus litigation).

herein have very different purposes. Indeed, the Administrative Conference believes that rules promulgated pursuant to this recommendation should not favor one class of litigants over another or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of rules that would promote efficiency and uniformity in the procedural management of social security disability and related litigation, to the benefit of both claimants and the agency.¹⁵ Such a commitment to neutrality would also serve to dampen any apprehensions that the proposed rules would violate the Rules Enabling Act's proscription of rules that would "abridge, enlarge, or modify any substantive right."¹⁶ Rules consistent with these criteria could potentially address a variety of topics, including setting appropriate deadlines for filing petitions for attorneys' fees, or establishing judicial extension practices, or perhaps authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult existing appellate procedural schemes, such as the Federal Rules of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims.

The Administrative Conference believes that a special set of procedural rules could bring much needed uniformity to social security disability and related litigation. In routine cases, page limits, deadlines, briefing schedules, and other procedural requirements should be uniform to ensure effective procedural management. At the same time, the new rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature of social security litigation justifies such separate treatment.¹⁷ In this way, the drafters can avoid the promulgation

¹⁵ This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. *See, e.g.*, Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

¹⁶ 28 U.S.C. § 2072(b) (2012).

¹⁷ *See* FED. R. CIV. P. 81(a)(6) ("[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.").



of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

The research that served as the foundation for this report focused on social security disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district court review of SSA old age and survivors benefits decisions, as well as other actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,¹⁸ it is the Conference's belief that this recommendation should apply, subject to the exceptions discussed below, to all cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The Conference recognizes that some cases might be brought under § 405(g) that would fall outside the rationale for the proposed new rules. This could include class actions and other broad challenges to program administration, such as challenges to the constitutionality or validity of statutory and regulatory requirements, or similar broad challenges to agency policies and procedures. In these cases, the usual deadlines and page limits could be too confining. By citing these examples, the Conference does not intend to preclude other exclusions. The task of precisely defining the cases covered by any new rules would be worked out by the committee that drafts the rules, after additional research and more of an opportunity for public comment on the scope of the rules than has been possible for the Conference. It may also be necessary to include specific rules explaining the procedure for the exclusion of appropriate cases.

RECOMMENDATION

1. The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final

¹⁸ Further, they only constitute about four percent of total social security cases appealed to district courts annually. See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.



administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

2. Examples of rules that should be promulgated include:
 - a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be substantially equivalent to a notice of appeal;
 - b. A rule requiring the agency to file a certified copy of the administrative record as the main component of its answer;
 - c. A rule or rules requiring the claimant to file an opening merits brief to which the agency would respond, and providing for appropriate subsequent proceedings and the filing of appropriate responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the proceedings;
 - d. A rule or rules setting deadlines and page limits as appropriate; and
 - e. Other rules that may promote efficiency and uniformity in social security disability and related litigation, without favoring one class of litigants over another or impacting substantive rights.

42 U.S.C. § 405. Evidence, procedure, and certification for payments

* * * * *

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

* * * * *

B. RULES 38, 39, 81(c)(3)

Consideration of the procedures that require an express demand by a party that wants to exercise a right to jury trial began with an ambiguity introduced by a style change in Rule 81(c)(3). It is not clear whether the demand requirement is excused after removal from a state court if state procedure requires a demand, but the requirement is set at a time after the case is removed. Initial discussions of this question with the Standing Committee led two members, then-Judge Gorsuch and Judge Graber, to suggest that the demand procedure should be reconsidered. The suggestion is that the Civil Rules should emulate Criminal Rule 23. Jury trial would be provided in every case with a statutory or constitutional right to jury trial unless all parties agree to waive jury trial—and even if all parties waive, it might be required that the judge approve the waiver. This approach would better protect the right to jury trial, would avoid a trap for the unwary, and might increase the number of cases that actually go to the gradually vanishing event of a jury trial.

The Committee has determined that some preliminary work should proceed on these questions. The initial step will be further research, with the help of the Administrative Office, on several questions. Some of the questions call for traditional research. Exploring the history of the 1938 decision to adopt a demand procedure, and to include a deadline early in the action, is one. A more sweeping task will be to explore state practices. Some states do not require a demand. Others set the time for demand much later than the time set in Rule 38. It will be useful to learn about the actual effects of these state rules in practice.

Other research may prove more elusive. The value of amending the rules is affected by two offsetting questions. The first is a purely empirical question: How often is the right to a jury trial forfeited by an inadvertent failure to make a timely demand, and by failing to seek or to win a jury trial by motion under Rule 39(b)? It may be difficult to get much solid information on this question. The other question is one of practical experience: What advantages may be gained by requiring an early demand? Early exploration of this question has been frustratingly inconclusive.

Once additional information is developed, the Committee will address whether to consider this subject further. Some concern has been expressed that a rule change in the jury trial demand procedure would not have much practical impact on jury practice and procedure.

C. SERVING RULE 45 SUBPOENAS

Rule 45(b)(1) directs that a subpoena be served by “delivering a copy to the named person.” There is a clear split in district-court opinions on the proper modes of delivery. The majority rule requires personal service. A healthy minority rule allows delivery by mail, with the qualification in some courts that mail is allowed only after attempts at personal service have failed. Occasionally a court authorizes delivery by some other means. This topic was discussed by the Committee as it developed the Rule 45 amendments that took effect in 2013. The decision then was to make no changes, in part from a view that the dramatic act of personal delivery impresses the witness with the importance of compliance. The topic has been taken up again in response to a suggestion by the State Bar of Michigan Committee on United States Courts that all of the means of service allowed by Rule 4 for a summons and complaint should also be allowed for a Rule 45 subpoena. That suggestion has been discussed with the Standing Committee.

Taking these questions up again no more than a few years after they were last considered does not seem urgent. There have been no significant changes in the positions taken by the courts under Rule 45 as it stands. And there are good reasons to be wary of the seemingly attractive analogy to Rule 4. Still, a time may come when it proves wise to establish a uniform rule. And some changes would not be particularly adventuresome. Service by postal mail, now allowed by some courts, might provide useful efficiencies at low cost. “Abode” service by leaving the subpoena at the witness’s home might be useful. The possibility that relatively modest changes could prove beneficial justifies retaining these questions on the Committee agenda, but not as a high priority.

D. RULE 47: LAWYER PARTICIPATION IN VOIR DIRE

The American Bar Association has recommended that Rule 47 be amended to reflect ABA Principles for Juries and Jury Trials 11(B)(2). The core of Principle 11(B)(2) is that “each party should have the opportunity, under supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.”

This topic was last explored by the Committee through a proposal to amend Rule 47 that was published for comment in 1995. The proposal was that “the court shall also permit the parties to orally examine the prospective jurors to supplement the court’s examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause.”

The 1995 proposal drew extensive comments and testimony, both from judges and from lawyers. These responses showed a divide, clear and sharp, between bench and bar. A strong majority of the lawyers’ comments supported the proposal for an expanded right to participate. The judges were nearly unanimous in opposing the proposal. Many of these judges reported that they did allow active lawyer participation, but that the practice was successful only because Rule 47 allowed the judge to keep tight control. Without a clear right to exclude lawyer participation, they feared that voir dire examination would be turned to improper purposes. The Committee concluded then that it would be better to emphasize the values of controlled lawyer participation as a “best practice” than to pursue the proposed amendment further.

In 1995 the Committee believed that a majority of federal judges actually permitted substantial lawyer participation in voir dire. Today it believes that this practice remains, and may even have expanded to a still greater portion of judges. It could be useful to attempt an empirical inquiry to determine the range of contemporary practices.

This question is important. But there is little reason to believe that positions have changed since 1995. The Committee will retain this matter on its docket, but does not plan to develop it in the near future.

E. RULE 68 OFFERS OF JUDGMENT

The Rule 68 offer-of-judgment procedure is seldom absent from the Committee agenda. A comparison might be drawn to discovery. Some aspect of discovery is almost always on the agenda. The discovery rules are amended regularly. Rule 68 wins its frequent place on the agenda by a continual flow of outside suggestions but has defied serious amendment attempts that go as far back as proposals published for comment in 1983. In October, 2014, the Committee decided to carry Rule 68 forward for further research, looking particularly to practices and results under a wide variety of analogous state procedures. The research continues, but has been interrupted intermittently as attention has been diverted to more urgent topics.

The focus of Rule 68 proposals can be broad or narrow.

The broad proposals look in two directions. One approach seeks to invigorate Rule 68 to become an instrument that yields, if not more settlements, then earlier settlements. These proposals commonly suggest an expansion that would provide for offers by claimants, and to enhance incentives by providing for an award of post-offer attorney fees against a party who fails to win a judgment better than a rejected offer. The other approach goes in the opposite direction, arguing that Rule 68 has provided few benefits in practice and should be abrogated because its occasional uses serve to take advantage of the uncertainty of litigation and the risk aversion of plaintiffs who often have urgent needs to recover something.

The narrower proposals look to a variety of particular problems. One, made by the Second Circuit more than a decade ago, was that guidance should be provided on the means of comparing the specific relief embodied in an offer with the somewhat different specific relief awarded by a judgment. Another, advanced more recently, points to the questions that arise when a statute or court rule requires that the court approve a settlement between the parties. The fear is that Rule 68 could be used to circumvent the approval requirement—the parties agree to settle, the defendant then offers the agreed settlement under Rule 68, the plaintiff accepts, and, as directed by Rule 68(a), the clerk must enter judgment. This tactic has been reported in Fair Labor Standards Act cases in the Second Circuit.

The long history of Committee consideration of Rule 68 persuaded the Committee that it should not reopen general amendments. But it will be useful to monitor the potential practice of resorting to Rule 68 as a means to bypass a requirement that a settlement be approved by the court. The Committee will keep that issue open on the Committee agenda as the law develops further.

III. RULE 30(b)(6)

In January 2017, the Standing Committee discussed the Civil Rules Advisory Committee's initial work on possible changes to Rule 30(b)(6). The agenda book for that meeting included an analysis of some 16 different issues that might be pursued in relation to this rule.

The Advisory Committee undertook a review of the rule about a decade ago in response to expressed concerns from the bar about the functioning of the rule. After completing that study and considering the issues, the Committee decided not to recommend any changes to Rule 30(b)(6).

But since that decision, several bar groups have submitted suggestions that the Advisory Committee look at the rule again. In April, 2016, the Advisory Committee decided to appoint a Rule 30(b)(6) Subcommittee to do that, and this Subcommittee's initial work produced the multiple possible amendment ideas that were in the January agenda book. As of that time, the Subcommittee had not had time to discuss many of the amendment ideas in any detail. But it had identified a number of issues that seemed to warrant legal research.

Since January, the legal research has been done thanks to support from the Rules Committee Support Office. The resulting research memorandum from Lauren Gailey and Derek Webb is included in this agenda book. The memorandum reports that the rule “seems to have become a flash point for litigation, having been cited in nearly 8,300 decisions,” although it is not clear how many involved meaningful discussion of the rule. In addition, that research shows:

- (1) Literature on Rule 30(b)(6) generally speaks approvingly of the rule, and focuses not on criticizing its provisions but instead on “practice pointers” for using it.
- (2) Although many districts have local rules that apply generally to depositions (specifying a minimum notice period, for example), only two (D.S.C. & D. Wyo.) have local rules that focus specifically on 30(b)(6) depositions.
- (3) All states have provisions parallel to Rule 30(b)(6). Some state rules include a general time frame for the organization to designate its witnesses. New York introduced a more detailed provision for its Commercial Division in 2015, with time limits and designation requirements.
- (4) Regarding the question whether statements by Rule 30(b)(6) witnesses are “judicial admissions,” the strong majority rule is that they are not. But there is a minority view, and due to the importance of this question, the issue is “extensively litigated.”

Also since the January Standing Committee meeting, the Subcommittee has met by conference call and considered which possible amendments seem most promising. One way of framing this question is to consider whether adding explicit reference to the rule in Rule 26(f),

calling for the parties to develop a discovery plan, and Rule 16(b) or (c), regarding the court's scheduling order and supervision of discovery, would address the problems identified in comments to the Committee. Notes of this conference call are included in this agenda book.

There was strong support within the Subcommittee for the view that—although such case-management emphasis could be valuable—it would not be enough by itself. There was also some consensus for the view that it would be desirable to trim the long list of possible changes identified to date as the Subcommittee moves forward.

At the Advisory Committee's April 2017 meeting, therefore, much of the discussion focused on which possible amendment topics offered the most promise of producing benefits while avoiding difficulties. Before the meeting, the Reporter had attempted an initial “ranking” of issues to facilitate discussion within the Advisory Committee. This discussion is reflected in the minutes of the Advisory Committee's meeting, included in this agenda book.

After the Advisory Committee's meeting, the Subcommittee met to discuss ways to proceed in evaluating the issues in light of the full Committee's discussion. After further exchanges by email, the decision was to post an invitation for comment on Rule 30(b)(6) on the Administrative Office's website, asking that comments be submitted by Aug. 1, 2017. This invitation was posted on May 2, and the organizations that have previously communicated with the Committee have been alerted to the invitation. The invitation is set forth below, and lists six potential amendment areas on which this effort will focus initially.

In addition to this general invitation for comment, members of the Subcommittee continue to receive input from the bar. On May 5, 2017, representatives of the Subcommittee participated in a panel about Rule 30(b)(6) during the membership meeting of the Lawyers For Civil Justice in Washington, D.C. This event provided a forum for discussion of problems encountered in practice under the rule. Tentative plans have been made for representatives of the Subcommittee to participate in a roundtable discussion of the rule during the American Association for Justice's convention in Boston in July. There may be additional opportunities for such input.

Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules

Invitation for Comment on
Possible Issues Regarding Rule 30(b)(6)
May 1, 2017

The Advisory Committee on Civil Rules appointed a Rule 30(b)(6) Subcommittee in April, 2016, and it has begun work. The Advisory Committee spent considerable time looking at this rule about a decade ago, and eventually decided not to propose any amendments at that time. Since then, several bar groups have submitted thoughtful reports to the Committee about problems encountered by their members with the current operation of the rule. Other bar groups have provided submissions questioning the need or appropriateness of amending the rule. Material on these subjects can be found in the agenda book for the Advisory Committee's April 25-26, 2017, meeting at pp. 239-316. That agenda book is available at www.uscourts.gov.

Initial legal research by the Rules Committee Support Office (reported at pp. 249-65 of the agenda book) has cast some light on the concerns that have been raised. The Subcommittee has given initial consideration to a wide range of possible concerns. During the Committee's April 2017 meeting there was considerable discussion of these issues.

As part of its ongoing work, the Rule 30(b)(6) Subcommittee invites input about experience under the rule. Reports received so far indicate both that the rule is an important vehicle for gathering information from organizations in a significant number of cases, and that without it the risk of “bandying” would increase. Other reports indicate, however, that some lawyers may be asking the rule to bear more weight than it was meant to bear, and that some who use the rule impose extremely heavy burdens on opposing parties (and perhaps sometimes on nonparties as well).

Because the Subcommittee's work on the rule is at a preliminary stage, it is not possible presently to determine whether any actual rule amendments would be helpful and therefore warrant the careful drafting effort that would be necessary before any amendment could be formally proposed. For the present, the goal is to determine whether rule changes should be seriously considered, and to identify the topics or areas that offer the most promise that amendments would improve Rule 30(b)(6) practice while preserving its utility.

Based on discussions to date, including the discussion during the Advisory Committee's April 2017 meeting, the following possibilities have been identified as potential rule-amendment ideas:

Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in that plan but does not refer specifically to 30(b)(6) depositions. Specific reference

to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or (c). Such a provision might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice under Rule 30(b)(6). There have been suggestions, however, that the Rule 26(f) conference comes too early in the case for the lawyers to speak with confidence about their Rule 30(b)(6) needs. But (in keeping with some local rules about cooperation in setting depositions) it could be that such early judicial involvement could forestall later disputes.

Judicial admissions: It appears that the clear majority rule is that statements during a 30(b)(6) deposition are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness. Yet there are repeated statements, including some in cases, that testimony by a Rule 30(b)(6) witness is “binding” on the organization. It may be that all these statements mean is that, under Fed. R. Evid. 801(b)(2)(C), this testimony is admissible over a hearsay objection. But it does appear that there is widespread concern that organizations will face arguments that the testimony offered is “binding” in the same way that an admission in a pleading or in response to a Rule 36 request for admissions forecloses admission of evidence about the subject matter. If so, that concern may fuel disputes about a variety of matters that would not generate disputes were the rule amended to make it clear that testimony at a Rule 30(b)(6) deposition is not a judicial admission. (At the same time, it might be affirmed that a finding that a party has failed to prepare its witness adequately could, under Rule 37(c)(1), justify foreclosing the use of evidence that should have been provided earlier.)

Requiring and permitting supplementation of Rule 30(b)(6) testimony: In general, Rule 26(e) does not require supplementation of deposition testimony. But Rule 26(e)(2) directs that the deposition of an expert witness who is required to provide a report (a specially retained expert) must be supplemented. A similar provision could be added for 30(b)(6) deponents, perhaps specifying that the supplementation must be done in writing and providing that it is a ground for re-opening the deposition to explore the supplemental information. Concerns in the past have included the risk that the right to supplement would weaken the duty to prepare the witness.

Forbidding contention questions in Rule 30(b)(6) depositions: Rule 33(a)(2) provides that “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” Interrogatory answers are usually composed by attorneys who have at least 30 days to prepare the answers, and Rule 33 nonetheless suggests that the answer date should sometimes be deferred. A spontaneous answer in a deposition seems quite different. It may be that questions of this sort are rarely if ever used in ordinary depositions, even with witnesses testifying from their personal knowledge. It might be that Rule 30(b)(6) should forbid asking such questions of the witness designated to testify about the organization's knowledge.

Adding a provision for objections to Rule 30(b)(6): An explicit provision authorizing pre-deposition objections by the organization could be added to the rule. One possibility would

be a requirement like the one now in Rule 34(b) that objections be specific. Objections might, on analogy to Rule 45(d)(2)(B), excuse performance absent a court order. But that Rule 45 provision ordinarily applies to nonparties who must be subpoenaed. Presently, it may be that the only remedy for an organizational party is a motion for a protective order, which may be difficult to present before the scheduled date for the deposition. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to Rule 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how many people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right. Ideally, such issues should be worked out between counsel. Is the absence of such rule provisions at present a source of disputes? Would the addition of specifics to the rule reduce or increase the number of disputes? If specifics would be a desirable addition to the rule, what should the specifics be?

* * * * *

The foregoing listing does not include many other matters that the Subcommittee has discussed, or that the Advisory Committee considered when it studied Rule 30(b)(6) a decade ago. As emphasized above, it is consciously tentative and provided only to suggest some ideas that have been discussed and on which the Subcommittee seeks further guidance. For the present, a key focus is to evaluate the desirability of beginning serious study of any of the issues identified above. Drafting actual amendment proposals will involve much further work and will identify further issues. At the same time, the Subcommittee is aware that there may be reason to give serious consideration to a variety of other Rule 30(b)(6) topics, and it therefore invites interested parties to submit suggestions for additional issues that might deserve serious consideration.

Because this is an ongoing project, there is no formal time limit on submission of commentary about Rule 30(b)(6). But for the Subcommittee to receive maximum benefit from any submission, it would be most helpful if it were received no later than Aug. 1, 2017. Any comments should be submitted to: Rules_Comments@ao.uscourts.gov.

MEMORANDUM

TO: Rule 30(b)(6) Subcommittee of the Civil Rules Advisory Committee

FROM: Lauren Gailey, Rules Law Clerk (with research and drafting assistance from Derek Webb, former Attorney Advisor, Rules Committee Support Office)

DATE: March 30, 2017

RE: Surveys of (I) attorney literature pertaining to Fed. R. Civ. P. 30(b)(6); (II) case law on the issue of whether corporate deponents' statements are "judicial admissions"; and (III) local and state procedural rules governing corporate depositions

Federal Rule of Civil Procedure 30(b)(6) authorizes a party to depose "a public or private corporation, a partnership, an association, a governmental agency, or other entity." The notice served on that organization "must describe with reasonable particularity the matters for examination," and the organization must then designate a real person to testify on its behalf. FED. R. CIV. P. 30(b)(6). Originally, the discovering party bore the burden of identifying a deponent capable of addressing the noticed topics. *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendments. This presented an opportunity for gamesmanship, in which deponent after deponent could disclaim knowledge of facts clearly known to *someone* in the organization. *See id*; *Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998). The 1970 amendments aimed to curb this "bandying" by requiring the organization to name a deponent capable of testifying "about information known or reasonably available to the organization." *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendments.

Although "[n]ormally the process operates extrajudicially," *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 79 (D.D.C. 1999), *rev'd in part on other grounds*, 271 F.3d 1101 (D.C. Cir. 2001), Rule 30(b)(6) seems to have become a flash point for litigation, having been cited in nearly 8,300 decisions.¹ It has appeared on the Civil Rules Advisory Committee's agenda three times in eleven years at the request of various bar groups claiming either 30(b)(6) witnesses were

¹ There is some anecdotal evidence to the contrary: several district judges have reported during various committee and subcommittee meetings that they are rarely called upon to resolve disputes over 30(b)(6) depositions. But the number of Rule 30(b)(6) decisions is undoubtedly large and continues to grow: a December 2016 Lexis "Shepard's" search yielded approximately 7,900 citing references, and another on February 9, 2017 returned 8,067. By March 30, the number had already climbed to 8,291. Nearly twenty years ago, Professor Kent Sinclair and litigator Roger Fendrich developed a theory to explain this apparent proliferation:

The burdens of depositions under [Rule 30(b)(6)] are so great and the potential for case-altering sanctions so near the surface of the proceedings, that authoritative rulings are avidly sought. This conjunction of factors may explain, in part, the frequency with which "clarifications" are sought of rulings bearing on compliance with Rule 30(b)(6) obligations.

Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 737-38 (1999) (footnotes omitted).

routinely unprepared, or the burden of preparing them was unreasonable. In 2006 and 2009, the advisory committee concluded that most of the problems complained of were attributable to behavior that could not be effectively addressed by rule. In January 2016, a group of attorneys from the American Bar Association Section of Litigation’s Federal Practice Task Force requested that the advisory committee again consider amending Rule 30(b)(6). *See* Jeffrey J. Greenbaum, et al., *Taking Rule 30(b)(6) Corporate Depositions: Should the 45-Year-Old Rule Be Changed?* 9–10 (A.B.A. SEC. OF LITIG., BUS. L. SEC. AND CTR. FOR PROF. DEV., presentation materials, May 10, 2016).²

This subcommittee was formed to consider whether a rule amendment addressing these problems might be feasible. In response to a request from the subcommittee, this memorandum provides surveys of:

- I. Attorney literature discussing Rule 30(b)(6);
- II. Case law on the issue of whether 30(b)(6) deponents’ statements are “judicial admissions”; and
- III. Local and state procedural rules governing corporate depositions.

I. Attorney Literature Review

Conclusions: Most attorney literature provides “practice pointers” rather than calling for a change to Rule 30(b)(6). Both the plaintiffs’ and defense bars are generally content to operate within the existing framework.

A. Calls for a Rule Change Tend To Be Confined to the Academy.

The topic of Rule 30(b)(6) corporate depositions has been explored frequently in attorney literature over the past several years. Overall, the practical literature over the past decade on the subject of Rule 30(b)(6) depositions speaks approvingly of the rule as currently written. Attorneys generally make a point of contrasting the rule with the pre-1970 “bad old days” of “bandying” between corporate representatives who may or may not have relevant information. *But see* James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYLOR L. REV. 938, 1032 (2013) (“Organization depositions under Federal Rule 30(b)(6) are largely all risk and no gain for the organization presenting the witness. Individual parties . . . are still free under the rules to ‘bandy about,’ denying personal knowledge and referring their opponents to discovery from others, their experts, etc., while corporations have been held obligated to seek out information even in the hands of third parties and present it to the interrogating party.”).

The general consensus seems to be that, on the whole, the burden-shifting framework of Rule 30(b)(6) has resulted in fairer notice to organizational defendants and better-prepared

² In the interest of readability, links to internet sources have been omitted from all citations. Instead, the links are embedded in the full citations to those sources.

deponents. *See, e.g.*, Nathaniel S. Boyer, *Going Rogue in a 30(b)(6) Deposition: Whether It's Permissible, and How Defending Counsel Should Respond* 1 (A.B.A. SEC. OF LITIG. 2012 SEC. ANN. CONF., presentation materials, Apr. 18–20, 2012) (“All in all, it’s a success story for U.S. litigation efficiency.”). For example, an article in an ABA Section of Litigation publication argued that the burden-shifting regime under Rule 30(b)(6), in which both parties have certain obligations (i.e., describing with reasonable particularity in the notice, and designating and preparing a deponent), is superior to interrogatories and individual depositions because it prevents evasion and bandying among uninformed officers. Eric Kinder & Walt Auvil, *Rule 30(b)(6) at 45: Is It Still Your Friend?*, A.B.A. SEC. OF LITIG. – PRETRIAL PRAC. & DISCOVERY (Dec. 3, 2015). *But see* Joseph W. Hovermill & Jonathan A. Singer, *A Solution to Complex Problems in 30(b)(6) Depositions*, LAW 360 (July 18, 2012, 1:49 PM) (concluding that “[t]he better approach” is to require written discovery in lieu of corporate depositions “where there is simply too much information for a corporate representative to sufficiently learn”). For those reasons, “[f]orty-five years after its adoption, Rule 30(b)(6) continues to perform the role envisioned by the advisory committee in 1970. The rule remains a valuable aid in focusing discovery efforts more efficiently than would be possible in its absence.” Kinder & Auvil, *supra*; *see also* John J. Hickey, *Why the Corporate Representative May Be the Most Neglected Key Witness . . . and How They Can Make Your Case* (AM. ASS’N FOR JUST. ANN. CONV., presentation materials, July 2014).

At the same time, many attorneys concede that Rule 30(b)(6) has also created problems, such as “bickering and contentious behavior” and “[m]otions practice on discovery issues” like the scope of the notice and the relevance of the questions. *See* Collin J. Hite, *The Scope of Questioning for a 30(b)(6) Deposition*, LAW 360, (July 13, 2011, 1:20 PM); *see also* Winton, *supra*, at 941–42 (discussing hypothetical based on typical confrontation over plaintiff’s counsel’s questions); *see also* John Maley, *Federal Bar Update: Rule 30(b)(6) Depositions*, IND. L. (July 2, 2014) (“In practice, disputes sometimes arise regarding the sufficiency of the witness’s knowledge.”). Other attorneys—particularly defense counsel—have pointed out that the Rule contains “traps for the unwary.” *See* Howard Merten & Paul Kessimian, *Tough Issues in 30(b)(6) Depositions* 2, (FDCC CONNECT AND LEARN WEBINAR, presentation materials, Mar. 26, 2015); *accord* Carter E. Strang & Arun J. Kottha, *A Trap for the Unwary: Notice, Selection, Preparation, and Privilege Issues for Corporate Representative Depositions*, IN-HOUSE DEF. Q., Spring 2010, at 25–29, 60 [hereinafter Strang & Kottha, *Trap*].

However, calls for an actual change to or repeal of Rule 30(b)(6) in recent years have largely been confined to law reviews. *See, e.g.*, Kelly Tenille Crouse, *An Unreasonable Scope: The Need for Clarity in Federal Rule 30(b)(6) Depositions*, 49 U. LOUISVILLE L. REV. 133 (2010); Amy E. Hamilton & Peter E. Strand, *Corporate Depositions in Patent Infringement Cases: Rule 30(b)(6) Is Broken and Needs To Be Fixed*, 19 INTELL. PROP. & TECH. L.J. 5 (2007); Craig M. Roen & Catherine O’Connor, *Don’t Forget To Remember Everything: The Trouble with Rule 30(b)(6) Depositions*, 45 U. TOLEDO L. REV. 29 (2013); Sinclair & Fendrich, *supra* note 1. *But see* Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal for a Change*, 46 FED’N INS. CORP. COUNS. Q. 365 (1996).

B. Most Attorney Literature Concerns Practice Pointers.

Overwhelmingly, the focus of the practical literature from both the plaintiffs' and defense perspectives has been finding ways to make the current version of the rule serve their respective causes. Practice tips abound for attorneys drafting notices or preparing corporate deponents. Most articles and CLE presentations on the subject of 30(b)(6) depositions have been decidedly "partisan." See, e.g., Hickey, *supra* (plaintiff's side); Mark R. Kosieradzki, *Using 30(b)(6) To Win Your Case* (TRIAL GUIDES DVD, 1st ed., Oct. 2016) (same); David R. Singh & Isabella C. Lacayo, *A Practical Guide to the Successful Defense of a 30(b)(6) Deposition*, VERDICT, Spring 2009 (defense side); David J. Shuster, *Corporate Designee Depositions: A Primer for In-House Counsel*, KRAMON & GRAHAM (Oct. 2013) (same); Strang & Kottha, *Trap, supra* (same).

From the plaintiffs' perspective, a popular topic for articles and CLE presentations is practical advice for obtaining statements from corporate deponents that can be turned into "judicial admissions" at summary judgment or trial.³ See, e.g., Charles H. Allen & Ronald D. Coleman, *Deposing Rule 30(b)(6) Corporate Witnesses: Preparing the Deposition Notice, Questioning the Corporate Representative, Raising and Defending Objections, and More* (STRAFFORD, webinar presentation materials, Dec. 8, 2015); Bailey King & Evan M. Sauda, *Using 30(b)(6) Depositions To Bind Corporations*, DRI'S FOR THE DEFENSE, Mar. 2012 ("The advantages of a 30(b)(6) deposition are that it allows a deposing party seeking discovery simply to provide a list of deposition topics shifting the burden to the corporation to designate one or more suitable spokespersons on those topics, and those spokespersons' testimony will bind the corporation."); Kosieradzki, *supra*; Ken Shigley, *7 Reasons Insurance Defense Lawyers Hate 30(b)(6) Depositions in Trucking Cases 1*, ATLANTA INJURY LAWYER (Apr. 2015) (dubbing the 30(b)(6) deposition the "Death Star deposition" because, "[i]f all the stars align," it "may strip away the filters that result from laziness, lack of motivation, dissembling and evasiveness, and . . . creat[e] . . . a series of sound bites of admissions and transparent evasions to play at trial").

Much of the relevant defense bar literature focuses on narrowing the scope of the deposition notice and limiting the number of topics addressed.⁴ See, e.g., Chad Colton, *The Art of Narrowing Rule 30(b)(6) Deposition Notices*, MARKOWITZ HERBOLD; Michael S. Cryan, *The Scope of Rule 30(b)(6) in the Examination of Corporate Deponents*, L.A. LAW., Apr. 2010, at 15–16, 18; Neil Lloyd & Christina Fernandez, *Refining and Then Sticking to the Topic: Making Representative Party Depositions under Fed. R. Civ. P. 30(b)(6) Fairer and More Efficient*, 83 U.S.L.W. 1026 (2015); Merten & Kessimian, *supra*, at 15; Carter E. Strang and Arun J. Kottha, *Corporate Representative Depositions: Notice Provision of Rule 30(b)(6)*, INTER ALIA, Spring 2009, at 1, 14–15; Strang & Kottha, *Trap, supra*. The defense bar acknowledges, however, that this is an uphill battle, as courts have generally permitted questions that exceed the bounds of the notice as long as they remain

³ For a survey of recent case law on the "judicial admissions" issue, see *infra* Part II.

⁴ Other defense topics include corporate-witness preparation. See, e.g., Martin D. Beier, *Organizational Avatars: Preparing CRCP 30(b)(6) Deposition Witnesses*, 43 COLO. L. 39 (Dec. 2014); Merten & Kessimian, *supra*, at 6–17 (discussing selection and preparation of witness and documents); Eric L. Probst, *How To Defend Rule 30(b)(6) Product Liability Depositions Successfully*, L.J.N.'S PROD. LIAB. L. & STRATEGY, Oct. 2015, at 1–4, 6; Singh & Lacayo, *supra*, at 2; Bailey Smith, *Preparing a Rule 30(b)(6) Representative for Deposition*, A.B.A. LITIG. NEWS, Summer 2010.

within the scope of discovery. *See, e.g., Hite, supra* (although defense counsel “often take pains to limit the scope of the testimony, . . . under the well-reasoned majority rule that effort is futile”); *see also Merten & Kessimian, supra*, at 17 (at best, “[f]ederal courts are split” as to whether the deponent can be questioned about matters beyond those listed in the notice). Universally, attorneys agree that instructing a witness not to answer questions outside the scope of the notice is improper in the absence of privilege. *See, e.g., Boyer, supra*, at 4; *Cryan, supra*, at 15; *Hite, supra*; *accord Kinder & Auvil, supra* (“While defense counsel have a number of options” when plaintiff’s counsel asks a question outside the scope of the deposition notice, “courts have been clear that merely instructing the witness not to answer is not one of those options.”).

Other articles are more neutral, and aim to expedite and streamline the corporate deposition process for *both* sides. *See, e.g., Michael R. Gordon & Claudia De Palma, Practice Tips and Developments in Handling 30(b)(6) Depositions* (A.B.A. SEC. OF LITIG., SEC. ANN. CONF., presentation materials, Apr. 9–11, 2014)⁵; *Kinder & Auvil, supra* (“Responsibilities under Rule 30(b)(6) are mutual.”). For example, an article by a Magistrate Judge Iain Johnston of the Northern District of Illinois suggested the parties work together *before* the 30(b)(6) deposition to clarify the scope of the notice and establish, in writing, what their respective concerns are and whether a protective order will be necessary. Iain D. Johnston, *A Modest Proposal for a Better Rule 30(b)(6) Deposition*, ILL. ST. B. ASS’N—FED. CIV. PRAC., June 2015, at 2; *accord Hite, supra* (“The better method is to work with opposing counsel to structure the deposition . . .”). This gives the court an opportunity to fashion a remedy early in the process and might obviate the need for judicial intervention entirely. *See Johnston, supra*.

II. The “Judicial Admissions” Issue

Conclusions: Courts are not monolithic as to whether Rule 30(b)(6) deponents’ statements bind corporations in the sense of “judicial admissions.” The strong majority position is that they do not, and may be contradicted at trial like any other evidentiary admission. The courts holding otherwise have done so to effectively “sanction” organizations for failing to prepare their witnesses.

As the review of attorney literature makes clear, practitioners are keenly interested in whether a court will deem a corporate deponent’s testimony a “judicial admission.” The distinction between “judicial admissions” and “ordinary evidentiary admissions” is critical. *See* 6 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 801:26 (7th ed. 2014). “Evidentiary admissions” are statements “by a party-opponent [that] are excluded from the category of hearsay.” *See* FED. R.

⁵ There seems to be a difference of opinion within the ABA Section of Litigation as to whether Rule 30(b)(6) should be changed. Although some members are advocating for change, *see Greenbaum, et al., supra*, many others seem content to operate within the existing framework. *See, e.g., Boyer, supra*; *Gordon & De Palma, supra*, at 1–2 (although Rule 30(b)(6) “has evolved into something different than what its creators no doubt envisioned,” it nonetheless “embodies the ultimate aim of the Federal Rules of Civil Procedure . . . to ‘secure the just, speedy, and inexpensive determination of actions and proceedings’” (quoting FED. R. CIV. P. 1)); *Kinder & Auvil, supra*; *Singh & Lacayo, supra*; *Smith, supra* note 4.

EVID. 801(d)(2). Practically speaking, evidentiary admissions have been “made by a party” and therefore “can subsequently be used in a trial against that party.” Ediberto Roman, “*Your Honor What I Meant To State Was . . .*”: A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP. L. REV. 981, 983, 985 (1995). At trial, the party can “put himself on the stand and explain his former assertion.” 4 JOHN HENRY WIGMORE ET AL., WIGMORE ON EVIDENCE § 1048 (3d ed. 1972).

On the other hand, “[j]udicial admissions are not evidence at all.” 2 MCCORMICK ON EVIDENCE § 254 (Kenneth S. Broun et al. eds., 7th ed. 2006). They go further than evidentiary admissions toward establishing a fact, in that “[a] judicial admission *concedes* a fact, removing [it] from any further possible dispute.” Roman, *supra*, at 984 (emphasis added). The fundamental difference is this: an evidentiary admission “is subject to contradiction or explanation,” while a judicial admission is not. MCCORMICK ON EVIDENCE, *supra*, § 254.

Judicial admissions generally occur in the context of pleadings, summary judgment motions, responses to requests to admit served during discovery, stipulations of fact, and statements made in open court. HANDBOOK OF FEDERAL EVIDENCE, *supra*, § 801:26. Nevertheless, the argument persists that a corporate designee’s statements in the course of a Rule 30(b)(6) deposition should be included in this group. *See id.* (“Occasionally a party while testifying . . . during a deposition . . . admits a fact which is adverse to his claim or defense. A question then arises as to whether such a statement may be treated as a judicial admission binding the party . . .”). Because “binding a party” to a Rule 30(b)(6) deponent’s statement (or inability to formulate one) by precluding the introduction of contrary testimony at trial can have grave consequences for that party, the high degree of interest among practitioners is not surprising. *See generally* Roman, *supra*. Another natural consequence is that the “judicial admissions” issue has been extensively litigated.⁶

The courts that have considered the issue have split, although the overwhelming majority—including all of the courts of appeals to directly address it—has concluded that admissions made during 30(b)(6) depositions are evidentiary rather than judicial in nature. These courts have permitted the corporate party to introduce trial testimony that contradicts or supplements its designee’s deposition testimony.⁷ Nevertheless, *Rainey v. American Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), a seminal district court case reaching the opposite conclusion, remains influential. *See infra* Part II-B. However, a closer inspection of decisions barring parties from contradicting their 30(b)(6) deponents’ statements reveals that it is imprecise to characterize them as approving of the “judicial admissions” approach. In these cases, which tend to involve unusually evasive behavior or extreme lack of preparation on the part of the corporate party, barring contradictory evidence has been used as a sanction rather than a true judicial admission.

⁶According to a March 22, 2017 Lexis search, the “judicial admissions” issue has been addressed more than a hundred times in federal court since 1991.

⁷The majority of courts’ refusal to treat a corporate deponent’s statements as judicial admissions is in accord with the prevailing view among legal scholars, who generally disfavor judicial admissions. *See, e.g.*, HANDBOOK OF FEDERAL EVIDENCE, *supra*, § 801:26 (“[T]reating a party’s testimony . . . as solely an evidentiary admission is preferable.”).

A. Majority Position: 30(b)(6) Deponent’s Statements Are Not Judicial Admissions

The majority of courts to decide the issue—including four courts of appeals—have concluded that a Rule 30(b)(6) deponent’s testimony should have the effect of an evidentiary admission rather than a judicial admission. In *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630 (7th Cir. 2001), the U.S. Court of Appeals for the Seventh Circuit became the first federal appellate court to weigh in on the “judicial admissions” issue. A.I. Credit, a finance company, sued a number of insurers and their representatives, claiming it had been fraudulently induced to agree to finance a struggling company that soon went bankrupt. *Id.* at 632–33. One of the representatives, William McPherson, argued in his motion for summary judgment that A.I. Credit’s evidence connecting him to the fraud was inadmissible. *Id.* at 632, 637. According to McPherson, Miles Holsworth, the bankrupt company’s controller, had testified that McPherson participated in the conference call that led to the financing agreement. *Id.* at 633, 637. However, the plaintiff’s 30(b)(6) witness, John Rago, testified that he, too, had been on the call, but also testified that he had never spoken to McPherson. *Id.*

In his summary judgment motion, McPherson argued that A.I. Credit should be precluded from introducing Holsworth’s testimony that McPherson was on the call because the testimony of its 30(b)(6) witness, Rago, suggested that he was not. *See id.* at 637. The Seventh Circuit rejected McPherson’s theory that Rule 30(b)(6) “absolutely bind[s] a corporate party to its designee’s recollection unless the corporation shows that contrary information was not known to it or was inaccessible.” *Id.* Following two influential district court cases, the court concluded that “[n]othing in the advisory committee notes indicates that the Rule goes so far.” *Id.* (citing *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) and *United States v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996)).

After *A.I. Credit*, the “judicial admissions” issue went somewhat dormant at the appellate level for more than a decade. It reemerged in 2013, when the U.S. Court of Appeals for the Eighth Circuit followed the Seventh Circuit in *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013). The case involved a constitutional challenge to a state law imposing a residency requirement upon liquor wholesalers. *Id.* at 802. The State’s 30(b)(6) designee “did not mount the most vigorous defense” of the residency requirement when he “testified that he did not ‘think’ that the residency rule ‘impacts the distribution system,’” and “could not ‘think of any’ relationship between the residency requirement and the safety of Missouri citizens.” *Id.* at 811. Nevertheless, Judge Colloton, writing for a unanimous panel, concluded that the testimony was ultimately “not as devastating” to the State’s case as the challenger argued. *Id.* Judge Colloton cited *A.I. Credit* and a Third Circuit case, *AstenJohnson, Inc. v. Columbia Casualty Co.*, 562 F.3d 213 (3d Cir. 2009), for the respective propositions that “a designee’s testimony likely does not bind a State in the sense of a judicial admission,” and “[a] 30(b)(6) witness’s legal conclusions are not binding on the party who designated him.” *Id.* at 811–12; *see also infra* Part II-C (discussing *AstenJohnson*).

The U.S. Court of Appeals for the Second Circuit reached the same conclusion two years later in *Keepers, Inc. v. City of Milford*, 807 F.3d 24 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 277

(2016), where Rule 30(b)(6) was more squarely at issue. *Keepers* also involved a government deponent testifying in support of a challenged law (here, a municipal ordinance), but on this occasion the 30(b)(6) witness “was unable to answer various questions” rather than supplying contradictory testimony. *Id.* at 27, 32. Like the Eighth Circuit, the Second Circuit acknowledged that “the process by which [the city] ultimately answered [the challenger’s] questions was not a route that is to be preferred,” but permitted the city to supplement the deponent’s answers with an affidavit. *Id.* at 36–37. Although the challenger was correct “that an organization’s deposition testimony is ‘binding’ in the sense that whatever its deponent says can be used against the organization,” the court concluded that “Rule 30(b)(6) testimony is not ‘binding’ in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements.” *Id.* at 34. Again, the court relied on *AstenJohnson* and *A.I. Credit*, and it echoed the Seventh Circuit’s rationale for permitting an organization to offer additional evidence at trial to supplement its 30(b)(6) designee’s testimony:

Nothing in the text of the Rule or in the Advisory Committee notes indicates that the Rule is meant to bind a corporate party irrevocably to whatever its designee happens to recollect during her testimony. Of course, a party whose testimony “evolves” risks its credibility, but that does not mean it has violated the Federal Rules of Civil Procedure.

Id. at 34–35 (footnotes omitted). The court discounted the challenger’s policy arguments, reasoning that even though “some deponents will, of course, try to abuse Rule 30(b)(6) by intentionally offering misleading or incomplete responses, then seeking to ‘correct’ them by offering new evidence after discovery,” remedies such as sanctions and the “sham-affidavit rule” are already available. *Id.* at 35–36. The court “ha[d] no trouble concluding” that the district court did not abuse its discretion by admitting the affidavit. *Id.* at 37.

Most recently, the U.S. Court of Appeals for the Tenth Circuit “agree[d] with [its] sister circuits that the testimony of a Rule 30(b)(6) witness is merely an evidentiary admission, rather than a judicial admission.” *Vehicle Mkt. Research, Inc. v. Mitchell Int’l, Inc.*, 839 F.3d 1251, 1261 (10th Cir. 2016). The case arose in the context of a proposed jury instruction stating in part, “The corporation cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative.” *Id.* at 1259. The court rejected this statement of the law and held that the district court did not abuse its discretion by striking that sentence from the proposed instruction. *Id.* The court of appeals clarified that the instruction’s proponent had mischaracterized the cases and treatises it relied on, which, properly read, “make clear that [barring contradictory evidence] is limited to the context in which an affidavit conflicts with the Rule 30(b)(6) deposition *without good reason.*” *Id.* at 1260; *see also infra* Part II-B.

The leading federal civil procedure treatises are in accord. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103 (3d ed. 2010) (“Of course, the testimony of the representative designated to speak for the corporation are admissible against it. But as with any other party statement, they are not ‘binding’ in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial.” (footnotes omitted)); 7-30 JAMES WILLIAM MOORE ET AL., MOORE’S FEDERAL PRACTICE –

CIVIL § 30.25[3] (2016) (“[T]he testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not ‘irrevocably’ bound to what the fairly prepared and candid designated deponent happens to remember during the testimony.” (footnotes omitted)).

B. Minority Position: Under Some Circumstances, a Corporation May Not Be Permitted To Contradict Its Deponent’s Statements (or Silences)

The leading case reaching the contrary conclusion is *Rainey v. American Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), in which the U.S. District Court for the District of Columbia refused to consider at summary judgment an affidavit that contradicted statements the defendant employer’s designee made during a 30(b)(6) deposition. *Id.* at 93–96. The plaintiff claimed to have been denied overtime payments as a result of being misclassified as “exempt” under the Fair Labor Standards Act. *Id.* at 86–87. The employer’s 30(b)(6) witness was unable give “an informed answer” to many questions about the plaintiff’s specific job duties, and claimed that her job functions were “exempt in character” but could not provide details as to why; the functions he *was* able to describe supported the opposite conclusion. *Id.* at 92–93. At summary judgment, the employer tried to introduce as additional evidence of the plaintiff’s exempt status a more detailed, knowledgeable affidavit from the plaintiff’s former supervisor, whom the employer claimed it could not designate under Rule 30(b)(6) because she had since left the company. *Id.* at 93–94.

The district court held that Rule 30(b)(6) “precluded” the employer from introducing the affidavit at the “eleventh hour.” *Id.* at 94–95. The court reasoned that the employer had failed to adequately prepare its designee as the Rule requires, and interpreted the employer’s subsequent introduction of the affidavit as an attempt to “proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.” *Id.* at 94. The court viewed the employer’s later “revis[ion of] the positions taken at the 30(b)(6) depositions” by one employee with the affidavit of another as precisely the kind of “bandying” that Rule 30(b)(6) “aims to forestall.” *Id.* at 94–95. Instead, the Rule “binds the corporate party to the positions taken by its 30(b)(6) witnesses” to prevent “trial by ambush.” *Id.* at 95. The court declined to consider the affidavit for summary judgment purposes, concluding that “Rule 30(b)(6) requires such relief” because the employer failed to show “that the affidavit’s particular allegations were not ‘reasonably available’ at the time of the depositions.” *Id.* at 95–96.

Some courts have rejected *Rainey* outright. *See, e.g., A.I. Credit*, 265 F.3d at 637 (permitting 30(b)(6) witness’s testimony to be contradicted “is the sounder view”); *Whitesell Corp. v. Whirlpool Corp.*, No. 05-679, 2009 U.S. Dist. LEXIS 101106, at *4 n.1 (W.D. Mich. Oct. 30, 2009) (concluding “the better approach” is that deeming a corporation “bound by the testimony of its designee does not also compel the conclusion that no contradictory evidence is permissible”).

Other courts declining to follow *Rainey* have noted that it does not categorically bar all evidence contradicting 30(b)(6) testimony, and its circumstances were somewhat extreme. *See, e.g.,*

Beauperthuy v. 24 Hour Fitness U.S., Inc., No. 06-715, 2009 U.S. Dist. LEXIS 104906, at *21 (N.D. Cal. Nov. 10, 2009) (“*Rainey* does not suggest that an inadequate Rule 30(b)(6) deposition may categorically preclude a party from bringing any evidence—indeed, the *Rainey* court found only that a single, specific affidavit was inappropriate, and discussed a variety of other types of evidence that Defendants offered to support their affirmative defense without suggesting that they were precluded by the inadequate deposition.”); *Mid-State Sur. Corp. v. Diversified Enter.*, No. 05-72, 2005 U.S. Dist. LEXIS 38687, at *29–30 (S.D. W. Va. Dec. 12, 2005) (rejecting argument that *Rainey* “stand[s] for the proposition that the failure of a corporation to provide an educated witness is, in and of itself, grounds for summary judgment” and distinguishing on the grounds that “this is not the case, as it was in *Rainey*, where a corporation was trying to avoid summary judgment by introducing new evidence that was clearly contrary to the testimony of its 30(b)(6) representative”).

Another aspect of *Rainey* that limits its reach is that the court strongly suggested its true purpose in barring the affidavit was punitive. See 26 F. Supp. 2d at 95 (finding employer’s conduct in either designating the wrong person or failing to prepare its witness “clearly violated Rule 30(b)(6)”). *Wright, Miller & Marcus* has described the exclusion of evidence as a consequence of failing to prepare a 30(b)(6) witness as a “sanction.” See FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2103 (“A court might . . . sanction a party that has failed to satisfy its Rule 30(b)(6) duties by limiting the evidence it could present . . . by forbidding it from calling witnesses who would offer testimony inconsistent with that given by the one it designated . . .”). In this sense, then, the *Rainey* court’s decision to bar the affidavit was not a true “judicial admission” at all.

Another district court decision reaching the same result as *Rainey* supports this theory. During the 30(b)(6) deposition in *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000), a products liability action, the defendant manufacturer’s designee “attested under no uncertain terms” that the defendant had manufactured the hammer at issue. *Id.* at 992. More than six months later, the manufacturer submitted an affidavit and report from one of its engineers concluding that it had *not* manufactured the hammer. *Id.* The court struck the affidavit and report, reasoning that the manufacturer “should not be allowed to defeat [the plaintiff’s] motion for summary judgment based upon its self-serving abuse of a Rule 30(b)(6) deposition.” *Id.* at 993. It allowed for the possibility of an exception for “contradictory or inconsistent affidavit[s]” that are “accompanied by a reasonable explanation,” but found that it did not apply. *Id.*

The *Hyde* court found the affidavit directly contradicting the 30(b)(6) testimony was “plainly” an example of the recurring (yet ineffective) sham-affidavit tactic at summary judgment: “where the non-movant . . . submits an affidavit which directly contradicts an earlier deposition and the movant has relied upon and based its motion on the prior deposition, courts may disregard the later affidavit.” *Id.*; accord *Keepers*, 807 F.3d at 35 (“[T]he ‘sham-affidavit rule’ prevents a party from manufacturing an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant’s previous deposition testimony.”). *Hyde* therefore fits neatly into the group of Rule 30(b)(6) cases standing for the unremarkable proposition that a non-movant organization cannot create a genuine issue of material fact sufficient to defeat summary judgment by introducing affidavits that contradict its own 30(b)(6) testimony. See *Vehicle Market Research*, 839 F.3d at 1259–60 (collecting cases excluding affidavits that

“conflict[] with the Rule 30(b)(6) deposition *without good reason*”); *see also* MOORE’S FEDERAL PRACTICE, *supra*, § 30.25[3] & n.15.2 (“[T]he entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know.”).

Although some have argued that *Hyde* effectively spread the *Rainey* “judicial admission” approach to the Fifth Circuit, *see, e.g.*, Greenbaum, *supra*, at 26, that conclusion is not airtight. Most obviously, *Hyde* did not cite *Rainey* at all; it primarily relied on *Taylor*, *see infra* Part II-C, and a District of Kansas sanctions case in which the 30(b)(6) “deposition reflect[ed] inadequate preparation and knowledge” as to two of the topics listed on the deposition notice. *See Hyde*, 107 F. Supp. 2d at 992–93 (citing *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999) (finding “sanctionable misconduct” where deponent “failed to make necessary inquiries about relevant topics” and “made no effort to review his own files”). In any case, even if *Hyde* could be interpreted so broadly as to suggest that it endorsed the rule read (fairly or not) into *Rainey* that a 30(b)(6) designee’s statements are judicial admissions, district courts in the Fifth Circuit do not seem to consider themselves bound by either precedent or comity to follow it. *See, e.g.*, *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 698 (S.D. Tex. 2009) (“A Rule 30(b)(6) deposition . . . is not ‘binding’ on the entity for which the witness testifies in the sense of preclusion or judicial admission.” (citing *Wright, Miller & Marcus* and *A.I. Credit*)).

C. Other Courts Seem Reluctant To Expand the “Judicial Admissions” Approach

In the other circuits, there is either no binding appellate precedent, or the court of appeals has not given a straightforward answer to the broad question whether a 30(b)(6) deponent’s statements are “judicial admissions.” The holding in the leading Third Circuit case is more limited: the Court of Appeals in *AstenJohnson, Inc. v. Columbia Casualty Co.*, 562 F.3d 213 (3d Cir. 2009), declined to hold that a *legal conclusion* made by a designee during a 30(b)(6) deposition precluded the corporation from producing at trial evidence contradicting that position. *Id.* at 229 n.9. *AstenJohnson* found persuasive a pre-*Southern Wine* Eighth Circuit case that drew a distinction based on whether a 30(b)(6) witness’s “admissions” concerned “matters of fact [or] conclusions of law.” *See id.* (citing *R & B Appliance Parts, Inc., v. Amana Co.*, 258 F.3d 783, 787 (8th Cir. 2001)). It remains an open question whether the Third Circuit would bar evidence contradicting *facts* to which a 30(b)(6) witness had testified. *See id.*

Both before and after *AstenJohnson*, district courts in the Third Circuit have rejected the minority position that a 30(b)(6) deponent’s statements have the effect of judicial admissions. *See, e.g.*, *Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*, 40 F. Supp. 3d 437, 451 (E.D. Pa. 2014) (“Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness.”); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008) (“[T]he testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party.” (quoting *Wright, Miller & Marcus*)); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 722 n.17 (M.D. Pa. 2006) (declining to bar evidence of damages at trial where 30(b)(6) designee “was unable to fully answer

questions about damages” during deposition). *But see Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 U.S. Dist. LEXIS 11320, at *8 (E.D. Pa. Aug. 13, 1991) (holding that corporate defendant “will not be allowed effectively to change its answer by introducing evidence during trial” where designee “does not know the answer to plaintiffs’ questions”).

District courts in the Fourth Circuit have reached contrary—but reconcilable—conclusions. The influential case of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996), adopted the position that “answers given at a Rule 30(b)(6) deposition are not judicial admissions.” *Id.* at 363. A more recent District of Maryland case used sanctions language to explain that, “depending on the ‘nature and extent of the obfuscation, the testimony given by [a] non-responsive deponent (e.g., ‘I don’t know’) may be deemed ‘binding on the corporation’ so as to prohibit it from offering contrary evidence at trial.” *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 685 (D. Md. 2012) (alteration in original) (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005)). *Wilson* in turn relied on both *Rainey* and *Taylor*. 228 F.R.D. at 530 (citing *Rainey*, 26 F. Supp. 2d at 94–95, and *Taylor*, 166 F.R.D. at 362). The takeaway from the District of Maryland cases appears to be this: a corporate deponent’s 30(b)(6) admissions will generally not preclude the introduction of contradictory evidence—unless the corporate party’s “obfuscation” demands punishment. A district court in the Eleventh Circuit is in accord. *Cont’l Cas. Co. v. First Fin. Emp. Leasing, Inc.*, 716 F. Supp. 2d 1176, 1190–91 (M.D. Fla. 2010) (“Although preclusion may be imposed as a sanction, it does not follow automatically from the nature of Rule 30(b)(6) testimony.”).

A district court in the Sixth Circuit acknowledged *Rainey*’s ambiguity and concluded that cases squarely rejecting the notion that “binding” a corporation with 30(b)(6) testimony means “no contradictory evidence is permissible” at trial “take the better approach.” *Whitesell*, 2009 U.S. Dist. LEXIS 101106, at *3–4 & n.1. The court explained:

The Federal Rules of Civil Procedure not only permit but encourage parties to revise and update information throughout the discovery process. To the extent evidence . . . offered at trial contradicts the testimony and exhibits offered during the 30(b)(6) deposition, Defendant can use that deposition testimony for impeachment purposes, and in this sense Plaintiff is “bound” by it. To the extent evidence . . . offered at trial merely clarifies and updates the testimony and exhibits offered during the 30(b)(6) deposition, no rule of evidence or civil procedure requires its exclusion on that basis alone.

Id. at *4–5 (citation omitted).

A district court in the First Circuit also declined to bar testimony from being introduced. In *Neponset Landing Corp. v. Northwestern Mutual Life Insurance Co.*, 279 F.R.D. 59 (D. Mass. 2011), the designee provided testimony on thirty of the thirty-six noticed topics and “prepared for the deposition by reviewing the documents and exhibits.” *Id.* at 61. Again, the court framed its decision in terms of the degree of punishment warranted: “This was not a situation where the defendant’s conduct was tantamount to a complete failure of the corporation to appear at its

deposition. Accordingly, there is no adequate basis for imposing the very severe sanction of precluding [the corporate party] from introducing evidence at trial.” *Id.* (citation omitted).

Although the U.S. Court of Appeals for the First Circuit has yet to address the subject, it foreshadowed in different context *Neponset Landing*’s emphasis on proportionality, i.e., whether the corporation violated its duty to prepare egregiously enough to deserve so harsh a sanction as preclusion of evidence:

Because of their binding consequences, judicial admissions generally arise only from deliberate voluntary waivers that expressly concede for the purposes of trial the truth of an alleged fact. Although there is a limited class of situations where, because of the highly formalized nature of the context in which the statement is made, a judicial admission can arise from an “involuntary” act of a party, considerations of fairness dictate that this class of “involuntary” admissions be narrow.

United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975) (citation omitted).

The common themes that emerge from cases in the circuits that have yet to address the Rule 30(b)(6) “judicial admissions” issue are that these courts (1) have read *Rainey* narrowly, (2) have frequently declined to adopt or extend *Rainey*’s approach, and (3) view exclusion of evidence to supplement or contradict a 30(b)(6) witness’s incomplete or incorrect testimony as a sanction reserved for unusually obstructive conduct. It is clear that courts have not embraced a broad reading of *Rainey*.

Critically, no cases—even those barring supplemental, contradictory, or explanatory testimony, like *Rainey*—expressly hold that a Rule 30(b)(6) witness’s statements are judicial admissions.

III. Surveys of Local and State Rules

For the purposes of this memorandum, systematic surveys were conducted of the procedural rules governing corporate depositions in the ninety-four federal judicial districts and all fifty states (and the District of Columbia). While, not surprisingly, more experimentation can be found at the state level than among the federal district courts’ local rules, these surveys yield few groundbreaking conclusions.

A. Local Rules

Conclusions: Local rules supplementing Rule 30 primarily address administrative details and only rarely prescribe additional requirements for organizational depositions. A recurring area of variance is the number of days constituting “reasonable notice.”

In addition to local analogs to Civil Rule 30, the survey of the federal jurisdictions examined *all* mentions of depositions in the district courts' local rules and standing, general, and administrative orders. Procedures specific to individual judges were beyond the scope of this particular survey.⁸

Only two districts have local rules or orders specifically addressing corporate depositions. A District of South Carolina rule provides that a 30(b)(6) deposition “shall be considered as one deposition regardless of the number of witnesses presented to address the matters set forth in the notice.” D.S.C. Civ. R. 30.01. This is consistent with case law indicating that multiple deponents may be needed to satisfy the organization’s obligations under Rule 30(b)(6). *See, e.g., Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) (“[C]orporations have an ‘affirmative duty’ to make available as many persons as necessary to give ‘complete, knowledgeable, and binding’ answers on the corporation’s behalf.” (quoting *Reilly v. NatWest Mkt. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir.1999))); *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (“The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena.”).

The other local rule specific to corporate depositions is a provision of District of Wyoming Rule 30.1(b):

Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he has no knowledge, he or she shall submit, reasonably before the date noticed for the deposition, an affidavit so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action. The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness’s right to seek a protective order.

No other jurisdiction requires such an affidavit.

Although few local rules directly address 30(b)(6) depositions, many jurisdictions have local rules governing depositions generally; these apply to corporate depositions as well as depositions of other witnesses. *See, e.g.,* D. ME. R. 30 (technical specifications for video depositions); S.D. TEX. R. 30.1 (“stenographic recordation” of video depositions); E.D.N.Y. R. 30.3 (who may attend depositions); N.D. OHIO CIV. R. 30.1 (conduct of participants).

A significant percentage of these general rules define what constitutes “reasonable notice.” Six jurisdictions require at least fourteen days. *See* D. COLO. CIV. R. 30.1; M.D. FLA. R. 3.02; N.D. IND. R. 30-1(b); D. MD. App. A(9)(b); D.N.M. CIV. R. 30.1; D. WYO. CIV. R. 30.1(a). Four other

⁸ Judge James Donato’s standing order setting forth procedures and expectations for 30(b)(6) depositions is perhaps the most noteworthy. Standing Order for Discovery in Civil Cases before Judge Donato ¶ 16 (N.D. Cal. Apr. 25, 2014). Other judges have also adopted chambers rules regarding corporate depositions. *See, e.g.,* Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases before Judge William Alsup ¶ 23 (N.D. Cal. Mar. 17, 2016); Discovery Order ¶ 8 (D. Md. Apr. 9, 2013) (Grimm, J.) (limiting 30(b)(6) depositions to seven hours).

jurisdictions set a shorter time frame: the District of Kansas (seven days), D. KAN. R. 30.1, the Eastern District of Oklahoma (same), E.D. OKLA. CIV. R. 30.1(a)(2), the District of Delaware (ten days), D. DEL. R. 30.1, and the Eastern District of Virginia (generally eleven days), E.D. VA. R. 30(H). The longest notice period is twenty-one days, as required in the Western District of New York. *See* W.D.N.Y. CIV. R. 30(a). In other jurisdictions, the length of a “reasonable time” is a matter of geography. In the Southern District of Florida and the District of Columbia, the seven-day notice period is extended to fourteen days for out-of-state depositions and depositions taking place “more than 50 miles from the District,” respectively. S.D. FLA. R. 26.1(j); D.C. R. 30.1. The Eastern District of Virginia builds flexibility for geographical considerations into its eleven-day notice period, which “will vary according to the . . . urgency of taking the deposition . . . at a particular time and place.” E.D. VA. R. 30(H).

Local rules concerning “reasonable notice” frequently allow the parties, *see, e.g.*, N.D. IND. R. 30-1(b), the court, *see, e.g.*, D. KAN. R. 30.1, or both, *see, e.g.*, D.N.M. CIV. R. 30.1, to vary the time period. Others address counsel’s conduct in giving notice. *See, e.g.*, D. COLO. CIV. R. 30.1 (counsel “shall make a good faith effort to schedule [the deposition] in a convenient and cost effective manner” before noticing); D.N.M. CIV. R. 30.1 (“Counsel must confer in good faith regarding scheduling of depositions before serving notice of deposition.”).

There is no evidence of meaningful experimentation with Rule 30(b)(6) at the local level; even the two rules that do specifically apply to corporate depositions merely codify existing interpretations of the rule. However, there *is* some variance among local rules that define “reasonable notice” for the purpose of depositions generally (and, by extension, corporate depositions specifically).

B. State Rules

Conclusions: Although state rules governing corporate depositions generally track Rule 30(b)(6) irrespective of whether a given state expressly follows the federal rules, “describ[ing] with reasonable particularity the matters for examination” is mandatory in only twenty percent of states.

Unlike the federal district courts, the states are not bound by Civil Rule 30(b)(6), and are thus less homogeneous and have more freedom to experiment. Nevertheless, a survey of the rules governing organizational depositions in all fifty states reveals many common threads—chief among which is a willingness to use Rule 30(b)(6) as a “base.” Every state has a version of Rule 30(b)(6), and thirty states track it almost exactly.

Even the twenty states that do not follow the federal rule’s organization and numbering scheme have adopted rules similar in substance to Rule 30(b)(6). For example, Iowa’s civil rule governing noticing of depositions provides, in relevant part:

A notice or subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the witness will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

IOWA R. CIV. P. 1.707(5).

This Iowa rule also illustrates an important, and frequently-occurring, difference between Rule 30(b)(6) and many otherwise-similar state rules: whether “describ[ing] with reasonable particularity the matters for examination” in the deposition notice is mandatory or permissive. Rule 30(b)(6)’s notice provision uses mandatory language. FED. R. CIV. P. 30(b)(6) (“In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and *must* describe with reasonable particularity the matters for examination.” (emphasis added)). Only ten states, however, have adopted the federal notice requirement word for word. Forty states and the District of Columbia instead use permissive language, i.e., “may” rather than “must.” A typical formulation in these states is: “A party *may* in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.” MO. SUP. CT. R. 57.03(b)(4) (emphasis added); *see also, e.g.*, D.C. SUPER. CT. R. CIV. P. 30(b)(6) (“A party may in the party’s notice . . . describe with reasonable particularity the matters on which examination is requested.”); IOWA R. CIV. P. 1.707(5) (“A notice or subpoena may . . . describe with reasonable particularity the matters on which examination is requested.”); PA. R. CIV. P. 4007.1(e) (“A party may in the notice . . . describe with reasonable particularity the matters to be inquired into and the materials to be produced.”).

State rules differ from Rule 30(b)(6) in other noteworthy ways. For example, two states, Indiana and Ohio, place a different—and arguably heavier—burden on organizational witnesses than the federal rule does. Those rules both provide that the organization’s designee must be able to testify about information “*known or available* to the organization.” IND. R. TRIAL P. 30(B)(6) (emphasis added); OHIO R. CIV. P. 30(B)(5) (emphasis added). Rule 30(b)(6) defines the duty more flexibly; the deponent must testify about information “known or *reasonably* available to the organization.” FED. R. CIV. P. 30(b)(6) (emphasis added). Another difference involves the time frame within which the organization must designate its witnesses. Whereas Rule 30(b)(6) does not set one, some states, such as Texas, require that the organization named in the notice must designate its witnesses within “a reasonable time before the deposition.” *See* TEX. R. CIV. P. 199.2(b)(1).

A few states have departed further from Rule 30(b)(6). One is New York, which in 2015 revised Rule 11(f) of the Rules of the Commercial Division of the Supreme Court to permit

depositions of entities and require organizations to provide knowledgeable witnesses. Rule 11(f) is the most detailed and recently-revised state rule, and is reprinted in full below:

Rule 11-f. Depositions of Entities; Identification of Matters.

- (a) A notice or subpoena may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.
- (c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition
 - (1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;
 - (2) such designation must include the identity, description or title of such individual(s); and
 - (3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.
- (d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:
 - (1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced;
 - (2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and
 - (3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates more than one individual, it must set out the matters on which each individual will testify.
- (e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.
- (f) The individual(s) designated must testify about information known or reasonably available to the entity.

- (g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.
- (h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

Although rules like this show that some states have experimented with rules governing organizational depositions, the general approach at the state level seems to be significant overlap with Civil Rule 30(b)(6)—but with potentially meaningful deviations in certain areas, such as the “reasonable particularity” requirement and the scope of the deponent’s duty to prepare.

Notes of Conference Call
Rule 30(b)(6) Subcommittee
Feb. 13, 2017

On Feb. 13, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter to the Advisory Committee), and Prof. Richard Marcus (Reporter to the Subcommittee), and Derek Webb of the Administrative Office.

The call was introduced with a report on the discussion at the Standing Committee meeting of Rule 30(b)(6) issues. The judges on that committee did not seem to think that this rule was a source of serious problems. One judge on the Standing Committee said he read through the entire packet of material in the agenda book (the agenda memo provided to the Advisory Committee for its November, 2016, meeting) and got a headache that only abated when he got to the case management ideas at the end of the agenda materials on the rule. That initially seemed to him a more sensible way to approaching these issues than a long, detailed addition to the rule.

So one way to resume the Subcommittee's work would be to shift focus to those case management ideas for revision to Rules 26(f) and 16. That sort of approach might be a "nudge" for lawyers and judges to make realistic provision for 30(b)(6) depositions early in the litigation, and the sort of case-specific tailoring such a nudge could produce might be superior to "one size fits all" default settings in a revised rule. That sort of revision to Rule 26(f) might insist on planning for some of the matters on which we have been discussing specific amendments to 30(b)(6). If that seemed promising, the question then might be whether there are specifics that nonetheless should be put into the rule. Perhaps all that is needed is a "nudge" on the case management track.

This idea prompted the reaction that focusing mainly on Rules 26(f) and 16 is not sufficient. That would only urge the parties to talk about various subjects, and could generate even more inconsistency than presently exists on some issues like the number or duration of these depositions. One problem with the case management approach is that its effectiveness depends a great deal on the energy level of the individual judge, and the judge's attitude toward this sort of activity. Some judges make intense use of Rule 16, but others are somewhat perfunctory in their attention to discovery planning at the inception of the case.

Having specifics in the rule on a number of the matters we have been discussing would be an important adjunct to invoking case management as well. A very large amount of time and energy and money is spent arguing about things that could be addressed in specific ways in a rule. That specific starting point would save time even if the parties agree to depart from the specifics, or urge the judge to do so by order. At the Rule 26(f) stage of the case, people are often not thinking as clearly about 30(b)(6) issues as would be needed to provide specifics then.

Given these circumstances, it was suggested, the LCJ starting point seems right -- the absence of motions does not show there is not a problem. The absence of motions may be the reason judicial members of the Standing Committee did not appreciate the level of difficulty caused by the rule. But the fact judges don't see motions shows that -- after a lot of bickering -- the parties make some sort of compromise rather than filing motions. Though one might endorse this situation as a sort of "cooperation," it is actually very time-consuming. Having specifics in the rule would actually save a lot of time.

A reaction to this view was that it was an eloquent argument for going beyond a general case-management admonition and providing specifics in the rule. Another reaction was to ask whether a Committee Note to such a case-management rule could itself provide the desired specifics. The response to that question was that "rulemaking by Note" is disfavored. Moreover, at least some of the issues that might be addressed in the rule are now addressed in Notes to prior amendments. For example, the 2000 amendments included a statement in a Note that a 30(b)(6) deposition should, for purposes of the duration limitation adopted that year, be regarded as permitting one day of seven hours for each person designated by the organization. And the Note to the 1993 amendments said that, for purposes of the ten-deposition limit introduced in 1993, the 30(b)(6) deposition should be regarded as one deposition no matter how many individuals are designated to testify. Standing alone, those Note comments seemingly have not avoided problems. That may show some of the hazards of "rulemaking by Note." Those Note comments could be elevated to rule provisions, but at least some seem to think they do not strike the right balance. So a rule provision could provide the desired force and also offer revised content.

Favoring adding specifics to the rule does not mean, it was added, that all the specifics we have identified should be added. Instead, our list could probably be considerably streamlined.

A question going forward, therefore, is whether action is needed on all these issues, and whether there are further issues that might be added. One possibility mentioned by the LCJ submission is that "duplication" by 30(b)(6) deposition should be

forbidden in the rule. But the ABA 2016 submission is pretty comprehensive; there probably are not a lot of additional issues beyond our original list of about 18 different issues.

Another reaction was that magistrate judges would likely be a more fruitful source of reports about 30(b)(6) issues than district or circuit judges. That drew the response that "it differs from jurisdiction to jurisdiction" because different districts use magistrate judges in very different ways. Moreover, there probably are differences among magistrate judges about active management of discovery; those who are active managers probably see fewer 30(b)(6) issues stimulating full-blown motions.

This drew a reaction from a lawyer member who had been surveying other lawyers about their 30(b)(6) experience. At least some 30(b)(6) notices include lists of matters for examination were very expansive. For example, in a patent case the matters listed were something like "(1) all your patents; (2) all affirmative defenses you have ever raised in patent infringement litigation; (3) all discovery you have ever done in patent infringement litigation; (4) your corporate structure." Probably some judges would insist that such a list be refined to a workable dimension. And it is not clear (as the ABA submission recognized) that a rule provision could improve much on the "reasonable particularity" specified in the current rule. Maybe the solution is to limit the number of matters that can be listed in a notice. But that might simply prompt parties to use even broader topic descriptions to avoid exceeding the numerical limit. Indeed, that seems to have occurred in the list of topics in the patent case described above.

Another concern might be that 30(b)(6) depositions sometimes seem to be employed as an end run around the limits on the number of interrogatories.

In terms of ways a rule amendment could improve practice, addressing judicial admissions could be helpful by reducing the risk that failure to prepare on something that the party doing discovery included in the list could have dire consequences. That drew agreement; the judicial admission issue is still a source of nervousness. There are constant objections that questions go beyond the scope of the notice because of a fear that there may be a judicial admission. This is a "key driver" of problems in these depositions.

This discussion drew the reaction that even if the case management approach is not a full solution all by itself it is still important to pare down this list. Remember how long it took the Subcommittee last September to complete its initial discussion of about half the issues. "We need to narrow this

down. "

It was suggested that at some point it would be desirable to get guidance from the bar. Most members of the Subcommittee intend to attend the LCJ discussion in early May. Perhaps other bar groups could offer similar opportunities for discussion of how a rule change would improve practice. Outreach to bar groups should emphasize involvement of a broad spectrum of lawyers; it is important to appreciate how practice experience and orientation affect views on this rule. It is likely that experience is not uniform throughout the bar.

Discussion turned to which categories seemed most important for provisions in Rule 30(b)(6). One list included the notice period, the number of matters on the notice, a procedure for objecting, supplementation and questions beyond the scope of the matters on the list. Another list included a timetable, supplementation, protecting against judicial admissions, and forbidding questions beyond the scope of the notice.

Regarding the judicial admissions issue, another idea suggested was to add a reference in Rule 37(d) about failure to properly prepare the 30(b)(6) witness, which could be treated as a "failure to appear" that permits Rule 37(b) sanctions without the prerequisite of a Rule 37(a) motion to compel. But it was noted that Rule 37(c)(1) might already produce similar results in terms of forbidding use of certain evidence to contradict or supplement what was said in a 30(b)(6) deposition.

That possibility prompted the observation that the very helpful research memorandum by the Rules Law Clerks shows that the "admissions" cases are really more like sanctions decisions than real judicial admissions. The focus seems to be on bad faith conduct by the party held to have made an admission.

A question was raised about whether it is wise to get too deeply into sanctions. There may be some risk that this would be regarded as a substantive rule. But some rules (e.g., Rule 8(b)(6) on the effect of failure to deny an allegation in a complaint) have consequences like a judicial admissions decision, and that qualifies as a procedural rule. In any event, however, raising sanctions too prominently as a part of any amendment package may have negative effects by inviting gamesmanship.

Another issue that might be raised is whether to limit 30(b)(6) depositions to parties. That drew the reaction that there is a qualitative difference with nonparties. With parties, one might say that interrogatories should be preferred or at least tried first. But with nonparties interrogatories are not available. And with nonparties the judicial admission issue seem nonexistent, or virtually nonexistent.

Another question is about whether to require/permit supplementation of testimony at a 30(b)(6) deposition. There have been concerns about the "I'll get back to you on that" reaction were supplementation added to the rule. But supplementation is a general feature of the discovery rules. It is connected to the obligation to properly prepare the witness for the 30(b)(6) deposition, and failure to do that is fraught with peril. There is a duty to supplement an interrogatory answer, and in a way 30(b)(6) depositions may serve as substitutes for interrogatories because lawyers "destroyed" the use of interrogatories for such purposes by avoidance behavior in crafting responses. Moreover, there are presently lots of cases involving asserted failure to prepare the witness adequately. Those seem to be the ones in which judicial admission treatment results. If those are really bad faith cases, does the addition of a supplementation requirement really make failure to prepare more likely? Even without it, some are not preparing adequately.

Another possible problem has been use of redundant 30(b)(6) depositions. First, the party takes the depositions of all those actively involved in the events in question, and then it notices the 30(b)(6) deposition of the organization to cover the same topics. That might be what the LCJ submission is getting at with its concern about "duplicative" 30(b)(6) discovery, although that idea seems to start with the 30(b)(6) deposition and then foresee limits on further discovery, such as depositions of the main actors in the events in question.

Yet another issue that might deserve attention is the contention question issue.

This discussion prompted the reaction "Nothing has been removed from our long list of issues." One goal of this "triage" discussion has been to shorten the list of topics that warrant mention in the rule (as opposed to a general "nudge" in the case management mode).

A reaction to this concern was that one approach would be to try to "fold 30(b)(6) into Rule 26(g)(1)." Then the court automatically has Rule 26(g)(3) sanctions available. That drew the reaction that this approach might be superior to trying to micro-manage via extensive specifics in 30(b)(6) itself. Instead, we should focus on specifics on which the rules are silent.

This approach drew support. The goal should be to identify a list of the specifics to focus upon in the rule. Indeed, we might start with our vision of what the rule is ideally designed to accomplish. Perhaps initial canvassing of the Subcommittee could be by email.

At the same time, it was noted, it is important to think about what exactly the Subcommittee wants to bring to the full Committee for its April meeting. One idea might be an A list and a B list. The A list might be illustrated with sketches. The B list might include only topics that have been considered but not included in the A list. On the other hand, the failure to include B list topics on the A list might be easier to appreciate if the difficulties of drafting were illustrated by rule sketches of those matters also.

It was noted that such an A list could co-exist with an expansion of the Rule 26(f) and Rule 16 issues to include reference to 30(b)(6) depositions as well. So section A1 might be specific rule language for the specifics that seem usefully added to 30(b)(6), and section A2 would be the case management package with a more general "nudge" to give thought to how to handle foreseeable 30(b)(6) depositions.

In addition to any sketches of specific provisions for section A1, it would be good to have a composite sketch that would show what the rule would look like overall with the additions.

Going forward, it might be desirable to see whether Subcommittee members could agree on which specific provisions should be put on the A list for the April meeting of the full Advisory Committee. Starting with the list that the Subcommittee presented at the November 2016 meeting, and adding ideas mentioned during this call, it might be useful to determine whether the Subcommittee could reach consensus on a relatively short A list -- perhaps five items or so. Then the remaining items could be placed on a B list so that the full Advisory Committee had them in the agenda book, but with a clear delineation of those the Subcommittee thought to have higher priority. A first effort at assembling such a list might be an email "ballot" that should be circulated no later than Monday, Feb. 20.

LIST OF SPECIFIC TOPICS
FROM NOV. 2016 AGENDA BOOK

Below is a list of the various topics included as specific rule-amendment ideas in the materials presented to the Advisory Committee at last November's meeting [along with some specifics not included that might be added]. At least a few (e.g., no. (2)) replicate provisions now in the rule and presumably need not be on our A list because they are already in the rule.

Items (12) and (13) would presumably be included on the A list to provide a "nudge" to early consideration, and a portion of the specific ideas would also be A list recommendations. As

noted below, depending on how one counts those items, there may be as many as 28 on our November 2016 list, and four more raised (and listed as (14) through (17) during the call:

- (1) Minimum notice period
- (2) Matters for examination stated with "reasonable particularity" (presently in rule)
 - (A) Limitation to ten or some other maximum (not included last November)
 - (B) [Limiting to scope of discovery already specified in Rule 26(b)(1)]
- (3) Objections to notice
 - (A) Permitting party seeking discovery to move under Rule 37(a) for an order compelling a response [and perhaps stating that the parties must meet and confer]
 - (B) Relieving responding party of responding at all [or only with regard to objected-to matters] pending court order.
 - (C) [and directing the court to apply proportionality limits in its order]
- (4) Explicitly inviting party seeking discovery to provide copies of exhibits a specified period before the deposition
 - (A) Explicitly requiring the witness to be prepared to provide information about those exhibits during the deposition
- (5) Requiring the responding organization to identify the persons it would present a specified time before the deposition
 - (A) Providing that if the organization designates more than one person, it also specify which matters each person will address
 - (B) Providing that designating a person certifies under Rule 26(g)(1) that the person will be prepared to provide its information on those matters
 - (C) Providing that if the designated person is unable to provide the information the organization has on a given matter the organization will designate an another person
 - (D) Providing that if the organization cannot, after good faith efforts to do so, locate responsive information or a person with responsive information, it will notify the party seeking discovery.
 - (E) Providing that if the organization gives the notice in (D) the party seeking discovery may move the court for an order under Rule 37(a)
 - (F) Providing that unless an order issues under (E) above the party seeking discovery may not inquire

- about the matters on which the organization gave notice under (D) [or providing that inquiry is allowed into the efforts to obtain such information]
- (6) Forbidding questioning on matters beyond those for which the witness has been designated to testify
 - (A) Providing that if questioning goes beyond those matters, the testimony is not admissible against the organization as testimony of the organization
 - (B) Providing that if the questioning goes beyond those matters, the deposition will be considered a deposition of the witness as an individual and counted as a separate deposition against the ten-deposition limit
 - (7) Forbidding contention questions
 - (8) Providing that the organization is allowed to offer additional evidence not provided by the witness and that the testimony is not a "judicial admission"
 - (A) Providing that the court may order, under either Rule 37(c)(1) or Rule 37(d), that the response will be treated as a "judicial admission" if the organization failed adequately to prepare the witness
 - (9) Providing that the organization must supplement the witness's testimony under Rule 26(e)
 - (A) setting a specific time limit for such supplementation
 - (10) Providing durational (one day of seven hours) and numerical (only one of the ten permitted depositions) for 30(b)(6) depositions [or other specifics]
 - (11) Providing that another 30(b)(6) deposition of the organization may be taken, but that it would count as another of the ten depositions that can be taken without stipulation or court order.
 - (12) Adding Rule 30(b)(6) as another topic to address in the discovery plan under Rule 26(f)(3) [with reference to some of the items mentioned in (1) through (11) above]
 - (13) Adding Rule 30(b)(6) as a mandatory topic of a scheduling order under Rule 16(b)(3)(A) or as a permissive topic under Rule 16(b)(3)(B)

ADDITIONAL POSSIBLE TOPICS MENTIONED DURING CALL

- (14) Adding a specific reference to Rule 30(b)(6) in Rule 37(d)
- (15) Limiting 30(b)(6) depositions to parties
- (16) Adding a specific reference to Rule 30(b)(6) depositions in Rule 26(g)(1) (though that rule already refers to "every discovery request")
- (17) Forbidding discovery "duplication" by Rule 30(b)(6) deposition (though Rule 26(b)(2)(C)(i) already says the

court must limit discovery that is "unreasonably
cumulative or duplicative")

IV. PILOT PROJECTS

The Pilot Projects Working Group has continued its work on two pilots: the Mandatory Initial Discovery Pilot (“MIDP”) and the Expedited Procedures Pilot (“EPP”).¹ While the goal of both pilots is to measure whether improvements in the pretrial management of civil cases will promote the just, speedy and inexpensive resolution of cases, they aim to do so in different ways. The Judicial Conference of the United States approved both pilot projects at its September 2016 meeting.

The MIDP seeks to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce the cost, burden, and delay in civil litigation. Under the MIDP, a party must produce specific items of information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case and including information that is both favorable and unfavorable to the responding party. In developing the MIDP, the Working Group drew on the positive experience of some state courts and the Canadian courts that have adopted mandatory disclosures of relevant information. If the MIDP results in a measurable reduction of cost, burden and delay, then this may provide empirical evidence supporting a recommendation that the Advisory Committee propose amendments to the civil rules to adopt mandatory initial discovery in civil cases.

The basic features of the MIDP are: the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss the initial discovery with the parties at the Rule 16(b)(2) case management conference, and resolve any disputes regarding compliance. The initial discovery responses must address all claims and defenses that will be raised. Hence, answers, counterclaims, crossclaims and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to answer in order to consider certain motions based on lack of jurisdiction or immunity.

The Working Group has developed educational materials to assist participating judges. These include a Standing Order, User’s Manual, Checklist, instructions for ECF administrators and Clerk’s office staff, notices to the bar, and a host of model form orders. Scripts were written for two instructional videos for pilot project judges and lawyers providing an overview of the pilot and a group discussion of state judges and lawyers in Arizona talking about the positive experience there with mandatory initial disclosures. Emery Lee from the FJC participated to help insure that the forms facilitate his ex post analysis of the pilot districts’ court filings to obtain data to evaluate the effectiveness of the pilot. Paul Vamvas and Tim Reagan of the FJC provided substantial assistance in preparing the scripts for the educational videos (and recording

¹The Working Group includes members from the Standing Committee, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management. It is chaired by Judge Paul Grimm, a former member of the Civil Rules Committee.

them) and creating a web site for use by judges and lawyers to access the MIDP documents and related written materials.

With substantial assistance from Dave Campbell and members of his court's clerk's office, the District of Arizona became the first MIDP district, with all district and magistrate judges participating. The pilot began on May 1, 2017. All materials were customized to reflect D AZ practices and procedures, without altering their original substance.

Largely due to the excellent work of Amy St. Eve and Bob Dow, 16 active district judges, one senior district judge and all 11 magistrate judges in the ND Ill have agreed to participate in the MIDP beginning on June 1. As with the District of Arizona, some customization of the forms has been done, again without altering the substantive content.

Efforts to recruit additional courts for the MIDP have been disappointing. Although we developed leads for quite a few districts (Southern District of Ohio, Northern District of California, and the Districts of Oregon, Idaho, Montana, New Hampshire, and New Mexico), none has yet agreed to participate. Many reasons have been given, to include reluctance of the bar, reluctance of the judges, court vacancies and workload. The SD Texas (Houston Division) is still considering participation, but concerns among the judges and court vacancies mean that any decision on participation is not imminent, and if there is participation, it is likely to be by only some judges.

The EPP is designed to expand practices already employed successfully by some judges and thereby promote a change in judicial culture by confirming the benefits of active management of civil cases. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances. The aim is to have 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months.

With the commencement of the MIDP, more detailed preparation for the EPP has started. Another small working group will be assembled to help. We will need to assess whether creating an educational video is necessary; because the EPP Pilot is more general in nature than the MIDP, there may be fewer materials that need to be prepared. A "user's manual" is being developed, and model forms and orders as well as other educational materials must be prepared before the EPP is ready for implementation. Mentor judges will be made available to support implementation in the pilot courts. The goal has been to have the project in place by the end of 2017, to run for a period of three years.

Unfortunately, to date only one district, the Eastern District of Kentucky, has agreed to participate in the EPP. The District of Kansas is still considering doing so, but more districts are needed. Unless we get a better cross-section of districts to participate, we will seek to add ED Ky to the MIDP effort and forego the EPP for now.

V. OTHER INFORMATION ITEMS

The Committee considered and decided to take no further action on several additional matters that are described in the draft Minutes. A few of them are identified here to support the opportunity for advice that further consideration might be warranted.

The most ambitious proposal was that Rule 65 should be expanded to provide that an injunction must provide “only for the protection of parties to the litigation and not otherwise enjoin[] or restrain[] conduct by the persons bound with respect to nonparties.” The proposal was supported by a forthcoming article that focuses on the occasional issuance of “nationwide” injunctions by a single district judge or by a court of appeals. The injunctions used as illustrations commonly restrain federal officials from enforcing a federal statute, regulation, or order. Many reasons are advanced for ending this practice. A single judge or court should not have such great power, given the risk that the decision may be wrong. It is better to let such important topics “percolate” in the lower courts, generating consensus or disagreements that illuminate difficult questions. The practice encourages forum shopping and opens the risk of conflicting injunctions. It is inconsistent with other aspects of accepted doctrine, including the rule that a district court decision is not precedent even within that court and the rule that the government is not subject to nonmutual offensive issue preclusion. These concerns are supplemented by an argument that Article III permits a court to accord relief only to a person that has standing and has been made a party. Once judgment is entered as to the actual parties, no case or controversy remains and the court lacks judicial power to afford relief to nonparties.

This terse summary of an elaborately supported proposal reflects the Committee’s reasons for declining further work. The questions are fundamental. They tie closely to remedies that in turn are anchored in substantive law. But the prospect of Article III concerns is daunting. And in the end, these questions are not suitable for resolution under the Rules Enabling Act.

Two other suggestions relate to specific statutes. One would add a new Rule 3.1 to make it clear that an “application” is the proper way to commence a proceeding to approve a qualifying modification of bond claims under Title VI of the Puerto Rico Oversight Act. The Committee concluded that procedural questions unique to this Act are better addressed by the District Court for Puerto Rico, perhaps through a local rule. The other suggestion would add a rule that tracks, virtually verbatim, a provision in the Patient Safety Act that protects “patient safety work product.” The Committee concluded that the Civil Rules should not be used to provide notice of applicable statutory provisions.

General civil procedure issues were reflected in two other suggestions. One would add more motions to the provision in Rule 16(b)(3)(B)(v) that lists permissive contents for scheduling orders. The present rule, added in 2015, provides that a scheduling order may direct that before moving for an order relating to discovery, the movant must request a conference with the court. The Subcommittee that worked on this provision considered the question whether other types of motions should be added but, in a spirit of conservative beginnings, decided not to. More recently, the Committee has considered a suggestion that motions for summary judgment

be added. It seems likely that any expansion of the list would draw up short of adding all motions. Many routine motions seem ill-suited to so much procedure. Defining which motions might be added could prove difficult, although the spirit of conservatism might again support limited expansion. The Committee concluded that these questions should be left to percolate and mature in practice by many judges. The other suggestion was to adopt a provision similar to Appellate Rule 28(j), which provides for a letter of supplemental authorities. The Committee concluded that, as compared to post-briefing and post-argument submissions on appeal, district-court practice is too variable to capture in a uniform national rule. The Civil Rules do not now attempt to regulate briefing practices, and addressing submission of supplemental authorities in a vacuum could prove awkward.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 25, 2017

1 The Civil Rules Advisory Committee met at the Ella Hotel in
2 Austin, Texas on April 25, 2017. (The meeting was scheduled to
3 carry over to April 26, but all business was concluded by the end
4 of the day on April 25.) Participants included Judge John D. Bates,
5 Committee Chair, and Committee members John M. Barkett, Esq.;
6 Elizabeth Cabraser, Esq. (by telephone); Judge Robert Michael Dow,
7 Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor
8 Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.;
9 Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver,
10 Jr.; Hon. Chad Readler; Virginia A. Seitz, Esq.; and Judge Craig B.
11 Shaffer. Professor Edward H. Cooper participated as Reporter, and
12 Professor Richard L. Marcus participated as Associate Reporter.
13 Judge David G. Campbell, Chair; Peter D. Keisler, Esq.; and
14 Professor Daniel R. Coquillet, Reporter (by telephone),
15 represented the Standing Committee. Judge A. Benjamin Goldgar
16 participated as liaison from the Bankruptcy Rules Committee. Laura
17 A. Briggs, Esq., the court-clerk representative, also participated.
18 The Department of Justice was further represented by Joshua
19 Gardner, Esq.. Rebecca A. Womeldorf, Esq., Lauren Gailey, Esq., and
20 Julie Wilson, Esq., represented the Administrative Office. Dr.
21 Emery G. Lee, and Tim Reagan, Esq., attended for the Federal
22 Judicial Center. Observers included Alex Dahl, Esq. (Lawyers for
23 Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq.
24 (IAALS); William T. Hangle, Esq. (ABA Litigation Section liaison);
25 Frank Sylvestri (American College of Trial Lawyers); Robert Levy,
26 Esq.; Henry Kelston, Esq.; Ariana Tadler, Esq.; John Vail, Esq.;
27 Susan H. Steinman, Esq.; and Brittany Schultz, Esq.

28 Judge Bates welcomed the Committee and observers to the
29 meeting. He noted that this is the last meeting for three members
30 whose second terms have expired – Elizabeth Cabraser, Robert
31 Klonoff, and Solomon Oliver. They have served the Committee well,
32 in the tradition of exemplary service. They will be missed. Judge
33 Bates also welcomed Acting Assistant Attorney General Readler to
34 his first meeting with the Committee.

35 Judge Bates noted that the draft Minutes for the January
36 Standing Committee meeting are included in the agenda materials.
37 The Standing Committee discussed the means of coordinating the work
38 of separate advisory committees when they address parallel issues.
39 Coordination can work well. The rules proposals published last
40 summer provide good examples. The Appellate Rules Committee worked
41 informally with the Civil Rules Committee in crafting the
42 provisions of proposed Civil Rule 23(e)(5) that address the roles
43 of the district court and the court of appeals when a request for
44 district-court approval to pay consideration to an objector is made
45 while an appeal is pending. A Subcommittee formed by the Appellate
46 and Civil Rules Committees and chaired by Judge Matheson worked to

47 coordinate revisions of Appellate Rule 8 in tandem with the
48 proposals to amend Civil Rules 62 and 65.1. Four advisory
49 committees have coordinated through their reporters, the Style
50 Consultants, and the Administrative Office as they have worked on
51 common issues on filing and service through the courts' CM/ECF
52 systems. The e-filing and e-service proposals will require
53 continued coordination as the advisory committees hold their spring
54 meetings.

55 *November 2016 Minutes*

56 The draft Minutes of the November 2016 Committee meeting were
57 approved without dissent, subject to correction of typographical
58 and similar errors.

59 *Legislative Report*

60 Julie Wilson presented the Legislative Report. She began by
61 directing attention to the summaries of pending bills that appear
62 in the agenda materials. There has been a flurry of activity in
63 February and March on several bills. Two, H.R. 985 and the Lawsuit
64 Abuse Reduction Act, have passed the House and have been sent to
65 the Senate.

66 H.R. 985 is the Fairness in Class Action Litigation and
67 Furthering Asbestos Claim Transparency Act of 2017. The bill
68 includes many provisions that affect class actions. Without
69 directly amending Rule 23, it would change class-action practice in
70 many ways, and the appeal provisions effectively amend Rule 23. It
71 also speaks directly to practice in Multidistrict Litigation cases,
72 and changes diversity jurisdiction requirements for cases removed
73 from state courts. Judge Bates and Judge Campbell submitted a
74 letter to leaders of the House and Senate Judiciary Committees
75 describing the importance of relying on the Rules Enabling Act to
76 address matters of procedure. The Administrative Office also
77 submitted a letter. Other Judicial Conference Committees are
78 interested in this legislation. The Federal-State Jurisdiction
79 Committee is charged with preparing a possible Judicial Conference
80 position on the legislation. It has not yet been decided whether
81 any position should be taken. Nothing has happened in the Senate.

82 Judge Bates noted that H.R. 985 has substantive provisions. It
83 also raises a "procedural" question about the role of the Rules
84 Enabling Act process in considering questions of the sort addressed
85 by the bill.

86 Judge Campbell stated that H.R. 985 went through the House
87 quickly. It has been in the Senate since early February. There is

First draft

88 no word on when the Senate may address it. It would significantly
89 alter class-action practices, even without directly amending Rule
90 23. And some of the provisions that address Multidistrict
91 Litigation would be unworkable in practice. These procedural issues
92 should be addressed through the Rules Enabling Act process. He also
93 noted the changes in diversity litigation that would direct courts
94 in removal cases to sever diversity-destroying defendants and
95 remand to state courts as to them, retaining each diverse pair of
96 plaintiff and defendant.

97 The Lawsuit Abuse Reduction Act of 2017, H.R. 720 and S. 237,
98 is a bill familiar from several past sessions of Congress. It
99 passed the House in early March. It remains pending in the Senate.

DRAFT

First draft

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I
RULES PUBLISHED FOR COMMENT, AUGUST 2016

102 Judge Bates introduced the three action items on the agenda
103 arising from rules proposals published last August. Rules 5, 23,
104 62, and 65.1 would be amended. There were three hearings, including
105 a February hearing held by telephone. There were many helpful
106 written comments and useful testimony from some 30 witnesses. Most
107 of the comments and testimony addressed Rule 23. Judge Dow, who
108 chaired the Rule 23 Subcommittee, will present Rule 23 for action.

109

Rule 23

110 Judge Dow opened the Rule 23 discussion by describing the
111 Committee process as smooth. The summary of the hearings and
112 comments runs 62 pages long. The Subcommittee held two conference
113 calls after the conclusion of the comment period. The first
114 narrowed the issues; notes on that call are included in the agenda
115 materials. The second call pinned down the final issues. A few
116 changes were made in rule text words, and the Note was shortened a
117 bit.

118 Professor Marcus led the detailed discussion of the proposed
119 Rule 23 amendments. Very few changes have been made in the rule
120 text as published. In Rule 23(c)(2)(B), the new description of the
121 modes of service has been elaborated by adding a few words: "The
122 notice may be by one or more of the following: United States mail,
123 electronic means, or other appropriate means." The testimony and
124 comments showed surprising levels of interest in the modes of
125 notice. The added words reaffirm that the same modes of notice need
126 not be used in all cases, nor need notice be limited to a single
127 mode in a particular case. The idea is to encourage flexibility.
128 The value of flexibility is described in the proposed Committee
129 Note.

130 Proposed Rule 23(e)(2) addresses approval of a proposed
131 settlement. The published proposal added a few words to the present
132 rule: "If the proposal would bind class members under Rule 23(c)(3)
133 * * *." The Subcommittee recommends that these new words be
134 deleted. They were added to address expressed concerns that Rule
135 23(e)(2) might somehow be read to authorize certification of a
136 class for settlement purposes even though the requirements of Rule
137 23(a) and (b) are not met. The hearings, however, suggested that
138 adding these words may cause confusion. The Committee Note says
139 that any class certified for purposes of settlement must satisfy
140 subdivisions (a) and (b). It is better to delete the added words
141 from rule text.

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142 Various style changes are proposed. Subparagraph (e)(2)(D) is
143 changed to the active voice: "the proposal treats class members
144 equitably relative to each other." The tag line for paragraph
145 (e)(3) is changed by deleting "side": "Identification of ~~Side~~
146 Agreements." "Side" is a non-technical word commonly used, but not
147 included in the rule text.

148 Subparagraph (e)(5)(B) also should be changed. As published,
149 it addresses payment or other consideration "to an objector or
150 objector's counsel." The hearings offered illustrations of payments
151 made, not to objectors or their counsel, but to a nonprofit
152 organization set up to receive payment. So the rule text is
153 broadened by removing that limit: "no payment or other
154 consideration may be provided ~~to an objector or objector's counsel~~
155 in connection with: * * *." A corresponding change is recommended
156 for the tag line.

157 Turning to the Committee Note, Professor Marcus began by
158 noting that the Note was revised to respond to the changes in the
159 rule text. It also has been shortened a bit "to delete repetition
160 that is not useful." In addition, parts that explore the genesis
161 and purpose of the amendments are deleted as no longer useful.

162 Professor Marcus concluded this introduction by observing that
163 it has been very useful to hear from the bar, but there was not
164 much controversy over the proposed changes.

165 Discussion began with two words in the draft Committee Note
166 for subdivision (e)(5)(B), appearing at line 376 on page 115 of the
167 agenda materials: some objectors "have sought to *exact tribute* to
168 withdraw their objections." "[E]xact tribute" seems harsh. The
169 Committee agreed that the thought will be better expressed by words
170 like this: "sought to obtain consideration for withdrawing their
171 objections * * *."

172 A separate question was raised about the use of "judgment" in
173 proposed item (e)(1)(B)(ii), which says that notice of a proposed
174 settlement must be directed if "justified by the parties' showing
175 that the court will likely be able to * * * (ii) certify the class
176 for purposes of *judgment* on the proposal." The judge who raised the
177 question said that he does not formally enter a judgment, but
178 instead enters an order. The order may simply rule on the proposal.
179 Discussion began by pointing to Rule 54(a), which states that a
180 "judgment" "includes a decree and any order from which an appeal
181 lies." A departure from the published proposal on this point should
182 be approached with caution. One point that was made in the comments
183 is that it is important to have a "judgment" as a support for an
184 injunction against duplicating litigation in other courts. And

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185 "judgment" also appears in subdivision (e)(5)(B), dealing with
186 payment for forgoing or undoing "an appeal from a *judgment*
187 approving" a proposed class settlement.

188 Discussion of "judgment" went on to observe that Rule 58(a)
189 requires entry of judgment on a separate document at the end of the
190 case. The purpose of Rule 58(a) is to set a clear starting time for
191 appeals. As "judgment" appears in the provision for notice of a
192 proposed settlement, it is important as a reminder that the court
193 should be confident that notice is justified by the prospect that
194 the proposed settlement will provide a suitable basis for
195 certifying a class and deciding the case after the notice provides
196 the opportunity to object or to opt out of a (b)(3) class. The
197 purpose is to focus attention on the need to justify the cost of
198 notice by the prospect that the eventual outcome will be final
199 disposition of the action by a judgment.

200 The discussion of "judgment" led to related questions about
201 the relationship between items (i) and (ii) in proposed (e)(1).
202 "[C]ertify the class" appears only in (ii), after (i) refers to
203 approving the proposed settlement. But certification is necessary
204 to approve the settlement. Why not put certification first? The
205 response looked to the evolution of practice. When Rule 23 was
206 dramatically revised in 1966, the drafters thought that the normal
207 sequence would be early certification, followed by much work, and
208 eventually a judgment. But the reality has come to be that most
209 class actions are resolved by settlement, and that in most class-
210 action settlements actual certification and approval of the
211 settlement occur simultaneously. Subdivision (e)(1) frames the
212 procedure for addressing this reality, in terms that depart from
213 the common tendency to talk of "preliminary approval" of a proposed
214 settlement.

215 Items (i) and (ii) reflect that the court certifies a class by
216 an order. The ultimate purpose is entry of judgment. If a class has
217 not already been certified when the parties approach the court with
218 a proposed settlement, certification and settlement become part of
219 a package. The settlement cannot be approved without certification,
220 and both certification and settlement require notice – usually
221 expensive notice – to the class. If the proposed settlement fails
222 to win approval, class certification for purposes of the settlement
223 also will fail. The Committee Note reflects this consequence by
224 reminding readers that positions taken for purposes of certifying
225 a class for a failed settlement should not be considered if class
226 certification is later sought for purposes of litigation.

227 There was a brief suggestion that some other word might
228 substitute for "judgment." Perhaps "order," or "decision"?

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229 The discussion of the relationship between items (i) and (ii)
230 in proposed (e)(1)(B) then took another turn. They might be read to
231 mean the same thing. (i) asks whether the court will likely be able
232 to "approve the proposal under Rule 23(e)(2)." Approving the
233 proposal includes certifying the proposed class. So what is
234 accomplished by "(ii) certify the class for purposes of judgment on
235 the proposal"? The first response was that approval of the
236 settlement is covered by subdivision (e)(2). "All that's happening
237 in (e)(1) is a forecast of what can be done later." Rule 58 "exists
238 on the side." No one brought up this question during the comment
239 period. All that (e)(1) does is to provide that notice is not
240 appropriate until the parties show that, after notice, the court
241 likely will be able to certify the class and approve the
242 settlement.

243 An alternative might be to combine (i) and (ii), although that
244 might reduce the emphasis: "showing that the court will likely be
245 able to certify the class and approve the proposal under Rule
246 23(e)(2)." This suggestion was echoed by a parallel suggestion to
247 retain the structure of (i) and (ii), but strike "for purposes of
248 judgment on the proposal" from (ii). "[F]or purposes of judgment on
249 the proposal" does not do any harm, but it says something that is
250 obvious without saying. Further discussion noted that perhaps it
251 makes sense to refer first to "certify the class," as (i), before
252 referring to approval of the proposed settlement. But care should
253 be taken to avoid backing into a structure that might be read to
254 create a separate settlement class-certification provision that the
255 Committee has resisted. Adequate care is taken, however, in the
256 Note discussion of subdivision (e)(1). The Note says specifically
257 that the ultimate decision to certify a class cannot be made until
258 the hearing on final approval of the settlement. The Note on
259 subdivision (e)(2), further, expressly says that certification must
260 be made under the standards of Rule 23(a) and (b).

261 One final question asked whether it would help to add one word
262 in (ii): "certify the class for purposes of entering judgment on
263 the proposal." Rule 58(a), however, seems to cover that.

264 This discussion concluded by unanimous agreement to retain (i)
265 and (ii) as published.

266 Consideration of the Rule 23 proposal concluded by discussing
267 the length of the Committee Note. It has been shortened during the
268 work that led to the published proposal, and the version
269 recommended for approval now is shorter still. But discussion of
270 the separate subdivisions at times becomes repetitive because the
271 interdependence of the subdivisions makes the same concerns
272 relevant at successive points. Occasionally almost identical

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273 language is repeated. Committee practice allows continuing
274 refinement of Committee Notes up to the time of submitting a
275 recommendation for adoption to the Standing Committee.

276 The Committee voted unanimously to recommend for adoption the
277 text of Rule 23 as revised, and also to approve the Committee Note
278 subject to editing by the Subcommittee and the Committee Chair.

279 *Rule 5*

280 Provisions for electronic filing were added to Rule 5 in 1993
281 and have gradually expanded as electronic communication systems
282 have become widespread and increasingly reliable. Provisions for
283 service by electronic means were added in 2001. The several
284 advisory committees have taken care to make the respective rules on
285 these matters as nearly identical as possible in light of
286 occasional differences in the circumstances that confront different
287 areas of procedure.

288 The proposal to amend Rule 5 published last August again
289 reflects careful attempts to coordinate with the proposals advanced
290 by the Appellate, Bankruptcy, and Criminal Rules Committees.
291 Coordination has continued as public comments and testimony have
292 shown opportunities to improve the published proposals.
293 Coordination is not yet complete, because other advisory committees
294 have yet to meet. The determinations made on Rule 5 will be subject
295 to adjustment to maintain consistency with the other sets of rules.
296 Matters of style can be adjusted without further Committee
297 consideration. Matters of substantive meaning may require
298 submission for Committee consideration and resolution by e-mail or
299 a conference call.

300 No changes are suggested for the text of Rule 5(b)(2)(E) as
301 published. The amended rule will provide for service by filing a
302 paper with the court's electronic-filing system. The present
303 provision in Rule 5(b)(3) that requires authorization by local rule
304 is abrogated in favor of this uniform national authorization.
305 Consent by the person served is not required. The amended rule
306 will, however, carry forward the requirement of written consent to
307 authorize service by other electronic means. It also carries
308 forward the provision in present Rule 5(b)(2)(E) that service
309 either by filing with the court, or by sending by other electronic
310 means consented to, is not effective if the filer or sender learns
311 that the paper did not reach the person to be served.

312 Concerns about the consequences of knowing that an attempted
313 transmission failed, however, have prompted preparation of a
314 proposed new paragraph for the Committee Note. The new paragraph

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315 describes the provision for learning that attempted service by
316 electronic means did not reach the person to be served and then
317 addresses the court's role. It says that the court is not
318 responsible for notifying a person who filed the paper with the
319 court's electronic-filing system that an attempted transmission by
320 the court's system failed. And it concludes with a reminder that a
321 filer who learns that the transmission failed is responsible for
322 making effective service.

323 The core proposed provisions for electronic filing appear in
324 Rule 5(d)(3)(A) and (B). No change is recommended in the published
325 proposals. Subparagraph (A) states the general requirement that a
326 person represented by an attorney must file electronically, unless
327 nonelectronic filing is allowed by the court for good cause or is
328 allowed or required by local rule. This provision reflects the
329 reality that in most districts electronic filing has effectively
330 been made mandatory. Subparagraph (B) states that a person not
331 represented by an attorney may file electronically only if allowed
332 by court order or by local rule, and may be required to file
333 electronically only by court order or by a local rule that includes
334 reasonable exceptions.

335 A witness who both submitted written comments and appeared at
336 a hearing suggested that pro se litigants should have the right to
337 choose to file electronically so long as they can meet the same
338 training standards that attorneys must meet to become registered
339 users. Important benefits would run both to the pro se party and to
340 the court and the other parties. Although other advisory committees
341 have not yet had their meetings, the consensus reflected in the
342 materials prepared for each advisory committee is that it is still
343 too early to move beyond case-specific permission or local rule
344 provisions.

345 Certificates of service have become the occasion for some
346 difficult drafting choices that remain to be resolved by uniform
347 provisions suitable for each set of rules. Most, perhaps all, of
348 the difficulty arises from the provision in Rule 5(d)(1) that
349 specified disclosure and discovery materials "must not be filed"
350 until they are used in the proceeding or the court directs filing.
351 The question is whether a certificate of service must be filed, or
352 even may be filed, before these materials are filed.

353 Present Rule 5(d)(1) says in the first sentence that any paper
354 after the complaint that is required to be served " – together with
355 a certificate of service – must be filed within a reasonable time
356 after service." The second sentence sets out the "must not be
357 filed" direction. Different readings are possible when confronting
358 a certificate of service for a paper that must not (yet) be filed.

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359 It may be that the more persuasive reading is that the "together"
360 tie of filing the certificate with the paper means that the
361 certificate must be filed only when the paper is filed. The time
362 for filing the certificate, set as a reasonable time after service,
363 however, confuses the question: it could be argued that a
364 reasonable time after service is measured by how long it takes to
365 file after service, not by the lapse of time when filing does not
366 occur until completion of a reasonable time after service.

367 Whatever the present rule means, it is important to write a
368 good and clear provision into amended Rule 5. The published
369 proposal addressed the question in a new Rule 5(d)(1)(A) that also
370 addressed certificates for a paper filed with the court's
371 electronic-service system: "A certificate of service must be filed
372 within a reasonable time after service, but a notice of electronic
373 filing constitutes a certificate of service on any person served by
374 the court's electronic-filing system."

375 The transmutation of the Notice of Electronic Filing into a
376 certificate of service has come to seem indirect. In line with the
377 approach proposed by the Appellate Rules Committee, all advisory
378 committees have agreed that it is better to provide, as suggested
379 for a revised Rule 5(d)(1)(B), that "No certificate of service is
380 required when a paper is served by filing it with the court's
381 electronic-filing system."

382 The next step involves a paper served by means other than
383 filing with the court's electronic-filing system. The time for
384 filing a certificate of service can be set at a reasonable time
385 after service for any paper that must be filed within a reasonable
386 time after service. The problem of papers that must not be filed
387 within a reasonable time after service remains. The revised
388 provision prepared for the agenda materials addressed it in this
389 way: "When a paper is served by other means, a certificate of
390 service must be filed within a reasonable time after service or
391 filing, whichever is later." The idea was that if filing occurs
392 long enough after service as to be beyond a reasonable time to file
393 a certificate as measured from the time of service, the certificate
394 must be filed within a reasonable time after filing. It was
395 expected that ordinary practice would file the certificate along
396 with the paper. It also was intended that if a paper that must not
397 be filed until it is used never is filed, there is no obligation to
398 file a certificate of service. A reasonable time after filing is
399 later than a reasonable time after service, and never starts to run
400 when there is no filing.

401 The revised draft encountered stiff resistance. Much of the
402 difficulty seems unique to the Civil Rule provision directing that

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403 most disclosure and discovery materials must not be filed. It seems
404 likely that the other rules sets will be drafted to omit any
405 provision that addresses certificates of service for papers that,
406 at the outset, must not be filed. A new version worked out with the
407 Style Consultants reads, adding words that emerged from continuing
408 Committee discussion, like this:

409 **(d) (1) (B). Certificate of Service.** No certificate of
410 service is required when a paper is served by filing it
411 with the court's electronic-filing system. When a paper
412 that is required to¹ be served is served by other means:
413 (i) if the paper is filed, a certificate of service must be
414 included with it or filed within a reasonable time after
415 service; and
416 (ii) if the paper is not filed, a certificate of service need
417 not be filed unless filing is required by local rule or
418 court order.

419 Under proposed (d)(1)(A), most papers must be filed within a
420 reasonable time after service. (B)(i) then directs that the
421 certificate of service be filed with the paper or within a
422 reasonable time after service. If different parties are served at
423 different times, the reasonable time for filing the certificate of
424 service will be measured from the time of service for each. This
425 provision should suffice for the other sets of rules.

426 (B)(ii) addresses the paper that is not filed because
427 (d)(1)(A) says that it must not be filed. (ii) says that a
428 certificate of service need not be filed. But under (i), a
429 certificate of service must be filed when filing becomes authorized
430 because the paper is used in the action, or because the court
431 orders filing. The time for filing the certificate is, as directed
432 by (i), either with the filing or within a reasonable time after
433 service. (Here too, the proposed language encompasses a situation
434 in which a party is served after the paper has been served on other
435 parties and is filed upon order or use in the action.)

¹ The Style Consultants used "must" here. Current Rule 5(d)(1) says "that is required to be served." The published proposal for 5(d)(1)(A) carries that forward. Unless we change to "must" in 5(d)(1)(A), parallelism dictates "is required" here.

Parallelism concerns are a bit confused. Rule 5(a)(1), which we have not addressed, begins "the following papers must be served." But when it comes to (C), it says "a discovery paper required to be served on a party."

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436 One more change is recommended for proposed Rule 5(d)(3)(C).
437 Present Rule 5(d)(3) provides that a local rule may allow papers to
438 be signed by electronic means. Displacing the local-rule provision
439 means adding a direct provision to Rule 5. The published proposal
440 was: "The user name and password of an attorney of record, together
441 with the attorney's name on a signature block, serves as the
442 attorney's signature." Comments on this proposal suggested some
443 confusion. The intent was that the user name and password used to
444 make the filing were not to appear on the paper, but the comments
445 expressed fear that the rule text might be read to require that
446 they appear. An additional concern was that evolving technology may
447 develop better means of regulating access than user names and
448 passwords – more general words should be used to accommodate this
449 possibility. And
450 an attorney may not become an attorney of record until the first
451 filing – what then?

452 The reporters for the several advisory committees have reached
453 consensus on the version recommended in the agenda materials for
454 Rule 5(d)(3)(C):

455 (C) *Signing*. An authorized filing made through a person's
456 electronic-filing account, together with the person's
457 name on a signature block, constitutes the person's
458 signature.

459 Discussion began with a question prompted by the new Committee
460 Note language for Rule 5(b)(2)(E). How often does a court receive
461 a message bounced back from the intended recipient? The answer was
462 in two parts. Court systems come exquisitely close to 100% accuracy
463 in transmitting messages to the addresses provided. The problems
464 occur when a message bounces back because the address is not good.
465 Almost all of those returned messages have been sent to addresses
466 for secondary recipients – usually the address for the attorney of
467 record remains good, and the bad address is for a paralegal or
468 legal assistant.

469 Some puzzlement was expressed as to the original decision to
470 address learning that attempted service failed only with respect to
471 service by electronic means. Why should it be different if the
472 party making service learns that mail did not go through, that a
473 commercial carrier failed to deliver, that a paper left at a
474 person's home was not in fact turned over to the person, that a
475 misidentified person was served in place of the intended person?
476 The history is clear enough – the decision in 2001 to address
477 failed electronic service was prompted by the newness of this means
478 of communication and lingering fears about its reliability.
479 Failures of other means of service were left to the law as it was

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480 and as it might develop without attempting to provide any guidance
481 in rule text.

482 The question of filing certificates of service for papers that
483 must not be filed was addressed from a new perspective. Earlier
484 reporter-level discussions asked whether there is any reason to
485 file a certificate of service for a paper that is not filed. Some
486 indications were found that filing the certificate would only add
487 clutter to the file. But in Committee discussion a judge reported
488 that he wants to have the certificates in the file because they
489 provide a means of monitoring the progress of an action. District
490 of Arizona Local Rule 5.2 provides that a notice of service of
491 discovery materials must be within a reasonable time after service.
492 That is useful. A practicing lawyer noted that it also is useful
493 for all parties to know what is going on; Rule 5(a)(1)(C) directs
494 that a discovery paper that is required to be served on a party
495 must be served on all parties unless the court orders otherwise,
496 but a certificate on the docket provides useful reassurance. Will
497 the proposed rule language that a certificate of service "need not
498 be filed" when the paper is not filed prevent filing voluntarily or
499 as directed by court order or local rule? And it is important to
500 know whether the answer, whatever it proves to be, will change the
501 present rule.

502 Discussion reflected the ambiguity of the present rule that
503 requires a certificate of service to be filed together with the
504 paper, but directs that some papers must not be filed. It is
505 difficult to be confident whether a clear new rule will change the
506 present rule. So too, it is difficult to be confident about the
507 implications that might be drawn from "need not be filed" standing
508 alone. It might imply a right not to file. One response might be to
509 redraft the rule to require that a certificate of service be filed
510 within a reasonable time after service, whether or not the paper is
511 filed. But it was concluded that the rule need not go so far; some
512 courts may prefer that certificates not be filed for papers that
513 are served but not filed. The conclusion was that words should be
514 added to the Style Consultants' version as described above: "(ii)
515 if the paper is not filed, a certificate of service need not be
516 filed unless filing is required by local rule or court order.

517 A motion to recommend the proposed Rule 5 amendments for
518 adoption, as revised in the agenda book and in the discussion, was
519 approved by 13 votes, with one dissent.

520 *Rules 62, 65.1*

521 Judge Matheson, Chair of the joint Subcommittee formed with
522 the Appellate Rules Committee, reported on the published proposals

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523 to amend Rules 62 and 65.1.

524 Rule 62 governs district-court stays of execution and
525 proceedings to enforce a judgment. The published proposal revises
526 the automatic stay by extending it from 14 days to 30 days, and by
527 adding an express provision that the court may order otherwise. It
528 recognizes security in a form other than a bond. It provides that
529 security may be provided after judgment is entered, without waiting
530 for an appeal to be filed, and that "any party," not only an
531 appellant, may provide security. A single security can be provided
532 to govern post-judgment proceedings in the district court and to
533 continue throughout an appeal until issuance of the mandate on
534 appeal. The rule also is reorganized to make it easier to follow
535 the provisions directed to injunctions, receiverships, and
536 accountings in an action for patent infringement.

537 Rule 65.1 provides for proceedings against a surety or other
538 security provider. The proposed amendments were developed to
539 dovetail with proposed amendments to Appellate Rule 8(b). The only
540 issues that remain subject to further consideration are reconciling
541 the style choices made for the Appellate and Civil Rules.

542 Public comments were sparse. All expressed approval of the
543 proposals in general terms. No testimony addressed these rules
544 during the three public hearings.

545 Discussion began with a question pointing to the wording of
546 proposed Rule 62(b) stating that "a party *may* obtain a stay by
547 providing a bond or other security." Must a judge allow the stay?
548 This provision carries over from present Rule 62(d) – "the
549 appellant may obtain a stay * * *." The choice to carry it over was
550 deliberate. Earlier Rule 62 drafts included provisions recognizing
551 judicial discretion to deny a stay, to grant a stay without
552 security, and take still other actions. They were gradually
553 winnowed out in the face of continuing arguments that there should
554 be a nearly absolute right to obtain a stay on posting adequate
555 security. Carrying "may" forward will carry forward as well present
556 judicial interpretations, which seem to recognize some residual
557 authority to deny a stay in special circumstances even though full
558 security is offered.

559 The Committee voted unanimously to recommend proposed Rules 62
560 and 65.1 for adoption, subject to style reconciliation with the
561 Appellate Rules proposal and to editorial revisions of the
562 Committee Notes.

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II
ONGOING WORK: RULE 30(B) (6) SUBCOMMITTEE

565 Judge Bates introduced the Rule 30(b)(6) Subcommittee Report
566 as work that remains in a preliminary stage. The question brought
567 to the Committee by the Subcommittee is how to move forward.

568 Judge Ericksen introduced the Subcommittee Report by pointing
569 to the Memorandum on Rule 30(b)(6) prepared by Rules Law Clerk
570 Lauren Gailey, with assistance from Derek Webb. The Report shows
571 that the rule "creates a lot of work," as measured by the number of
572 cases that cite to it. "It is a focus of litigation."

573 The Report provides a ranking of possible new rule provisions,
574 moving from A+ through A, A-, and simple B. Professor Marcus
575 prepared the ranking after the last Subcommittee conference call.
576 The Subcommittee has not reviewed it. But it provides a good point
577 of departure in providing direction to the Subcommittee. What
578 should the Subcommittee do first?

579 Rule 30(b)(6) can be seen as a hybrid of interrogatories and
580 depositions. "It's a place where people release frustrations with
581 numerical limits in Rules 30, 31, and 33." This shows in the
582 continuing discussions of how to apply the Rule 30 limits of number
583 and duration to multiple-witness depositions under Rule 30(b)(6).

584 Supplementation of a witness's deposition testimony has been
585 a regular subject of discussion. The case law is pretty clear that
586 an answer can be supplemented. But people worry about it because
587 the Rule does not say it. "If we take away that worry, we may be
588 able to focus better on discovery of where in the organization an
589 inquiring party can find the desired information."

590 This first introduction prompted the observation that there is
591 a tension in what the Committee is hearing. "We hear it is a focus
592 of litigation." But in the Standing Committee, and here in this
593 Committee, judges say they do not see these problems. We need to
594 explore that. Judge Ericksen responded that "lawyers fight and
595 scream with each other, but are reluctant to take it to the court."
596 This observation led to an inquiry whether the many cases cited in
597 the research memorandum reflected mere mentions of Rule 30(b)(6),
598 or whether they involved actual disputes? Other Committee members
599 reported different numbers of cases citing to Rule 30(b)(6), citing
600 to the rule in conjunction with "dispute," or citing to the rule
601 with "dispute" in the same paragraph. Still different on-the-spot
602 e-search results were reported.

603 Professor Marcus described a new book that he has just read,

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604 Mark Kosieradzki, *30(b)(6): Deposing Corporations, Organizations*
605 *& the Government* (2017). It runs more than 500 pages, including
606 appendices. It reflects a point of view – "it's clear, and my side
607 wins." Pages 242-245 of the agenda materials reflect "a lot of
608 ideas that have been bouncing around."

609 The Subcommittee is still working on these ideas. It has not
610 yet reached firm conclusions. Some, for example the American
611 College of Trial Lawyers, tell us that reasonable lawyers can work
612 out the things that might have a default in rule text. But why
613 bother with new rule text when work-outs are common?

614 Looking to the most modest proposal, perhaps no one believes
615 it would hurt to say that lawyers should talk about Rule 30(b)(6)
616 depositions early in the litigation, although early discussions may
617 not prove helpful when the 30(b)(6) depositions come at a late
618 stage in discovery. So the only A+ ranking is awarded to the
619 possibility of adding Rule 30(b)(6) depositions as subjects for
620 possible provisions in a scheduling order and for discussion at the
621 Rule 26(f) conference.

622 What else might be useful? Is there a risk that adding
623 specific rule provisions will promote more disputes?

624 The A list begins with "judicial admissions," a topic that the
625 Rule 30(b)(6) book covers in three chapters. These questions
626 distinguish between giving a witness's deposition testimony the
627 effect of a judicial admission that cannot be contradicted by other
628 evidence and simply making it admissible in evidence against the
629 entity that named the witness to represent it at the deposition.
630 The next item on the A list is supplementation of the witness's
631 testimony, either as an obligation or as an opportunity. Then come
632 contention questions, attempts to use the witness to nail down the
633 legal positions taken by the entity that designated the witness;
634 objections to the "matters for examination" "specified with
635 reasonable particularity" in the notice, a matter now open only by
636 a motion for a protective order, and one that is made prominent in
637 the Rule 30(b)(6) book; and the durational limit questions noted
638 above.

639 The A- list begins with the practice of providing the witness
640 advance copies of exhibits that will be used as a subject of
641 examination; the Subcommittee has been reluctant to make this a
642 mandatory practice for fear of stimulating massive sets of
643 documents with a correspondingly massive obligation to prepare the
644 witness. Second is the possibility of requiring that notice of a
645 30(b)(6) deposition be provided a minimum period before the time
646 set for the deposition. The underlying concern is that, as compared

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647 to other depositions, these depositions require the entity to
648 gather information and train the witness to testify to it. Some
649 local rules have general provisions setting notice periods, but
650 there is little focused specifically on Rule 30(b)(6). The third A-
651 topic asks whether questioning should be limited to the matters
652 specified in the deposition notice. The witness designated by the
653 entity named as deponent may have independent knowledge of the
654 topic, and it is efficient to explore that knowledge in a single
655 "deposition." But there are risks that the individual knowledge may
656 be incomplete or simply wrong. Finding an all-purpose approach is
657 difficult. The final two questions are whether a means should be
658 found to channel into Rule 33 interrogatories inquiries into the
659 sources of information, both witnesses and documents, and whether
660 Rule 31 depositions on written questions might be developed as a
661 similar alternative.

662 The B list includes nine subjects: Advance notice of the
663 identity of the witnesses designated by the entity-deponent; second
664 depositions of the entity; limiting Rule 30(b)(6) to parties, even
665 though it may be useful as to nonparty entities; requiring
666 identification of documents used in preparing a witness to testify
667 for the entity; expanding initial disclosures to reduce the need
668 for 30(b)(6) depositions that seek to identify witnesses and
669 documents, a possibility being explored by the Initial Mandatory
670 Discovery pilot project; forbidding other discovery to duplicate
671 matters subject to a 30(b)(6) subpoena; making more stringent the
672 "reasonable particularity" designation of matters for examination,
673 or limiting the number of matters that can be listed; adding a
674 specific reference to Rule 30(b)(6) to Rule 37(d), although the
675 Rule 30(b)(6) book says that courts find it there now; and adding
676 a specific reference to Rule 30(b)(6) to the provisions of Rule
677 37(c)(1) that impose consequences – most notably exclusion of
678 evidence not disclosed – for inadequate witness testimony.

679 Summing up the A, A-, and B lists, Professor Marcus suggested
680 that attempting to address this many topics, many of them in a
681 single rule, will indeed induce the "headaches" suggested by a
682 member of the Standing Committee when a similar list was discussed
683 last January.

684 Judge Bates suggested that these summaries of the list and
685 grading of potential topics set the stage for discussing which
686 subjects deserve further exploration.

687 A Subcommittee member identified himself as an advocate for
688 doing more than prompting discussion of Rule 30(b)(6) depositions
689 in scheduling conferences and Rule 26(f) conferences. "Unless you
690 have a very active judge, in a complex case people will not yet be

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691 able to anticipate what problems will arise" as discovery proceeds.
692 Subcommittee work has shown that there are problems that recur in
693 some types of civil litigation. And judges do not often see them.
694 This rule "is a time-consuming source of controversy in certain
695 kinds of litigation." Lawyers argue about the same issues in case
696 after case. Yes, they are worked out most of the time. "We can save
697 a lot of time and expense if we do it right." But we must do it
698 right. "We do not want a rule that will simply promote further
699 disputes." The conflicting pressures suggest a "less is more"
700 approach.

701 What issues most deserve close attention? "Judicial
702 admissions" is one. The case law may pretty much have it right. But
703 it is a lingering worry for many lawyers. It affects witness
704 preparation and objections.

705 Another issue is contention questions. At the deposition you
706 are not supposed to instruct the witness not to answer.

707 Yet another issue is questions that go beyond the scope of the
708 matters designated in the notice: this ties to the "binding" effect
709 of the answers. A distinction might be drawn by providing that a
710 witness's answers to questions beyond the scope of the notice are
711 not even admissible against the entity. A different line might be
712 drawn to questions that are within the scope of the notice when the
713 witness has not been adequately prepared to answer them.

714 Supplementation also might be usefully addressed. Allowing or
715 requiring supplementation creates a risk that witnesses will not be
716 prepared, and returning to the old "bandying" practice in which
717 each successive witness says that someone else knows the answer.

718 It may not be useful to adopt rule text to say whether
719 examination of each witness designated by an entity counts as a
720 separate deposition, or whether the one-day-of-7-hours limit
721 applies to each witness or to all of the designated witnesses
722 together.

723 For a while it seemed attractive to require a minimum advance
724 notice of the deposition, to be followed by a defined period for
725 objections, to be followed by a meet-and-confer. All of that
726 happens now in practice. People work it out. There is no real need
727 to address it in rule text.

728 Finally, it would be better to put aside all of the topics in
729 the "B" list.

730 Another member agreed that "judicial admissions is an

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731 interesting topic." It lies alongside the explicit Rule 36
732 provisions for obtaining binding admissions. The question is
733 different in addressing the effects of testimony by an entity's
734 designated witness at deposition. Any rule should be framed
735 carefully to guard against trespassing over the line that divides
736 substance from procedure.

737 A practicing lawyer reported a comment by the legal department
738 for a big company that seven hours is not enough time to complete
739 a Rule 30(b)(6) deposition when the entity designates a number of
740 witnesses. More generally, "we should continue our work." It may be
741 that the problems may be solved by case management in some cases.
742 But there also may be room for rule changes. In response to the
743 question asked by the American College of Trial Lawyers, rulemaking
744 can help. Adding explicit reminders of Rule 30(b)(6) to Rules 16(b)
745 and 26(f) will help. A recent case from the Northern District of
746 California is a worthy example. The notice listed 30 matters for
747 examination. The judge found that Rule 1, as amended, "favors
748 focus." Case management can help to cut out duplicative topics.
749 "There may be room for nudges that will prevent the infighting that
750 judges never see, or see only at times." Work should continue on
751 the A list topics.

752 A judge said that he had seen some Rule 30(b)(6) problems, but
753 in more than a decade and a half he could count the number on one
754 hand. He agreed that case management can get the lawyers to work on
755 the issues.

756 Another judge observed that he had never *ruled* on a Rule
757 30(b)(6) dispute – "we work through them on calls." Creating a
758 formal objection process might prove counterproductive by
759 entrenching a more formal dispute process requiring more formal
760 resolution.

761 A practicing lawyer noted that "we get objections now." The
762 available procedure is a motion for a protective order, which must
763 be preceded by a conference of the attorneys. Creating a formal
764 objection procedure could allow the deposition to go forward on
765 matters not embraced by the objections. Formalizing it will get
766 people talking, and will crystalize the dispute. But it must be
767 asked how much a formal process will slow things down, and what the
768 value will be. It is not clear whether a formal objection process
769 will slow things down as compared to current practice.

770 Judge Bates noted that the discussion had mostly involved
771 Subcommittee members, and urged other Committee members to address
772 the question whether the Subcommittee should move forward, and with
773 what focus.

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774 A judge said that, like the other judges, "I don't get many
775 issues," although that may be because he refers discovery disputes
776 to magistrate judges. Still, his colleagues do not see many Rule
777 30(b)(6) disputes. "It's a lawyer problem." And lawyers seem to
778 work out the problems. "But there may be clear guidance that will
779 help lawyers at the margin. The trick is to not write provisions
780 that increase disputes." To this end, it may be useful to seek
781 advice from lawyer groups that we have not yet heard from.

782 Another judge reported that he too does not see many 30(b)(6)
783 disputes. It is hard to figure out what the core problems are. Are
784 they not providing the right witnesses? Failing to prepare
785 witnesses properly? It would help to get lawyers to identify the
786 three or four worst problems, and to help think whether anything
787 can be done to improve the means of addressing them. Adding
788 30(b)(6) to the lists of topics that may be addressed in a
789 scheduling order, and to the subjects of a Rule 26(f) conference,
790 may help to get lawyers thinking about the issues. But it may be
791 that the most useful approach will be to foster best practices
792 rather than add to the rules.

793 Yet another judge stated that in 14 years on the bankruptcy
794 court he has never encountered a 30(b)(6) problem, nor has he heard
795 of them.

796 A fourth judge also has had very limited experience with the
797 possible problems. He suspects it will be best to focus on a couple
798 of broad issues.

799 Speaking as a practitioner, another Committee member suggested
800 that disputes arise during the deposition, presenting questions
801 that are hard for the lawyers to address in advance. Other issues
802 may emerge as the case goes on, before the deposition itself, but
803 again the scheduling conference and Rule 26(f) conference may come
804 too early to enable useful discussion. This thought was echoed by
805 another lawyer, who suggested that moving the discussion to the
806 beginning of an action could increase the number of disputes. You
807 do not know what the actual problems will be until you see and hear
808 them.

809 The immediate response was that Rule 30(b)(6) depositions may
810 come at the very beginning of an action. Lawyers who represent
811 individual employment discrimination plaintiffs use them as an
812 initial discovery tool. "It depends on the kind of case."

813 A judge said that these topics deserve further development in
814 the Subcommittee. It will be useful to "kill" the idea of binding
815 judicial admissions – it makes no sense to bind a party to things

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816 said by imperfect witnesses with imperfect memories. A rule can
817 properly provide that an answer is not an admission that cannot be
818 contradicted by other evidence. But in addressing other issues, it
819 will be important to avoid adding detailed rules that will provoke
820 disputes. And the last two items on the A- list – "substituting
821 interrogatories" and "Rule 31 alternative" – should be dropped.

822 Judge Ericksen reported that the Subcommittee will be helped
823 by knowing that the Committee supports continuing work. The
824 question of judicial admissions will be considered. The list of
825 topics will be studied to determine which should be dropped. Should
826 "contention" questions be kept on for more work? There is a
827 possibility of directing them to Rule 33 and Rule 36, perhaps by
828 new rule text that forbids a question allowed by Rule 33(a)(2) as
829 one that "asks for an opinion or contention that relates to fact or
830 the application of law to fact."

831 A judge followed up on this question by noting that lawyers
832 use contention questions as a catch-all, and usually work out the
833 disputes. They are concerned that answers to interrogatories may
834 not be as forthcoming as should be.

835 Judge Bates invited comments from observers.

836 An observer based her observations on many years in practice
837 and now as an in-house lawyer. "Rule 30(b)(6) is very expensive."
838 Often it takes days, even weeks, to prepare for a deposition that
839 takes one or two hours. It is not possible to overstate the time
840 required to prepare the witness. "The absence of case law does not
841 mean there is no problem." The notices often set out very broad
842 topics, going far back in time, and spread across all products, not
843 just the one in suit. "We object, file for protective orders, but
844 often are not successful." We work hard to address it in Rule 16
845 conferences, but that can be too early – the other side says that
846 they do not yet have our information, and cannot yet know what they
847 will have to seek through Rule 30(b)(6). Objections and attempts to
848 work through the objections often are met by a simple response: "We
849 want what we want." "Court rulings are not always satisfactory." As
850 to contention questions, they are often inappropriate. A witness
851 might be asked to state the basis for a limitations defense, a
852 question of law. Or the question might ask about vehicle
853 performance, a matter for an expert witness. And "we are getting
854 discovery on discovery" – questions about what documents were used
855 to prepare the witness, what documents were sought.

856 Another observer began with this: "There are people who abuse
857 it, but that does not mean the rule is broken." A scheduling
858 conference often is premature with respect to potential 30(b)(6)

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859 issues. If 30(b)(6) is added to list of topics in Rule 16(b), the
860 parties will focus on it more, but it may be irrelevant to actual
861 discovery. Rule 30(b)(6) "is one tool among many. It should be used
862 wisely." The parties should, under Rule 1, cooperate by giving
863 notice of the subjects they want to explore before discovery
864 actually begins. Rule 30(b)(6) should be used only to get
865 information that has not come forth by other means. An effective
866 means of addressing the issues that do arise as discovery proceeds
867 may be a meet-and-confer process triggered by a potential motion.

868 Yet another observer expressed concern that nothing be done to
869 vitiate the utility of Rule 30(b)(6). From a plaintiff's
870 perspective, it provides an opportunity to get by deposing one or
871 two witnesses information that otherwise would require seven or
872 eight depositions. Supplementation is appropriate when a witness
873 says something that is absolutely wrong. It is not clear whether
874 supplementation is otherwise useful.

875 Judge Bates concluded the discussion by noting that the
876 Subcommittee has learned that it should continue its work. The
877 Committee discussion will be helpful in focusing the work. There is
878 a clear caution that care should be taken to avoid unintended
879 consequences that generate more disputes than are avoided. Care
880 must be taken to avoid changes that move lawyers away from working
881 out their differences to taking them all to the court.

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Pilot Projects

883 Judge Bates described progress with the Expedited Procedures
884 Pilot Project and the Mandatory Initial Discovery Pilot Project.
885 The people working hard to complete supporting materials and to
886 promote the projects include Judge Grimm, a past member of this
887 Committee, Judge Campbell, Judge Shaffer, Laura Briggs, and Emery
888 Lee, as well as others. The supporting materials will include video
889 presentations available online to all those participating in a
890 project. The work that lies ahead is to recruit a sufficient number
891 of courts to provide a basis for strong empirical evaluation of the
892 projects. Even some Committee members have found it difficult to
893 persuade other judges on their courts that they should participate
894 in one of the projects.

895 Judge Campbell said that the Mandatory Initial Discovery
896 project has come further along than the Expedited Procedures
897 project. It will be launched in the District of Arizona on May 1.
898 The general order implementing it is very close to the pilot-
899 projects draft. A check list for lawyers has been prepared; Briggs,
900 Lee, and others have prepared model documents. Two introductory
901 videos are available on the district web site. One is prepared by
902 Judge Grimm. The other features Arizona state-court judges and
903 lawyers who explain how comparable disclosure requirements work in
904 Arizona courts and what does – and does not – work. The video shows
905 that they believe in the system. It seems likely that Arizona
906 disclosure practice explains why 73% of lawyers who litigate in
907 both Arizona state courts and Arizona federal courts prefer the
908 state courts; across the country, only 45% of lawyers who litigate
909 in both state and federal courts prefer state courts. The District
910 of Arizona is a good place to start the project because Arizona
911 lawyers have 25 years of experience with sweeping initial
912 disclosure requirements. The first months of the program will be
913 studied in September to determine whether adjustments should be
914 made. One price has been paid for starting the project – the
915 successful protocol for discovery in individual employment cases
916 had to be stopped because it is inconsistent with the project.

917 The Northern District of Illinois will start the Mandatory
918 Initial Discovery project for many judges on June 1. Both the
919 Eastern District of Pennsylvania and at least the Houston Division
920 of the Southern District of Texas are "in the works."

921 The Expedited Procedures project still needs some work. The
922 Eastern District of Kentucky is going to participate. Other courts
923 need to be found. It may not be launched before the end of the
924 year.

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925 The amendments that took effect in 2015 renewed the lesson
926 that many rules changes will be accepted only if they are supported
927 by hard facts. The hope is that the pilot projects will provide
928 support for rules that lead to greater initial disclosures and
929 still more widespread case management.

930 Emery Lee said that some time will be needed before we can
931 begin to measure the effects of either pilot project. Cases that
932 terminate early in the project period will not reflect the effects
933 of the project. Many cases that are affected by the project will
934 not conclude until some time after the formal project period
935 closes.

936 Strategies to attract participation were discussed briefly.
937 The standing order that establishes a project has been sent to
938 every court that has been approached. The videos that explain the
939 projects have not been; perhaps they should be used as part of the
940 recruiting effort. More courts are needed.

941 Judge Campbell noted that United States Attorneys Offices have
942 not been approached as such. The Department of Justice has
943 identified a couple of concerns with the Arizona Mandatory Initial
944 Disclosure project that can be addressed.

945 The final observations were that progress is being made, and
946 that the Committee on Court Administration and Case Management has
947 been helpful in promoting further progress.

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948 **III**
949 **SETTING AGENDA PRIORITIES**

950 Judge Bates introduced five sets of issues that vie for
951 priority on the Committee agenda. Each will demand a significant
952 amount of Committee time when it comes up, and some will require a
953 great deal of time. The question for discussion today is which of
954 these projects should be taken up first, recognizing that any
955 present assignment of priorities will remain vulnerable to new
956 topics that emerge while these projects are considered.

957 The five current projects involve two that are new, at least
958 on the current agenda, and three that have been on the agenda. The
959 two new projects are a request from the Administrative Conference
960 of the United States that new rules be developed for district-court
961 review of Social Security Disability Claims and a suggestion from
962 the American Bar Association that Rule 47 should be amended to
963 ensure greater opportunities for lawyer participation in the voir
964 dire examination of prospective jurors. The three projects already
965 on the agenda involve several aspects of the procedure for
966 demanding jury trial, the means of serving Rule 45 subpoenas, and
967 the offer-of-judgment provisions of Rule 68.

968 It is possible that one or another of these projects will be
969 withdrawn from the agenda as a result of the discussion. But it
970 seems likely that most will survive in some form, although perhaps
971 reduced and perhaps deferred indefinitely.

972 Each project will be explored separately. Discussion aimed at
973 assigning priorities will follow.

974 *Review of Social Security Disability Claims*

975 The Administrative Conference of the United States has made
976 this request:

977 The Judicial Conference, in consultation with Congress as
978 appropriate, should develop for the Supreme Court's
979 consideration a uniform set of procedural rules for cases
980 under the Social Security Act in which an individual
981 seeks district court review of a final decision of the
982 Commissioner of Social Security pursuant to 42 U.S.C. §
983 405(g). These rules would not apply to class actions or
984 to other cases that are outside the scope of the
985 rationale for the proposal.

986 Apart from a general suggestion that new rules should promote
987 efficiency and uniformity, four specific suggestions are made. The

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988 complaint should be "substantially equivalent to a notice of
989 appeal." A certified copy of the administrative record should be
990 the main component of the agency's answer. The claimant should be
991 required to file an opening merits brief, with a response by the
992 agency and appropriate subsequent proceedings should be provided.
993 The rules should set deadlines and page limits.

994 It seems clear that the request is to adopt the new rules
995 under the authority of the Rules Enabling Act, 28 U.S.C. § 2072.
996 Although less clear, and perhaps not an important element, it seems
997 to be a request to adopt the rules outside the Federal Rules of
998 Civil Procedure – there is an explicit suggestion that "the new
999 rules should be drafted to displace the Federal Rules *only* to the
1000 extent that the distinctive nature of social security litigation
1001 justifies such separate treatment." This suggestion is illustrated
1002 by a footnote suggesting that the new rules could be embraced by
1003 adding to Civil rule 81(a)(6) a provision that the Civil Rules
1004 govern proceedings under the new rules except to the extent that
1005 the new rules provide otherwise.

1006 Presentation of this proposal began with recognition that it
1007 must be treated with great respect because its source is the
1008 Administrative Conference. Respect is further entrenched by the
1009 support provided by a research paper authored by Jonah Gelbach and
1010 David Marcus. Important questions remain as to the process best
1011 fitted to developing any new rules that may prove appropriate, but
1012 those questions may be discussed after sketching the underlying
1013 administrative framework and the judicial review statute.

1014 Social Security disability claims, and claims under similar
1015 provisions for individual awards outside old-age benefits, begin
1016 with an administrative filing. If benefits are denied at the first
1017 administrative stage, review is provided at a second stage. If
1018 benefits are denied at that stage, review goes to an administrative
1019 law judge. The Social Security Administration has 1,300
1020 administrative law judges. The case load is enormous, looking for
1021 dispositions on the merits and after hearings in 500 to more than
1022 600 cases a year. The administrative law judge has responsibilities
1023 that extend beyond the neutral umpire role familiar in our
1024 adversary system; the judge must somehow see to it that the record
1025 is developed to support an accurate determination. Once the
1026 administrative law judge makes an initial determination of how the
1027 claim should be decided, the case is assigned to a staff member to
1028 write an opinion. The administrative law judge then reviews the
1029 draft and makes any changes that are found appropriate. A
1030 disappointed claimant can then take an appeal within the
1031 administrative system.

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1032 Section 405(g) provides for district-court review of a final
1033 determination of the Commissioner of Social Security "by a civil
1034 action." It further directs that a certified copy of the record be
1035 filed "[a]s part of the Commissioner's answer." Characterizing
1036 review as a civil action brings the review proceeding squarely into
1037 the Civil Rules, but of itself does not preclude adoption of a
1038 separate set of review rules, particularly if they are integrated
1039 with the Civil Rules in some fashion.

1040 The purpose of establishing special Social Security review
1041 rules lies in experience with appeals. About 17,000 to 18,000
1042 actions for review are filed annually. By case count, they account
1043 for about 7% of the federal civil docket. In 15% of them, the
1044 Office of General Counsel determines that the final decision cannot
1045 be defended and voluntarily asks for remand for further
1046 administrative proceedings. Of the cases that remain, the national
1047 average is that about 45% are remanded. Remand rates, however, vary
1048 widely across the country. The lowest remand rates hover around
1049 20%, while the highest reach 70%. It is a fair question whether the
1050 procedures that bring the review to the point of decision are
1051 likely to have much effect on the remand rate, either in the
1052 overall national rate or in bringing the rates for different courts
1053 closer together. Other factors may account for the variability in
1054 outcomes, including speculation that there are differences in the
1055 quality of the dispositions reached in different regions of the
1056 Social Security Administration.

1057 Another source of different outcomes may lie in differences in
1058 the procedures adopted by district courts to provide review. Some
1059 treat the proceedings as appeals. Some invoke summary judgment
1060 procedures, reasoning that both summary judgment and administrative
1061 review involve judicial action on a paper record. The analogy to
1062 summary judgment is imperfect, however. On summary judgment, the
1063 court invokes directed verdict standards to determine whether a
1064 reasonable jury could come out either way, assuming that most
1065 credibility issues are resolved in favor of the nonmovant and
1066 further assuming all reasonable inferences in favor of the
1067 nonmovant. On administrative review the question is whether, using
1068 a "substantial evidence" test that is subtly different from the
1069 directed-verdict test, the actual administrative decision can be
1070 upheld. Beyond that point lie a large number of other procedural
1071 differences. Both lawyers representing the government and private
1072 practitioners that have regional or national practices may
1073 experience difficulties in adjusting to these differences.

1074 Against this background, the initial questions tie together.
1075 Is it suitable to invoke the Rules Enabling Act to address
1076 questions as substance-specific as these? The Committees have

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1077 traditionally been reluctant to invoke the authority to adopt
1078 "general rules of practice and procedure" to craft rules that apply
1079 only to specific substantive areas. One concern lies in the need to
1080 develop the detailed knowledge of the substantive law required to
1081 develop specific rules. General rules that rely on case-specific
1082 adaptation informed by the particular needs of a particular
1083 question as illuminated by the parties may work better. Another
1084 concern is that however neutral a rule is intended to be, it may be
1085 perceived as favoring one set of parties over other parties, and in
1086 turn may be thought to reflect a deliberate intent to "tilt the
1087 playing field." At the same time, there are separate rules for
1088 habeas corpus and § 2255 proceedings, and the Civil Rules have a
1089 set of Supplemental Rules for admiralty and civil forfeiture
1090 proceedings. And the nature of social security cases accounts for
1091 special limitations on remote access to electronic records in Rule
1092 5.2(c).

1093 One response to the concerns about substance-specific rules
1094 could be to adopt more general rules for review on an
1095 administrative record. The difficulty of taking this approach is
1096 underscored by the specific character of individual social security
1097 disability benefits cases described in the initial discussion. A
1098 great deal must be known to determine whether a generic set of
1099 rules for review on an administrative record can work well across
1100 the vast array of executive and other administrative agencies that
1101 may become involved in district-court review.

1102 If the Enabling Act process is employed, should it rely on the
1103 Civil Rules Committee as it is, drawing on experts in social
1104 security law and litigation as essential sources of advice, or
1105 should some means be found to bring one or more experts into a
1106 formal role in the process? Given the statutory direction that
1107 review is sought by way of a civil action, the Civil Rules
1108 Committee is the natural source of initial work, then to be
1109 considered by the Standing Committee and on through the normal
1110 process. But if it proves wise to structure the civil review action
1111 as essentially an appeal process, it may help to involve the
1112 Appellate Rules Committee in the process.

1113 Let it be assumed that any rules should be developed either
1114 within the Civil Rules or as an independent body that still is
1115 integrated with the Civil Rules. What form might they take?

1116 The first step is likely to require a sound understanding of
1117 the structure and procedures that lead to the final decision of the
1118 Commissioner that is the subject of review. It does not seem likely
1119 that rules governing district-court review procedure can do much to
1120 affect the administrative structure and operation. The standard of

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1121 review – "substantial evidence" – is set by statute. But knowing
1122 the origins of the cases that come to the courts may affect the
1123 choice between rules that are simple and limited or rules that are
1124 more complex and extensive.

1125 The second step will be to establish the basic character of
1126 the rules. The analogy to appeal procedures is obviously
1127 attractive. Guidance may even be sought in the Appellate Rules. But
1128 going in that direction does not automatically mean that review
1129 should be initiated by a paper that is as opaque as an Appellate
1130 Rule 3 notice of appeal. There is a real temptation to ask that the
1131 review be commenced by a paper that provides some indication of the
1132 claimant's arguments. On the other hand, little may be possible
1133 until the administrative record is filed with the answer as
1134 directed by § 405(g). If the "complaint" provides little
1135 information about the claimant's position, it may make sense to
1136 follow the Administrative Conference suggestion that the
1137 administrative record should be the "main component" of the answer.

1138 Once the review is launched, the reflex response will be to
1139 treat the claimant as a plaintiff or appellant, responsible for
1140 taking the lead in framing the arguments for reversal or remand. It
1141 may be that the ambiguous assignment of responsibilities to the
1142 administrative law judge might carry over to assign to the
1143 Commissioner the first responsibility for presenting arguments for
1144 affirmance. This alternative is likely to prove unattractive
1145 because it will be difficult, at least in some cases, to frame the
1146 argument that the final decision is supported by substantial
1147 evidence before the claimant has articulated the contrary
1148 arguments.

1149 Assuming that the claimant is to file the first brief on
1150 review, the analogy to appellate procedure suggests several
1151 correlative rules. A time must be set to file the brief. A later
1152 time must be set for the Commissioner's brief. Provision might well
1153 be made for a reply by the claimant. Whether to allow still further
1154 briefing would be considered in light of past experience with these
1155 review proceedings. Times must be set for each step. Page limits
1156 might be set, although some thought should be given to the
1157 possibility that leeway should be left for local rules that reflect
1158 local district circumstances. None of these provisions should be
1159 imported directly from the Appellate Rules without considering the
1160 ways in which a narrowly focused set of rules may justify specific
1161 practices better than those crafted for a wide variety of cases.

1162 The review rules might be expanded to address more detailed
1163 issues. The Administrative Conference recommends that there be no
1164 provisions for class actions, and that the rules should not apply

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1165 to "cases outside the scope of the rationale." It suggests
1166 provisions governing attorney fees, communication by electronic
1167 means, and "judicial extension practice". Work on these and other
1168 issues that will be raised will again require learning about the
1169 details of social security administration. It will be important to
1170 understand the scope of § 405(g) in attempting to define the
1171 categories of cases covered by the rules – why, for example, is it
1172 assumed that § 405(g) authorizes review by way of a class action?
1173 And why, if indeed the statute would establish jurisdiction, is a
1174 class action inappropriate if the ordinary Rule 23 requirements are
1175 met? Or, on a less intimidating scale, what is different about
1176 these cases that justifies departure from the procedures for
1177 awarding attorney fees set out in Rule 54(d)(2)?

1178 It will be important to explore limits of useful detail. It
1179 seems likely that much will be better left to the Civil Rules. And
1180 imagination should not carry too far. As compared to appellate
1181 courts, for example, district courts regularly take evidence and
1182 decide questions of fact. And there may be some special fact
1183 questions that are not committed to agency competence. Imagine, for
1184 example, questions of improper behavior not reflected in the
1185 administrative record: bribery, supervisor pressure on the
1186 administrative judge corps to produce an acceptable rate of awards
1187 and denials, or ex parte communications. As intriguing as it might
1188 be to craft rules for such claims, the task likely should not be
1189 taken up.

1190 This initial presentation concluded with two observations. The
1191 Administrative Conference has made an important recommendation that
1192 must be taken seriously. Careful thought must be given to deciding
1193 whether the project should be undertaken. A commitment to explore
1194 the suggestion carefully, however, does not imply a commitment to
1195 develop new rules.

1196 Judge Bates summarized this initial presentation by a reminder
1197 that the present task is to determine what priority should be
1198 assigned to social-security review rules on the Committee agenda.
1199 If the project is taken up by this Committee, an early choice will
1200 be whether to adopt one rule or several more detailed rules, and
1201 whether to place them directly in the Civil Rules or to adopt a
1202 separate set of rules that are nonetheless integrated with the
1203 Civil Rules in some fashion. Every year brings many of these cases
1204 to the district courts. Around the country, different districts
1205 adopt quite different procedures for them. And there are wide
1206 variations in remand rates.

1207 Discussion began by asking how many districts have local rules
1208 that govern review practices. This question led to a more pointed

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1209 observation that in various settings there may be confusion whether
1210 proceedings that involve agencies should be initiated as a civil
1211 action by a Rule 3 complaint, or instead are some other sort of
1212 "proceeding" in the Rule 1 sense that is initiated by an
1213 application, petition, or motion. It will be important to explore
1214 other substantive areas that involve quasi-appellate review in the
1215 district courts.

1216 The next observation was that district courts may well follow
1217 different procedures for different areas of administrative review,
1218 or may instead have a single general review practice. There are
1219 variations among the districts. One variation is that in many
1220 districts, particularly for social security cases, magistrate
1221 judges are the first line of review.

1222 Judge Campbell encouraged the Committee to take up this
1223 project. This is a Civil Rules matter. The District of Arizona
1224 local rule for these cases is not long, showing that a good rule
1225 need not be long. He gets 20 to 30 of these cases every year. They
1226 always rely on a paper record. The records include many medical
1227 reports. One important element in the review is provided by
1228 specific rules, often rather detailed rules, that each circuit has
1229 developed to guide the administrative decision process. The Ninth
1230 Circuit has specific rules as to the standard of decision the
1231 administrative law judge must use when the treating expert's
1232 opinion is not contradicted, the standard when it is contradicted,
1233 and so on. These rules may require reversal for failure to
1234 articulate the reviewing circuit standard without considering
1235 whether substantial evidence supports the denial of benefits. If
1236 the administrative law judge does not say the right things in
1237 rejecting an expert opinion, "I have to treat the opinion as true."
1238 That leads to about a 50% reversal rate. But reversal rates vary
1239 across the Ninth Circuit, ranging from 28% in the District of
1240 Nevada to 69% in the Western District of Washington. There is
1241 reason to suspect that reversals often happen because
1242 administrative judges do not say what circuit rules require them to
1243 say.

1244 This observation led to the question whether the Rules
1245 Enabling Act process can address circuit decisions imposing rules
1246 that are closely bound up with the substance of social security law
1247 and the administrative procedures that implement that substance.
1248 This concern provides a specific illustration of the need to keep
1249 constantly in mind the challenges of creating procedural rules
1250 specific to a single substantive area.

1251 Another participant stated that the United States Attorney
1252 offices handle the vast majority of these cases. Two working groups

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1253 in the Department of Justice have studied the variations among the
1254 circuits. A "model" rule might be useful, if it is adaptable to
1255 local circumstances. But there is no real sense that these are
1256 issues that must be addressed.

1257 A judge reviewed some of the statistics provided in the
1258 Gelbach and Marcus paper describing the workload of the
1259 administrative law judges and the amount of time they can devote to
1260 any single case. These statistics "point to the Social Security
1261 Administration looking to its own structures and procedures." It
1262 will be hard to do much by rulemaking. "We do need to respect the
1263 request, but we need to look at a lot more than this report." And
1264 it may be important to look at practices on administrative review
1265 in many different settings for insights that may be important in
1266 considering this particular setting. This suggestion was seconded
1267 – we must look to what is happening in other substantive fields.

1268 Another participant asked how much variation there is among
1269 the circuits, and whether the variations will make it difficult to
1270 craft a single rule that makes sense across the board? Another
1271 participant turned this question around by asking whether the
1272 principal problem lies in the work of the Social Security
1273 Administration, not in variations in circuit law.

1274 A judge suggested that we should look for more specific local
1275 rules. The District of Minnesota aims at timelines and procedures
1276 that will reduce delay in getting benefits to a person who is
1277 entitled to them. (It was later noted that social security cases
1278 are reported separately for delays in disposition.)

1279 The local-rule inquiry may tie to the number of review cases
1280 that are brought to a district. Some courts have more than others,
1281 often because of differences in the size of the local population.

1282 A judge asked whether there is any sense of what proportion of
1283 claimants appear pro se – a pro se litigant may encounter
1284 difficulty with a separate set of rules. Two judges responded that
1285 most claimants in their districts have lawyers; one explained that
1286 fee provisions mean that the lawyer appears with essentially no
1287 cost to the claimant.

1288 A judge noted that there are separate rules for habeas corpus
1289 cases and for § 2255 proceedings and asked whether the issues
1290 surrounding substance-specific rules are different for those rules
1291 than they would be for social-security review rules.

1292 A lawyer member said that "it is difficult to say to the
1293 Administrative Conference that we do not want to look at this." So

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1294 where should we look? Should we look to administrative review more
1295 broadly? That would be more consistent with the "general rules"
1296 contemplated by the Enabling Act. But if there is no obstacle to
1297 prevent focusing on the specific setting of social-security review,
1298 it will be better to focus on that. "This seems to be a
1299 distinctive, even unique, set of issues." One obvious place to
1300 start will be with standards of review, or circuit rules that seem
1301 to combine approaches to review with dictates about practices that
1302 must be followed by administrative law judges to avoid reversal.
1303 How far do the circuits root their rules in statutory language? And
1304 we should determine whether the Administrative Conference is most
1305 concerned with establishing uniform rules, or whether it aims
1306 higher to get rules that are both uniform and good? Is the test of
1307 good defined only in terms of good dispositions in the district
1308 courts, or is it defined more broadly in hoping for procedures that
1309 will wash back to enhance administrative law judge dispositions?

1310 Several members joined in suggesting that it will be important
1311 to seek out associations of claimants' representatives if this
1312 project proceeds. The Committee will need expert advice from all
1313 perspectives. A number of organizations were quickly identified.

1314 Emery Lee reported that Gelbach and Marcus got some of their
1315 information from him. And they have a lot of data that might be
1316 shared for our study. And he has been involved with the
1317 Administrative Conference and the Social Security Administration.
1318 The Social Security Administration has a really impressive data
1319 processing system. There is a long-term effort to improve the
1320 entire Administration.

1321 Judge Bates concluded the discussion by suggesting that the
1322 Committee should look at these questions, beginning with efforts to
1323 gather more information. But decisions about priorities should be
1324 deferred until four more pending projects have been discussed.

1325 *Jury Trial Demands: Rules 38,39, and 81(c)(3)*

1326 Judge Bates introduced the questions raised by the rules that
1327 require an explicit demand by a party who wishes to enjoy the right
1328 to a jury trial.

1329 The question first came to the agenda in a narrow way. Until
1330 the Style Project changed a word in 2007, Rule 81(c)(3)(A) provided
1331 that a party need not demand a jury trial after a case is removed
1332 from state court if "state law *does not*" require a demand. "Does
1333 not" was understood to mean that a demand was excused only if state
1334 law does not require a demand at any time. Even then, the rule
1335 provided that a demand must be made if the court orders that a

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1336 demand may be made, and further provided that the court must so
1337 order at the request of a party. The Style project changed "does"
1338 to "did." That creates a seeming ambiguity: what does "did" mean if
1339 state law requires a demand at some point, but the case is removed
1340 to federal court before it reaches that point? Is a demand excused
1341 because state law did not require it to be made by the time of
1342 removal? Or is a demand required because, at the time of removal,
1343 current state law did require a demand, albeit at a later point in
1344 the case's progress toward trial?

1345 Early discussions of this question have been inconclusive.
1346 Discussion in the Standing Committee in June, 2016, also was
1347 inconclusive. But soon after the meeting, two members – then-Judge
1348 Gorsuch and Judge Graber – suggested that Rule 38 should be amended
1349 to delete the demand requirement. The new model would follow the
1350 lead of Criminal Rule 23(a), under which a jury trial is
1351 automatically provided in all cases that enjoy a constitutional or
1352 statutory right to jury trial. A jury trial would be bypassed only
1353 by express waiver by all parties; the Criminal Rule might be
1354 followed to require that the court approve the waiver. They wrote
1355 that this approach would produce more jury trials, create greater
1356 certainty, remove a trap for the unwary, and better honor the
1357 purposes of the Seventh Amendment.

1358 The Committee agreed last November that further research
1359 should be done. A starting point will be to attempt to dig deeper
1360 into the history of the 1938 decision to adopt a demand
1361 requirement, and to set the deadline early in the litigation. State
1362 practices also will be examined, recognizing that some states do
1363 not require a demand at any point and others put the time for a
1364 demand later, even much later, than the time set by Rule 38.

1365 Empirical questions also need to be researched. One is to
1366 determine how often a party who wants a jury trial fails to get one
1367 because it overlooked the need to make a timely demand and failed
1368 to persuade the court to accept an untimely demand under Rule
1369 39(b). That question may be difficult to answer. A separate
1370 question asks a different kind of practical-empirical question: Is
1371 it important to the court or the parties to know early in an action
1372 whether it is to be tried to a jury? Why?

1373 If the Criminal Rule model is to be followed, it will be
1374 useful to consider drafting issues that distinguish the Seventh
1375 Amendment from the Sixth Amendment. It is not always clear whether
1376 there is a Seventh Amendment (or statutory) right to jury trial, or
1377 on what issues. There should be some means to raise this question.
1378 Whether the means should be provided by express rule text is not
1379 yet clear. As part of that question, it may be useful to consider

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1380 whether it is appropriate to hold a jury trial in a case that does
1381 not involve a jury-trial right. Present Rule 37(c)(2) authorizes a
1382 jury trial with the same effect as if there is a right to jury
1383 trial, but only with the parties' consent. Should a no-demand-
1384 required rule address this issue?

1385 The right to jury trial is important and sensitive. These
1386 questions must be approached with caution.

1387 Discussion began with the empirical question: How often *do*
1388 people lose the right to jury trial? "Can there be a general, quick
1389 fix"? This is an important issue – jury trial is an important part
1390 of democracy. And there are all sorts of ways to address the issue.

1391 A judge supported this view, saying that part of the first
1392 step will be to explore the issue of inadvertent waiver. Another
1393 judge agreed that these questions are important philosophically,
1394 but empirical information is also important.

1395 Another member agreed that these questions may deserve
1396 consideration. Some state courts do not require a demand: does that
1397 create any problems? Pro se cases may become an issue. But there
1398 are reasons to ask whether amending Rule 38 would change much in
1399 practice.

1400 The other side of the practical question was asked again:
1401 Criminal Rule 23 means that the parties know from the beginning
1402 that there will be a jury trial. If an amended Rule 38 does not go
1403 that far, how important is it to set the time for demand early in
1404 the case? Can the time be pushed back, reducing the risk of
1405 inadvertent waiver, until a point not long before trial?

1406 Another part of the empirical question will be to determine
1407 what standards are employed under Rule 39(b) to excuse a failure to
1408 make a timely demand. If tardy demands are generally allowed, the
1409 case for amending Rule 38 may be weakened.

1410 *Rule 47: Jury Voir Dire*

1411 Judge Bates introduced the Rule 47 proposal that came from the
1412 American Bar Association. The proposal adheres to the ABA
1413 Principles for Juries and Jury Trials 11(B)(2), which provides that
1414 each party should have the opportunity to question jurors directly.
1415 The ABA proposal is supported by submissions from the American
1416 Board of Trial Advocates and the American Association for Justice.

1417 The proposal observes that federal judges generally allow less
1418 party participation in voir dire than is allowed in state courts.

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1419 Judge-directed questioning is challenged because judges know less
1420 about the case than the parties know, leaving them unable to think
1421 of questions that probe for potential biases relevant to that
1422 particular case. For the same reason, judges are unable to
1423 anticipate developments at trial that may trigger bias. The ABA
1424 also urges that jurors will be more forthcoming in answering
1425 lawyers' questions, more willing to acknowledge socially
1426 unacceptable things, than in answering a judge's questions.
1427 Possible difficulties are anticipated and refuted by arguing that
1428 lawyer participation will not cause significant delay, and that it
1429 should not be assumed that lawyers will abuse the opportunity.

1430 This question was considered by the Committee some time ago.
1431 In 1995 it published for comment a proposal very similar to the ABA
1432 proposal. The public comments divided along clear lines. Most
1433 lawyers supported the proposed rule. Judges were nearly unanimous
1434 in opposing it. Opposition was expressed by many judges who
1435 actually permit extensive lawyer participation – they believe that
1436 lawyer participation can be valuable, but that the judge must have
1437 an unlimited right to restrict or terminate lawyer participation as
1438 a means to protect against abuse. The Committee decided then to
1439 abandon the proposal. Rather than amend the rule, it concluded that
1440 judges should be better educated in the advantages of allowing
1441 lawyer participation subject to clear judicial control.

1442 The reactions seem to be the same today. It is not clear
1443 whether federal judges generally are more or less willing to permit
1444 lawyer participation in voir dire than they were in 1995. There is
1445 reason to suspect that more judges permit active lawyer
1446 participation today. But if indeed more judges do so, that could
1447 cut either way. It may show that there is little need to amend Rule
1448 47. Or it may show that Rule 47 should be amended to ensure that
1449 all judges permit practices that wide experience supports. It may
1450 be important to try to get better information on current practices.

1451 Discussion began with the observation that Criminal Rule 24(a)
1452 is closely similar to Rule 47.

1453 A lawyer member strongly favors the ABA proposal. His
1454 experience is that more federal judges have come to permit
1455 supplemental questioning by lawyers, but that not all do. Many
1456 trial lawyers believe that judge questions produce less useful
1457 information about how people think, about what prejudices they
1458 have. And some judges do not permit lawyer participation, or allow
1459 only a very short time for lawyer participation. Allowing
1460 supplemental questioning by the lawyers "would be a good start."

1461 Another lawyer asked what would be the standard of review

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1462 under a new rule when the judge limits lawyer participation? A
1463 judge answered that judges are inclined to allow lawyer
1464 participation "when it seems helpful, otherwise not." If the rule
1465 expands lawyers' rights, appeals will be taken to review rulings on
1466 what are reasonable questions. Minnesota state courts generate many
1467 opinions on what are reasonable questions that must be allowed.

1468 Another judge observed that his district has 30 judges and
1469 perhaps 20 different ways of regulating lawyer participation in
1470 voir dire. He allows supplemental questions. "One size may not fit
1471 all judges. There is a risk in losing my discretion." But it is
1472 useful to think further about this proposal.

1473 Another judge observed that he respects lawyers, "especially
1474 the experienced, good lawyers. Not all are like that." We need to
1475 learn more before going for more lawyer participation. If we can
1476 get questions from the lawyers up front, a combined procedure in
1477 which the judge goes first, supplemented by the lawyers, should
1478 work.

1479 Another judge noted that he gives lawyers a limited time to
1480 ask questions after he has finished. "I worry about giving lawyers
1481 and parties a right to conduct voir dire, especially in pro se
1482 cases."

1483 A state-court judge said that his state has a large body of
1484 law on this topic. The 1995 Committee Note referred to clear abuse
1485 of discretion. In his state, "we get a lot of issues for appeal."

1486 Another judge said that he asks questions, then allows lawyers
1487 to ask questions. "They're not very good at it," perhaps because
1488 earlier judges on his court did not give them a chance to get
1489 experience with it.

1490 Further discussion was deferred to the overall discussion of
1491 assigning agenda priorities.

1492 *Rule 45: Serving Subpoenas*

1493 Rule 45 directs that "serving a subpoena requires *delivering*
1494 *a copy to the named person.*" A majority of courts interpret this
1495 opaque language to mean that personal service is required. But a
1496 fair number of courts interpret it to allow delivery by mail, and
1497 some interpret it to allow delivery by mail if attempts at personal
1498 service fail. Occasionally a court has authorized other means of
1499 service.

1500 The proposal submitted to the Committee suggests that all of

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1501 the means allowed by Rule 4 to serve the summons and complaint
1502 should be allowed for service of a subpoena. The argument is
1503 straightforward: the consequences of complying with a subpoena are
1504 less than the consequences of being brought into an action as
1505 defendant who must participate in the full course of the litigation
1506 and is at risk of losing a judgment. The proposal would also
1507 authorize the court to direct service by means not contemplated by
1508 Rule 4.

1509 The reasons for expanding the modes of service are attractive.
1510 Personal service can be expensive. It can cause delay. And at times
1511 it may be physically dangerous. The analogy to Rule 4 has an
1512 initial appeal.

1513 In addition to the wish for less burdensome means of service,
1514 it is desirable to have a uniform national practice. If some courts
1515 permit service by mail, uniformity can be restored by permitting
1516 mail service generally or by prohibiting mail service generally.
1517 Whichever way, uniformity is attractive.

1518 There is much to be said for permitting service by mail; the
1519 rule might call for certified or registered mail, or might borrow
1520 from other rules a more general "any form of mail that requires a
1521 return receipt."

1522 Turning to the Rule 4 analogy, there also is much to be said
1523 for allowing "abode" service by leaving the subpoena with a person
1524 of suitable age and discretion who resides at the dwelling or usual
1525 place of abode of the person to be served.

1526 Allowing other means authorized by the court seems attractive,
1527 at least if there are reasons why personal service, mail, or abode
1528 service have failed.

1529 Still further expansions can be made. And it may prove
1530 attractive to distinguish between parties and nonparties. Serving
1531 a subpoena on a party by serving the party's attorney is
1532 attractive, particularly in an era that permits service by filing
1533 the subpoena with the court's electronic-filing system.

1534 Going all the way to incorporate all of Rule 4, on the other
1535 hand, raises potential problems. Careful thought would have to be
1536 given to serving a minor or incompetent person; serving a
1537 corporation, partnership, or association; serving the United States
1538 and its agencies, corporations, officers, or employees; or serving
1539 a state or local government. So too for service outside the United
1540 States.

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1541 Discussion began with the observation that Criminal Rule 17(d)
1542 is similar to Rule 45: "The server must deliver a copy of the
1543 subpoena to the witness * * *." This Committee should consult with
1544 the Criminal Rules Committee to determine their views on the value
1545 of expanding the means of service, either generally or as to
1546 criminal prosecutions in particular. And it would be useful to
1547 learn how "deliver" is interpreted in the Criminal Rule.

1548 The Bankruptcy Rules Committee also should be consulted.

1549 A lawyer member noted that the Committee considered this very
1550 set of questions a few years ago during the work that led to
1551 extensive amendments of Rule 45. The Committee decided then that
1552 there was not sufficient reason to amend the rule. Personal service
1553 was thought useful because it dramatically underscores the
1554 importance of compliance. There does not seem to have been any
1555 change of circumstances since then – the state of the law described
1556 in the proposal is the same as the law described in extensive
1557 research for the Discovery Subcommittee then. "This does not seem
1558 the most important thing we can do."

1559 *Rule 68*

1560 Judge Bates introduced the Rule 68 offer-of-judgment topic by
1561 noting that it has been the subject of broad proposals for
1562 reconsideration and expansion and also the subject of proposals
1563 that focus on one or another specific problems that have appeared
1564 in practice.

1565 The history of the Committee's work with Rule 68 was used to
1566 set the framework for the current discussion. Some observers have
1567 long lamented that Rule 68 does not seem to be used very much. They
1568 believe that it should be given greater bite. The purpose is not so
1569 much to increase the rate of settlements – it would be difficult to
1570 diminish the rate of cases that actually go to trial – as to
1571 promote earlier settlements. A common parallel theme is that the
1572 rule should be expanded to include offers by plaintiffs. Since
1573 plaintiffs generally are awarded "costs" if they win a judgment,
1574 the cost sanction seems inadequate to the purpose of encouraging a
1575 defendant to accept a Rule 68 offer for fear the plaintiff will win
1576 still more at trial. So these suggestions commonly urge that post-
1577 offer attorney fees should be awarded to a plaintiff who wins more
1578 than an offer that the defendant failed to accept. That proposition
1579 leads in turn to the proposal that if a plaintiff can be awarded
1580 attorney fees, fee awards also should be provided for a defendant
1581 when the plaintiff fails to win a judgment more favorable than a
1582 rejected offer made by the defendant.

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1583 Alongside these proposals to expand Rule 68 lie occasional
1584 arguments that Rule 68 should be abrogated. It is seen as largely
1585 useless because it is not much used. But it may be used more
1586 frequently by defendants in cases that involve a plaintiff's
1587 statutory right to attorney fees so long as the statute
1588 characterizes the fees as "costs." The Supreme Court decision
1589 establishing this reading of the Rule 68 provision that "the
1590 offeree must pay the costs incurred after the [more favorable]
1591 offer was made" is challenged as a "plain meaning" ruling that
1592 thwarts the plaintiff-favoring purpose of fee-shifting statutes.
1593 More generally, Rule 68 is challenged as a tool that enables
1594 defendants to take advantage of the risk aversion plaintiffs
1595 experience in the face of uncertain litigation outcomes.

1596 The Committee published proposed amendments in 1983. The
1597 vigorous controversy stirred by those proposals led to publication
1598 of quite different proposals in 1984. No further action was taken.
1599 The Committee came to the subject again in the 1990s. The model
1600 developed then worked from a proposal advanced by Judge William W
1601 Schwarzer. Both plaintiffs and defendants could make offers and
1602 counteroffers. A party could make successive offers. Attorney fees
1603 were provided as sanctions independent of statutory authority. But
1604 account was taken of the view that post-offer fees should be offset
1605 by the "benefit of the judgment": the difference between the
1606 rejected offer and the actual judgment was subtracted from the fee
1607 award. As one illustration, the plaintiff might reject an offer of
1608 \$50,000, and then win a judgment of \$30,000. The defendant may have
1609 incurred \$40,000 of attorney fees after the offer lapsed. The
1610 \$20,000 benefit of the judgment – \$30,000 subtracted from the
1611 \$50,000 offer – was subtracted from the \$40,000 post-offer fees to
1612 yield a fee award of \$20,000. A further concern for fairness led to
1613 an additional limit: the fee award could not exceed the amount of
1614 the judgment. In this illustration, the defendant's post-offer fees
1615 might have been \$80,000. Subtracting the \$20,000 benefit of the
1616 judgment would leave a fee award of \$60,000. Simply offsetting the
1617 \$30,000 judgment would leave the plaintiff liable for \$30,000 out-
1618 of-pocket. The rule prevented this result by denying any fee award
1619 greater than the judgment. And to afford equal treatment, the same
1620 cap applied for the benefit of a defendant who rejected a more
1621 favorable offer: the fee award was capped at the amount of the
1622 judgment for the plaintiff. Still further complications were added
1623 in accounting for contingent-fee arrangements, offers for specific
1624 relief, and other matters. The Committee eventually decided that
1625 the attempt to address so many foreseeable complications had
1626 generated a rule too complex for application. The project was
1627 abandoned without publishing any proposal.

1628 Many suggestions to revise Rule 68 have been made by bar

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1629 organizations and others over the years. Extensive materials
1630 describing many of them were supplied in an appendix to the agenda
1631 book. Many of them aim at broad revision. Some are more focused.
1632 Ten years ago the Second Circuit suggested that the Rule should be
1633 amended to provide guidance on the approach to evaluating
1634 differences between an offer of specific relief – commonly an
1635 injunction – and a judgment that does not incorporate all of the
1636 proposed relief but adds more besides. More recently, Judge Furman
1637 has pointed to a specific problem: The voluntary dismissal
1638 provisions of Rule 41(a)(1)(A), incorporated in Rule 41(a)(2), are
1639 "subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable
1640 federal statute." When a settlement requires court approval,
1641 voluntary dismissal cannot be used to sidestep the approval
1642 requirement. The Second Circuit has ruled, for example, that a
1643 requirement of court approval of a settlement is read into the text
1644 of the Fair Labor Standards Act. This requirement cannot be
1645 defeated by stipulating to dismissal. Rule 68 does not have any
1646 list of exceptions. So a question has appeared: can the parties
1647 agree to a settlement that requires court approval, and then avoid
1648 court scrutiny by making a formal Rule 68 offer that is accepted by
1649 the plaintiff? Rule 68(a) directs that on filing a rule 68 offer
1650 and notice of acceptance, "[t]he clerk must * * * enter judgment."
1651 Perhaps Rule 68 could be amended to address only this problem – the
1652 1983 proposal, for example, specifically excluded actions under
1653 Rules 23, 23.1, and 23.2 from Rule 68.

1654 The lessons to be learned from this history remain uncertain.
1655 Continually renewed interest in revising Rule 68 suggests there are
1656 strong reasons to take it up once again. Repeated failure to
1657 develop acceptable revisions, both in the carefully developed
1658 efforts and in brief reexaminations at sporadic intervals, suggests
1659 there are strong reasons to leave the rule where it lies. It causes
1660 some problems, but is not invoked so regularly as to cause much
1661 grief. Yet a third choice might be to recommend abrogation because
1662 Rule 68 has a real potential for untoward effects and because
1663 curing it seems beyond reach.

1664 The repeated suggestions for amendments caused the Committee
1665 to reopen Rule 68 in 2014, giving it an open space on the agenda.
1666 Further consideration will be scheduled when there is an
1667 opportunity for further research. There is a considerable
1668 literature about Rule 68. Many states have similar rules that
1669 nonetheless depart from Rule 68 in many directions. Careful review
1670 of the state rules may show models that can be successfully
1671 adopted.

1672 Discussion began with the observation that many states have
1673 offer provisions. The California provision is bilateral. Federal

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1674 courts have ruled that when a state rule provides for plaintiff
1675 offers, the state practice applies to state-law claims in federal
1676 court because Rule 68 is silent on the subject. But Rule 68 governs
1677 to the exclusion of state law as to defendant offers, because Rule
1678 68 does speak to that subject. One consequence of abrogating Rule
1679 68 could be that state rules are adopted for state-law claims in
1680 federal court. State rules, further, may suggest effective
1681 sanctions other than awards of attorney fees. California practice
1682 allows award of expert-witness fees, a sanction that has proved
1683 effective.

1684 The next observation was that Georgia has a new offer statute
1685 enacted as part of tort reform. It recognizes bilateral offers, and
1686 bilateral awards of attorney fees. "The effect has been chaotic."
1687 Offers are made early in an action, before either party has any
1688 well-developed sense of what discovery may show about the merits of
1689 the case. Even with early offers, there is little evidence that the
1690 rule has advanced the time of settlement. There have been lots of
1691 problems, and no benefit. And "getting rid of it presents its own
1692 set of issues."

1693 A lawyer member asked "how fast can I run away from this?
1694 Trying to do everything everyone wants will be a real headache."
1695 And a judge remarked that Rule 68 seems to be falling away.

1696 *Ranking Priorities*

1697 Judge Bates suggested that the time had come to consider
1698 ranking the priority of these five items: Review of social-security
1699 claims; the demand procedure for jury trial, both in removed
1700 actions and generally; lawyer participation in jury voir dire;
1701 service of Rule 45 subpoenas; and Rule 68 offers of judgment.

1702 The first advice addressed all five. The Committee should
1703 press ahead with the social-security review topic. The jury demand
1704 questions should begin with an attempt to learn how often parties
1705 suffer an inadvertent loss of a desired jury-trial right. As to
1706 voir dire, Rule 47 could be written as the ABA proposes, but the
1707 amendment would not change judges' behavior. Exploring subpoena-
1708 service questions should be coordinated with the Criminal rules
1709 Committee. There is not enough reason to reopen Rule 68 in general,
1710 but it would be interesting to see how other courts react to
1711 similar procedures. There is no need to act immediately.

1712 A lawyer member noted that courts divide on the availability
1713 of mail service for Rule 45 subpoenas. "There aren't that many
1714 cases." And some courts allow mail service only after attempting
1715 and failing to make personal service. The Committee should decide

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1716 what it wants. Perhaps the jury-demand question could be explored
1717 by addressing removal cases separately from the general Rule 38
1718 demand question.

1719 A judge suggested that the Committee should take up the
1720 social-security review question. For Rule 38, it should attempt to
1721 determine how often parties forfeit the right to jury trial for
1722 failure to make timely demand. The remaining Rule 45, 47, and 68
1723 questions should be put on a back burner.

1724 Another lawyer member agreed with the first suggestion that
1725 not much is likely to be accomplished by revising Rule 47. It will
1726 be useful to explore inadvertent loss of the right to jury trial by
1727 failing to make a timely demand. And the Committee should look to
1728 the social-security review questions.

1729 Emery Lee and Tim Reagan addressed the difficulty of
1730 undertaking empirical research into the inadvertent loss of jury
1731 rights. "Jury trials are rare to begin with." There may not be a
1732 Rule 39(b) request to excuse an unintentional waiver – it may be
1733 difficult to find docket entries that reflect the problem. Getting
1734 useful information may not be impossible, but it will be difficult.
1735 It might work to look at reported cases and work backward from
1736 them. A judge observed that anecdotal information is available, but
1737 it will be difficult to distinguish between accident and choice –
1738 a party that knowingly failed to make a timely demand may come to
1739 wish for a jury trial and plead for relief from what is
1740 characterized as an inadvertent oversight. A judge observed that in
1741 cases challenging the effectiveness of a demand she rules that it
1742 makes no difference whether the demand was entirely proper. Another
1743 judge said that he has had two cases in which pro se litigants
1744 failed to make a timely demand; he ruled that they had not lost the
1745 right to jury trial.

1746 A lawyer agreed that it is almost impossible to figure out how
1747 often there is an inadvertent forfeiture of jury trial. But he
1748 asked "why should the right be lost by failing to meet a deadline?
1749 It may be deep in the case before you figure out whether you want
1750 a jury."

1751 A lawyer member reported that a quick on-line search of Rule
1752 39(b) cases suggests a general approach: a belated jury demand
1753 should be granted unless there is good reason to deny it. Examples
1754 of reasons to deny may be long delay, disrupting the court
1755 schedule, or burden on the opposing party.

1756 A further caution was noted. If we expand the right to jury
1757 trial without demand, the rule should deal with the fact that many

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1758 contracts waive the right to demand a jury trial.

1759 Lauren Gailey reported that research has begun on these
1760 topics, including the history of the demand requirement, and Rule
1761 39(b). She noted that the Ninth circuit has a stringent test for
1762 granting relief under Rule 39(b). The research should be available
1763 soon.

1764 Judge Bates summarized the discussion of priorities. Social-
1765 security review issues lie at the top of the list. The work will
1766 move forward now. It may be that a way should be found to bring
1767 people familiar with these issues into the project.

1768 The jury demand questions will be pursued by finishing the
1769 research now under way in the Administrative Office. Empirical
1770 investigations also may be undertaken if a promising approach can
1771 be developed.

1772 The remaining three topics will be held aside for the time
1773 being. There is little enthusiasm for present renewal of the jury
1774 voir dire question. The Rule 45 subpoena question also will be on
1775 a back burner, recognizing that the question is manageable and that
1776 we likely will have to deal with it in the future as means of
1777 communication continue to develop. Short of more adventuresome
1778 approaches, a simple amendment to authorize service by mail may be
1779 considered. Rule 68 will not be reopened now, but developments in
1780 FLSA cases in the Second Circuit will be monitored.

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IV
OTHER MATTERS

1784 *Pre-Motion Conference: 17-CV-A*

1784 Judge Furman has suggested consideration of Rule
1785 16(b)(3)(B)(v). Rule 16(b)(3)(B) lists "permissive contents" for
1786 scheduling orders. The broadest potential amendment would change
1787 item (v) so that a scheduling order may:

1788 direct that before ~~moving for an order relating to~~
1789 ~~discovery~~ making a motion, the movant must request a
1790 conference with the court;

1791 This question was considered by the subcommittee that
1792 developed the package of case-management and discovery amendments
1793 that took effect on December 1, 2015. The subcommittee concluded
1794 that it would be better to encourage the pre-motion conference
1795 through Rule 16(b) in a modest way limited to discovery motions.
1796 Many judges require pre-motion conferences now, but many do not.
1797 The subcommittee was concerned that a more ambitious approach would
1798 meet substantial resistance.

1799 More recently, the Committee has added to the agenda a
1800 suggestion that the encouragement of pre-motion conferences should
1801 be expanded to include summary-judgment motions. The purpose of the
1802 conference would not be to deny the right to make the motion, but
1803 to help focus the motion and perhaps illuminate the reasons why a
1804 motion would not succeed.

1805 Judge Furman's suggestion would add to the list at least some
1806 motions to dismiss. A motion to dismiss for failure to state a
1807 claim is a leading candidate, along with similar motions for
1808 judgment on the pleadings or to strike. Motions going to subject-
1809 matter or personal jurisdiction could be added. Perhaps other
1810 categories could be included. But it does not seem likely that all
1811 motions should be included. Ex parte motions are an obvious
1812 example. So for many routine motions and some that are not so
1813 routine. What of a motion to amend a pleading? For leave to file a
1814 third-party complaint? To compel joinder of a new party?

1815 Discussion began with a reminder that not long ago a
1816 deliberate decision was made to limit the new provision to
1817 discovery motions. "Judges do it in different ways." Some require
1818 a conference before filing a motion for summary judgment. Others
1819 require a letter informing the court that a party is considering
1820 filing a motion – judges use the letter in different ways. Judge
1821 Furman himself does not have a pre-motion requirement.

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1822 The Committee concluded that these questions should be left to
1823 percolate and mature in practice. It is too early to reopen more
1824 detailed consideration.

1825 *The Patient Safety Act: 17-CV-B*

1826 The Patient Safety Act creates patient safety organizations.
1827 Health-care providers gather and provide information to patient
1828 safety organizations about events that harm patients. The Act
1829 defines and protects "patient safety work product."

1830 The suggestion is that a Civil Rule should be adopted to
1831 repeat, almost verbatim, the statute that protects against
1832 compulsory disclosure of information collected by a patient safety
1833 organization unless the information is identified, is not patient
1834 safety work product, and is not reasonably available from another
1835 source. The purpose is to provide notice of a statute that
1836 otherwise might be ignored in practice.

1837 The chief reason to bypass this proposal is that the Civil
1838 Rules should not be used to duplicate statutes. A related but
1839 subsidiary reason is that a provision in the Civil Rules would be
1840 incomplete – the statute extends its protection to discovery in
1841 federal, state, or local proceedings, whether civil, criminal, or
1842 administrative.

1843 Beyond that, it seems likely that patient safety organizations
1844 themselves are well aware of the statute. They can bring it to the
1845 attention of anyone who demands protected information.

1846 The Committee agreed that this topic should be removed from
1847 the agenda.

1848 *Letter of Supplemental Authorities: 16-CV-H*

1849 This suggestion builds on Appellate Rule 28(j), which allows
1850 a party to submit a letter to provide "pertinent and significant
1851 authorities" that have come to the party's attention after its
1852 brief has been filed or after oral argument. The proposal is that
1853 a comparable procedure should be established for the district
1854 courts, backed by personal experience with wide differences in the
1855 practices now followed.

1856 The analogy to appellate practice is not perfect. Appellate
1857 practice has a clear structure for scheduling the parties' briefs.
1858 District-court practice includes a wide variety of events that must
1859 be addressed by the court, and the Civil Rules do not establish any
1860 particular system of briefing or time schedules for presenting a

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1861 party's position. Immediate presentation and response are likely to
1862 be needed more frequently than in courts of appeals. Any attempt to
1863 establish a meaningful structure for submitting supplemental
1864 authorities might well depend on establishing a structure and time
1865 limits for presenting arguments in general.

1866 Discussion began with an appellate judge who, as the frequent
1867 recipient of Rule 28(j) letters, is skeptical about expanding the
1868 practice to the district courts. A district judge said that he has
1869 no "mechanism" for such submissions, and "I love them when they
1870 come in," but concluded that the time for a Civil Rule is not now.

1871 Another judge noted that the variety of motions confronting a
1872 district court, and the lack of a structure for briefing in the
1873 Civil Rules, weigh against exploring this suggestion further.

1874 The Committee agreed that this topic should be removed from
1875 the agenda.

1876 *Title VI, Puerto Rico Oversight Act: 16-CV-J*

1877 The Puerto Rico Oversight Act includes, as Title VI, a
1878 procedure for restructuring bond claims (including bank debt). An
1879 Oversight Board determines whether a "modification" qualifies. The
1880 issuer can apply to the District Court for Puerto Rico for an order
1881 approving a qualifying modification. The provisions for action by
1882 the district court are sketchy.

1883 The Act includes a Title III, with proceedings governed by the
1884 Bankruptcy Rules. The Bankruptcy Rules Committee has advised that
1885 the Bankruptcy Rules are not appropriate for Title VI proceedings.

1886 The suggestion is for adoption of a new Civil Rule 3.1. The
1887 suggestion arises from the provision in Title VI that the district
1888 court acts on an "application" by the issuer. Rule 3 directs that
1889 a civil action is commenced by filing a complaint. It is not clear
1890 what an "application" should include, but the proposal is that it
1891 is better to track the statute, so the new Rule 3.1 should direct
1892 that a civil action for relief under the Act "is commenced by
1893 filing an application for approval of a Qualifying Modification *
1894 * *."

1895 The puzzlement about Rule 3 reflects an issue that was
1896 addressed in the Style Project. At the time of the Project, Rule 1
1897 applied the Civil Rules to "all suits of a civil nature." It was
1898 amended to apply the Rules to "all civil actions and proceedings."
1899 Some proceedings are initiated by filing a petition or application,
1900 not a complaint. Whether a complaint is appropriate is a question

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1901 governed by the substantive law. What should be required of an
1902 "application" embodied in a particular substantive statute also
1903 should be shaped by the substantive law.

1904 Strong arguments counsel against undertaking to draft a new
1905 Rule 3.1. Proceedings under the Act can be brought in only one
1906 district court, the District Court for Puerto Rico. Suitable
1907 procedures should be tailored to the overall practices of that
1908 court, and to the substantive provisions of the Oversight Act. That
1909 court knows its own practices, and will come to know the
1910 substantive provisions of the Act, better than any other court or
1911 this Committee can know them. In addition, it will soon confront
1912 applications under the Act and must respond to them. Procedures
1913 must be developed now. A new Civil Rule, at least in the ordinary
1914 course, could not take effect before December 1, 2019, and that
1915 schedule might be ambitious in light of the need to become familiar
1916 with local procedures and the substance of the modification
1917 process.

1918 The Committee agreed that this topic should be removed from
1919 the agenda.

1920 *Disclaimer of Fear or Intimidation: 16-CV-G*

1921 This suggestion would add a rule "requiring a judge disclaim
1922 fear or intimidation influence the judgment being written." It
1923 draws from concern that a judge may be influenced by forces not
1924 perceived, such as use of a horn antenna with a microwave oven
1925 Magnetron as a beam-forming wireless energy device.

1926 The Committee agreed that this topic should be removed from
1927 the agenda.

1928 *"Nationwide Injunctions": 17-CV-E*

1929 This suggestion urges adoption of a new Rule 65(d)(3):

1930 (3) *Scope.* Every order granting an injunction and every
1931 restraining order must accord with the historical
1932 practice in federal courts in acting only for the
1933 protection of parties to the litigation and not
1934 otherwise enjoining or restraining conduct by the
1935 persons bound with respect to nonparties.

1936 Although the proposed rule ranges far wider, the supporting
1937 arguments are presented primarily through the draft of a
1938 forthcoming law review article. The article focuses on injunctions
1939 issued by a single district judge, or by a single circuit court,

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1940 that restrain enforcement of federal statutes, regulations, or
1941 official actions throughout the country.

1942 Examples are given of an injunction that restrained
1943 enforcement of an order by President Obama and another that
1944 restrained enforcement of an order by President Trump. The reasons
1945 advanced for prohibiting "nationwide" injunctions are partly
1946 conceptual and partly practical.

1947 On the practical side, it is urged that a single judge or
1948 circuit should not be able to bind the entire country by an order
1949 that may be wrong. The intrinsic risk of error is aggravated by the
1950 prospect of forum-shopping for favorable districts and circuits;
1951 the risk of conflicting injunctions; and "tension" with established
1952 doctrines that reject nonmutual issue preclusion against the
1953 government, establish important protective procedures when relief
1954 is sought on behalf of a nationwide class under Civil Rule
1955 23(b)(2), deny judgment-enforcement efforts by nonparties, and deny
1956 any stare decisis effect for district-court decisions.

1957 On the conceptual side, it is urged that the Judiciary Act of
1958 1789 limits federal equity remedies to traditional equity practice.
1959 Some adjustments must be made to reflect the fact that there was
1960 but a single Chancellor for all of England, while now there are
1961 many federal-judge chancellors. There also are extended arguments
1962 based on Article III justiciability concerns. Article III is seen
1963 to limit remedies as well as initial standing. It confers judicial
1964 power only to decide a case for a particular claimant. Once that
1965 controversy is decided, "there is no longer any case or controversy
1966 left for the court to resolve."

1967 This suggestion raises many questions. It is well argued. But
1968 the questions go beyond those that may properly be addressed by
1969 "general rules of practice and procedure" adopted under the Rules
1970 Enabling Act. Appropriate remedies are deeply embedded in the
1971 substantive law that justifies a remedy. If justiciability limits
1972 in Article III are involved, a rule on remedies would have to
1973 recognize, and perhaps attempt to define, those limits.

1974 Additional questions are posed by the broad generality of the
1975 proposed rule, which sweeps across all substantive areas.

1976 The Committee agreed that this topic should be removed from
1977 the agenda. It also agreed, however, that it will consider any
1978 suggestions that may be made by the Department of Justice to
1979 address concerns it may advance for possible rule provisions.

1980 *Rule 7.1: Supplemental Disclosure Statements*

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1981 Rule 7.1(b)(2) directs that a disclosure statement filed by a
1982 nongovernmental corporate party must be supplemented "if any
1983 required information changes."

1984 The disclosure provisions of the several sets of rules were
1985 adopted through joint deliberations aimed at producing uniform
1986 rules. Criminal Rule 12.4(b)(2) now requires a supplemental
1987 statement "upon any change in the information that the statement
1988 requires." The slight differences in style are immaterial.
1989 "[C]hange" in the Criminal Rule and "changes" in the Civil Rule
1990 bear the same meaning.

1991 The Criminal Rules Committee is considering an amendment of
1992 disclosure requirements as to an organizational victim under
1993 Criminal Rule 12.4(a)(2). In the course of its deliberations it has
1994 proposed an amendment of Rule 12.4(b)(2) to address the situation
1995 in which facts that existed at the time of an initial disclosure
1996 statement were not included because they were overlooked or not
1997 known. The underlying concern is that the present rule does not
1998 require a party to file a supplemental statement when it learns of
1999 facts that existed at the time of the initial statement because
2000 there is no "change" in the information.

2001 The question for the Civil Rules Committee comes in three
2002 parts.

2003 The first question is whether a supplemental disclosure
2004 statement should be required when a party learns of pre-existing
2005 facts that were not disclosed. The answer is clearly yes.

2006 The second question is whether the present rule text requires
2007 a supplemental statement. There is a compelling argument that it
2008 does. Even if the facts have not changed, information about them
2009 changes when a party becomes aware of them. The purpose of
2010 disclosure requires supplementation.

2011 The third question is whether to amend Rule 7.1(b)(2) even if
2012 it now provides the proper answer. One reason to amend would be
2013 that it is ambiguous. It does not seem likely that a court would
2014 accept the argument that a supplemental statement is not required.
2015 It seems likely that a rule amendment would not be pursued if the
2016 question had come in through the mailbox. But another reason to
2017 amend is to maintain uniformity with the Criminal Rules if the
2018 proposed amendment is recommended for adoption. The Appellate Rules
2019 Committee will soon consider adoption of an amendment to maintain
2020 uniformity with the Criminal Rule. If both committees seek to
2021 amend, it likely is better to amend Civil Rule 7.1(b)(2) as well.
2022 And it likely is better to adopt the language of the Criminal Rule

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2023 rather than engage in attempts to consider possibly better drafting
2024 for all three rules.

2025 The Committee agreed that uniformity is a sufficient reason to
2026 pursue amendment of Civil Rule 7.1(b)(2) if the other committees go
2027 ahead with proposed amendments. The amendment might be pursued in
2028 the ordinary course, with publication for comment this summer. But
2029 it seems appropriate to advise the Standing Committee that the
2030 amendment might be pursued without publication to keep it on track
2031 with the Criminal Rule. Publication and an opportunity to comment
2032 on the Criminal Rule may well suffice for the Civil Rule; there is
2033 little reason to suppose there are differences in the circumstances
2034 of criminal prosecutions and civil actions that justify different
2035 rules on this narrow question. That seems particularly so in light
2036 of the view that the amendment makes no change in meaning.

2037 If the Criminal and Appellate Rules Committees pursue
2038 amendment, the Rule 7.1(b)(2) question will be submitted to this
2039 Committee for consideration and voting by e-mail ballot.

2040 **NEXT MEETING**

2041 The next Committee meeting will be held in Washington, D.C.,
2042 on November 7, 2017.

2043 Respectfully submitted,

2044 Edward H. Cooper
Reporter

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TAB 5A

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

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CHAIR

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DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 19, 2017

I. Introduction

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C. This report presents five action items. The Committee unanimously recommends that the Standing Committee approve and transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) Rule 49 (filing and service),
- (2) Rule 45(c) (conforming amendment), and
- (3) Rule 12.4 (government disclosure of organizational victims).

The Committee also recommends that the following proposed amendments be published for public comment:

- (1) Rule 16.1 (new), and
- (2) Rule 5 of the Rules Governing Proceedings under Sections 2254 and 2255.

The report also discusses two information items: continuing consideration of the recommendation of the Committee on Court Administration and Court Management (“CACM”)

for rules changes to protect cooperators, and the Federal Judicial Center’s undertaking to prepare a manual on complex criminal litigation.

II. Action Item: Rule 49

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts’ electronic filing system. Because Rule 49(b) and (d) currently provide that service and filing be made in the “manner provided for a civil action,” the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. With the approval of the Standing Committee, the Advisory Committee drafted and published a stand-alone Criminal Rule for filing and service that included provisions for e-filing and service. Parallel amendments providing for e-filing and service are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees. All were published for public comment in August of 2016.

The Committee reviewed the public comments received on the Criminal Rules, as well as comments that implicated common provisions. In response, the Committee revised two subsections in the published rule, and added a clarifying section to another portion of the Committee Note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required and certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised by the reporters and Advisory Committees. The published Criminal Rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed “within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court’s electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court’s electronic filing system the certificate must be filed “within a reasonable time after service of filing, whichever is later.” Because that might be read as barring filing of the certificate with the paper, (d)(1) was revised to state that the certificate must be filed “with it or within a reasonable time after service or filing.” Parallel changes have been recommended for Civil Rule 5(d).

The second change revised the language of (b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. The revised language, which is also proposed for Civil Rule 5, states:

An authorized filing made through a person’s electronic-filing account, together with the person’s name on a signature block, serves as the person’s signature.

One clarifying change was made to the Committee Notes to Rule 49(a)(3) and (4) and Civil Rule 5. In response to concerns expressed by clerks of court, a sentence was added to the Note stating that “The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

The Committee also considered, but declined to adopt, public comments recommending that it extend presumptive e-filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to e-filing was considered extensively during the drafting process, and the Committee was not persuaded that the comments warranted a change.

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 49 governing service and filing in criminal cases, and the Committee Note, for submission to the Judicial Conference.

III. Action Item: Conforming Amendment to Rule 45

No comments were received on the published amendment revising cross references that would be made obsolete by the proposed amendment of Rule 49. Although this is a technical and conforming amendment, it was published with Rule 49 to avoid any concern that might arise. The Committee made no changes following publication.

The Committee unanimously recommends that the Standing Committee approve the proposed conforming amendment to Rule 45 governing computing and extending time, and the Committee Note, for submission to the Judicial Conference.

IV. Action Item: Rule 12.4

The proposed amendment to Rule 12.4, which governs the parties’ disclosure statements, was initially recommended by the Department of Justice. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the Committee Note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest “that could be substantially affected by the outcome of the proceedings.”

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. The published amendment also made changes in

Rule 12.4(b): (1) specifying that the time for making the disclosures is within 28 days after the initial appearance; (2) revising the rule to refer to “later” (rather than “supplemental”) filings; and (3) making clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were received. One stated that the proposed changes were unobjectionable. The other suggested that the phrase “good cause” should be limited to “good cause related to judicial disqualification.” The Committee declined to make that change, concluding that in context the amendment was clear.

The Committee was also made aware of concerns that its proposed clarifying language in 12.4(b) would be inconsistent with the language in Civil Rule 7.2(b)(1). The Committee concluded that clarification was not necessary, and that it would be desirable to track the language now in the Civil Rule. A motion to revise the published amendment to adopt the language drawn from Civil Rule 7.2(b)(1) was approved unanimously. As revised, Criminal Rule 12.4(b)(2) requires a party to “promptly file a later statement if any required information changes.”

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 12.4 governing disclosure statements in criminal cases, and the Committee Note, for submission to the Judicial Conference.

V. Action Item: New Rule 16.1

Proposed new Rule 16.1 originated in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “gigabytes of information.” At the suggestion of Judge David Campbell, chair of the Standing Committee, the Committee held a mini-conference to learn more about the issues and to determine whether a rule amendment to deal with discovery in cases that are complex or involve large quantities of electronically stored information (ESI) would be warranted.

At the mini-conference, experienced private practitioners and public defenders working with these issues expressed strong support for a rule change. One question was whether the ESI Protocol worked out by the Justice Department and defense representatives¹ was sufficient to solve most problems. The defense attorneys reported that some prosecutors and judges do not know about the ESI Protocol, nor do they understand the problems some disclosures pose for the defense. The prosecutors who attended were not initially convinced a rule was needed. They did

¹ The Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

agree that not all judges or Assistant United States Attorneys are aware of the ESI Protocol and that more training would be useful. They also emphasized that any rule had to be flexible in order to address variation between cases. Prosecutors agreed that a rule directing prosecutors to the protocol would be helpful.

All attendees agreed that ESI discovery issues are handled very differently between districts, and that most criminal cases, large and small, now include ESI. Problems can arise, for example, with social media, cell site data, storage devices, and other evidence an incarcerated defendant would have trouble reviewing. A surprising degree of consensus developed about what sort of rule was needed: something simple, that puts the principal responsibility on the lawyers, and encourages the use the ESI Protocol, which saves time and is cost-effective for the courts. Some participants reported that once the parties get together and actually consult the ESI Protocol, discovery goes very smoothly. Participants did not support a rule that would attempt to specify narrowly the type of case in which this attention was required, or list the individual options that should be considered, such as providing an index.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified. The proposed amendment was drafted after reviewing several examples of local rules and orders addressing this issue, and unanimously approved first by the Subcommittee and then by the Advisory Committee at its April meeting. The Committee chose to place the new language in a new Rule 16.1 rather than Rule 16 because it addresses activity that is to occur shortly after arraignment and well in advance of discovery. Also, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting “no later than” 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial contact, which can then be followed by additional conversations. The rule does not prescribe a time period for seeking judicial assistance. Members noted that subsection (b) bears some resemblance to Civil Rule 26(f), but is much more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. If there is no applicable order or rule governing the schedule or manner of discovery, the parties

may ask the court to “determine” when and how disclosures should be made. But if they wish to change the existing discovery schedule, the parties must seek a modification. A modification is required if (1) the schedule or manner of discovery is ordered by the judge in their individual case or (2) is included in a standing order or local rule. In any case, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached.

The district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and in local rules and standing orders. The rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the court to accept their agreement or otherwise limit the court’s discretion. To avoid any confusion, this point is emphasized in the Committee Note, which states: “Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure.”

The Committee Note also emphasizes that the rule does not attempt to state specific requirements for the manner or timing of disclosure of ESI, but also states that counsel “should be aware of best practices.” As an example of these best practices, it cites the ESI Protocol. The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

The Committee considered but decided not to broaden this provision to include other grounds for judicial action, such as “the interests of justice” or simply “other grounds.” The proposal is narrowly focused, and the Committee concluded it does not need to accommodate other traditional concerns, such as delays for conflicts in trial dates. Members also expressed concern about the unanticipated consequences of a broad undefined phrase.

The Committee also considered a suggestion that it delete the phrase “to facilitate preparation for trial,” but concluded that it should be retained. This phrase is the heart of the proposal from the point of view of the defense community that first brought the problems of discovery in complex cases to the Committee’s attention.

After the adoption of amendments to incorporate some suggestions from the style consultants and to clarify the Committee Note, the Committee voted unanimously to forward Rule 16.1 to the Standing Committee with the recommendation that it be published for public comment. The Committee views the proposed rule as a modest but positive step to respond to significant changes in discovery.

The Committee unanimously recommends that the Standing Committee approve the new Rule 16.1, and the accompanying Committee Note, for publication for public comment.

VI. Action Item: Rule 5(d) of the Rules Governing 2255 Actions and Rule 5(e) of the Rules Governing 2254 Actions

Judge Richard Wesley first drew the Committee’s attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that “The moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a thorough review of the cases, the Committee has concluded that the text of the current rule (as well as the parallel language in Rule 5(e) of the Rules Governing 2254 actions) is contributing to a misreading of the rule by a significant number of district courts. The current rule provides that a prisoner can file a reply “within a time fixed by the judge.” The reference to filing “within a time fixed by the judge” can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing. Indeed, some members acknowledged that they had previously been uncertain whether the rule granted a right to reply. Acknowledging the remote prospect that appellate review will correct the interpretation, the Committee agreed an amendment is warranted.

The Committee approved language that would clearly signal that the moving party in 2255 cases (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

The moving party may file a reply to the respondent’s answer or other pleading.
The judge must set the time to file, unless the time is already set by local rule.

There was some concern that retaining “may” (rather than “has a right to” or “is entitled to”) in the first sentence might not solve the problem. On the other hand, as the style consultants emphasized, it was important not to cast doubt on the meaning of “may,” a term that is used in many other rules. To address this, the Committee added a sentence to the Committee Note, which the style consultants accepted: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’”

The proposed amendment does not set a presumptive time for filing, as there was considerable concern that the rule retain the discretion individual courts and judges use to accommodate local circumstances and practices. It also recognizes that the time for filing is sometimes set by local rule, as research by the Federal Judicial Center indicates. Declining to impose a new, presumptive filing period avoids disrupting the widely varying practices among the districts. When there is no local rule, requiring the judge to set a time for filing will help avoid uncertainty that might trip up unwary prisoners and create unnecessary litigation.

The Committee also approved a parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The earlier Committee that revised both amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

The Committee unanimously recommends that the Standing Committee approve the amendments to Rule 5 of the Rules Governing Section 2254 and 2255 Cases, and the accompanying Committee Notes, for publication for public comment.

VII. Information Item: Cooperators

Judge Kaplan presented a progress report on the work of the Advisory Committee's Subcommittee on Cooperators, as well as the Task Force on Cooperators, both of which he chairs. CACM has proposed a variety of measures to protect cooperators. The Subcommittee is working on changes to the rules that would implement CACM's specific recommendations, and it will make a recommendation to Advisory Committee as to whether it thinks those changes should be adopted. The Subcommittee is also considering other rule changes that either go beyond what CACM has suggested or take a different approach. There is significant interaction between the Subcommittee and the Task Force. At the moment the Task Force is heavily focused on non-rules approaches to protecting cooperators, and the Subcommittee is focused on rules. The Task Force's ongoing efforts may affect the Subcommittee's tentative conclusions about what might or might not be done with the rules, and this is likely to continue.

When the Criminal Rules Committee makes its recommendation in the fall, the Task Force will be preparing a final report that will cover both rules and non-rules subjects which it hopes to have out at the end of the year.

Judge Kaplan explained that the Subcommittee is developing three sets of possible rules amendments. Preliminary drafts of each approach were provided in the agenda book.

The first set of draft amendments were intended to implement CACM's approach. CACM has recommended that various documents and transcripts of what happens in court be sealed in every criminal case, and the reporters prepared initial drafts of the amendments required to implement that approach. They also identified a number of potential rule changes that were not specifically recommended by CACM, which they thought would be necessary to fully implement the premises underlying the CACM report. The Subcommittee has tentatively concluded that it will present only the amendments necessary to implement CACM's recommendations, but flag in its report all of the other things that probably should be considered if the ultimate decision is to implement the CACM sealing approach full bore.

The second set of amendments were the result of Judge Kaplan's conversations with Judge Molloy and Judge Hodges, leading to the suggestion of an approach that would preserve confidentiality but not involve quite as much sealing as CACM's proposal. The idea was to take advantage of the historic confidentiality of Presentence Reports (PSRs). PSRs have traditionally been viewed as internal to the judiciary. In many cases they are never filed, although they are available to an appellate court if needed. These amendments attempt to use the PSRs to accomplish as nearly as possible the end product that CACM sought to achieve. Just before the April meeting the Subcommittee decided that it would not support a PSR approach that would change what happens in the courtroom, and it rejected a requirement that cooperation be discussed only at the bench, transcribed in a separate document that would then be added to the PSR.

The third approach being considered by both the Subcommittee and the Task Force, is limiting at least lay public access through PACER. This general approach could be used in combination with or in lieu of the other approaches. There is a good deal of at least anecdotal evidence that anonymous remote public access to PACER is a source of much of the information that gets into prisons about who is cooperating.

Judge Kaplan stressed that these are all preliminary drafts. The Subcommittee may end up recommending one, none, or some combination of them.

Turning to the Task Force, Judge Kaplan stated that the Bureau of Prisons ("BOP")/Marshal Service working group, chaired by Judge St. Eve, had produced a very substantial report to the Task Force that deals with what is going on in the prisons and what can be done to bring about change. The information from BOP is based on Task Force interviews with BOP personnel. BOP does not track which inmates are cooperators, nor does it link information on assaults and other adverse consequences affecting individual inmates to whether the inmate had cooperated in the past or was cooperating. Thus, BOP has no quantitative data. However, the BOP has been tremendously cooperative and totally forthcoming.

The BOP working group report describes widespread attempts by inmates to determine if someone arriving in prison has been a cooperator. In many places a new inmate is asked for "his papers" (whatever documents the inmate has, such as a PSR, sentencing minutes, judgment and commitment order, transcripts, etc.). If the inmate says he doesn't have his papers, he is told to get them. The report describes the various means by which inmates seek to obtain their own papers, as well as means that inmates use to learn about the cooperator status of others. This often involves use of PACER by someone outside the prison. The BOP working group also found that the problem of physical assaults is concentrated in high security facilities, and to a lesser extent in medium security facilities. It occurs rarely at lower security level institutions.

Judge Kaplan drew attention to the important role of several BOP policies. For some time, BOP has treated an inmate's PSR as contraband and made an inmate's possession of a PSR a disciplinary offense. If the inmate wants to see his own PSR, he can review it in a secure

environment, but may not copy it or retain a copy. That procedure has not been extended to other sensitive papers, such as sentencing minutes and plea agreements.

The Task Force is considering a recommendation for revisions in the BOP policies. For example, BOP currently has no policy restricting the posting of papers by inmates. Another aspect of the problem is that the possession of PSRs is not restricted for pretrial detainees, who need their PSRs to prepare for sentencing. And there are pretrial and post-conviction inmates in the same lockups. It will be critical to prevent papers from moving into the prison with inmates after they are convicted. Some changes in BOP policies will have to be negotiated with the union that represents BOP employees, which will take some time.

The Task Force Electronic Court Filing (“ECF”) working group, chaired by Judge Phillip Martinez, a member of CACM, has also been active. It is focused on possible changes to ECF that would make cooperation status opaque or nearly opaque to someone who gets access to the docket sheet. The working group has been considering six options, and is attempting to determine which options are feasible within a reasonable timetable.

The Task Force is scheduled to meet on June 14. It will have the full report from the BOP working group and perhaps a full report from the ECF working group. The Task Force may come to tentative views about possible recommendations for non-rules changes, subject to the input of the Justice Department and more discussion between May and October after the Task Force has met again.

There was extensive discussion (summarized in more detail on pages 8-20 of the minutes). Many members emphasized the importance of the problem and the need for changes to reduce the threats to cooperators. Representatives from the Department of Justice said that this is a paramount issue for the Department, and that prosecutors lose sleep over concerns about the safety of people who have agreed to cooperate. A judicial member said we have a moral duty to protect the safety of cooperators. But members were also concerned that there was a lack of data about the size of the problem, and questioned how much of the harm to cooperators could be linked to information from the court’s files and dockets, as opposed to other sources.

One important theme was the tension between the need to protect cooperators and the values of openness and transparency in the judicial system, which are reflected in the First Amendment. Some members sharply criticized the possibility of rules that would increase secrecy in federal judicial proceedings or result in secret dockets. A presumption of secrecy and sealing, they said, undermines the presumption of transparency and raises constitutional issues. Members also discussed the degree to which the problems could or should be addressed by the Executive Branch through changes in BOP procedures and by other means. Representatives of the Department of Justice agreed that the executive branch has the primary responsibility, but they also emphasized that judges had raised the issue and should be involved. In their view, judicial action is essential to solve the problem and necessary to protect the integrity of the judicial system.

Judge Campbell asked whether the different procedures adopted in the 94 district courts to protect cooperators—sealing documents revealing cooperation, keeping the documents out of the court’s records by lodging them with some other individual, or placing them in a master file of some sort—establish a consensus that a national rule is warranted despite concerns about transparency. Participants responded that there is considerable variety in the approaches of the districts. Some districts limit only remote access rather than sealing, and some districts are close to the traditional presumption of transparency with sealing only in individual cases. Less than a dozen districts have adopted the CACM approach. Some members emphasized the fundamental difference between a uniform national rule to seal certain kinds of documents in all cases and a judgment by an individual judicial officer to seal something in an individual case. From a constitutional and transparency point of view, the Supreme Court has said repeatedly that sealing to protect an informant, for example, is acceptable based on particularized findings in an individual case. A determination to seal every plea agreement in every criminal case, on the ground that in a few cases there is a real risk, is quite another thing. A member noted that the Eleventh Circuit has ruled that there can be no secret dockets, and members from other circuits doubted that their courts would allow blanket sealing.

Members also explored different options.

Several members expressed interest in the master sealing event which is placed on the docket of every criminal case in Judge Campbell’s district. The court can make an individualized determination whether public access to certain documents should be restricted to protect a cooperator. If access is restricted, the document is placed in the master sealed event. Because there is a master sealed event in every case, the public docket in every criminal case looks the same to third parties. All plea agreements are filed on the public docket, but each plea agreement states that there may or may not be a cooperation addendum. If there is a cooperation addendum, it is in the master sealed event. In that district, the courtroom is sealed for plea colloquies in cooperation cases.

Other members expressed interest in protecting cooperators by restricting remote access, at least as a first step. Many of the problems seem to trace back to, or be aggravated by, unrestricted remote access to the full docket in criminal cases, and members thought that there would be no constitutional impediment to restricting remote access. Some members noted that relatively few people take the trouble to come to the courthouse to look at judicial records, and restricting remote access seems to be working in some districts. But others characterized this as an unworkable approach in contemporary society, and they predicted that motivated individuals would come to the courthouse if necessary. Limiting remote access also raises serious issues under the E-Government Act, which states a very strong policy of openness, though it also provides for exceptions. The E-Government Act does allow for privacy and security based exceptions to be promulgated under the Rules Enabling Act. That is why the current rules require redaction of social security numbers and the names of juveniles. Restricting remote access to all or part of all criminal cases would be a major exception.

Members were also concerned about how various approaches would work in practice, noting the difficulties that would be raised when defense counsel in other cases make arguments about sentencing disparities under 18 U.S.C. § 3553. Discussion of a hypothetical revealed that it would be extremely difficult to give appropriate sentences to a cooperator and a non-cooperator who committed similar offenses without revealing the fact of cooperation or the status of the cooperator.

Members also expressed opposition to changes that would restrict what happens in the courtroom, such as requiring a bench conference in every sentencing or plea colloquy, or sealing the courtroom itself.

There was also interest in exploring new possibilities, such as an effort to determine, ex ante, which defendants were most likely to be subject to retaliation, and providing additional protections for those defendants at earlier stages of the proceedings.

VIII. Information Item: Federal Judicial Center Manual on Complex Criminal Litigation

The Federal Judicial Center will prepare a manual for Complex Criminal Litigation. The Rule 16.1 Subcommittee, chaired by Judge Kethledge, will take the lead in helping the Committee develop a list of the top five to ten issues it would like to see addressed in the manual.

TAB 5B

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 49. Serving and Filing Papers**

2 (a) **Service on a Party.**

3 **(1) What is~~When~~ Required.** ~~A party must serve on~~
4 ~~every other party.~~ Each of the following must be
5 served on every party: any written motion (other
6 than one to be heard ex parte), written notice,
7 designation of the record on appeal, or similar
8 paper.

9 ~~(b) **How Made.** Service must be made in the manner~~
10 ~~provided for a civil action.~~

11 **(2) Serving a Party's Attorney.** Unless the court
12 orders otherwise, ~~W~~when these rules or a court
13 order requires or permits service on a party
14 represented by an attorney, service must be made

¹ New material is underlined; matter to be omitted is lined through.

15 on the attorney instead of the party, ~~unless the~~
16 ~~court orders otherwise.~~

17 **(3) Service by Electronic Means.**

18 (A) Using the Court's Electronic Filing System.

19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 (B) Using Other Electronic Means. A paper

28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the

32 serving party learns that it did not reach the
33 person to be served.

34 (4) *Service by Nonelectronic Means.* A paper may
35 be served by:

36 (A) handing it to the person;

37 (B) leaving it:

38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or

42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;

47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;

50 (D) leaving it with the court clerk if the person
51 has no known address; or
52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.

57 **(b) Filing.**

58 (1) *When Required; Certificate of Service.* Any
59 paper that is required to be served must be filed
60 no later than a reasonable time after service. No
61 certificate of service is required when a paper is
62 served by filing it with the court’s electronic-
63 filing system. When a paper is served by other
64 means, a certificate of service must be filed with
65 it or within a reasonable time after service or
66 filing.

67 **(2) Means of Filing.**

68 (A) Electronically. A paper is filed
69 electronically by filing it with the court's
70 electronic-filing system. An authorized
71 filing made through a person's electronic-
72 filing account, together with the person's
73 name on a signature block, serves as the
74 person's signature. A paper filed
75 electronically is written or in writing under
76 these rules.

77 (B) Nonelectronically. A paper not filed
78 electronically is filed by delivering it:
79 (i) to the clerk; or
80 (ii) to a judge who agrees to accept it for
81 filing, and who must then note the
82 filing date on the paper and promptly
83 send it to the clerk.

84 **(3) Means Used by Represented and Unrepresented**

85 **Parties.**

86 **(A) Represented Party.** A party represented by
87 an attorney must file electronically, unless
88 nonelectronic filing is allowed by the court
89 for good cause or is allowed or required by
90 local rule.

91 **(B) Unrepresented Party.** A party not
92 represented by an attorney must file
93 nonelectronically, unless allowed to file
94 electronically by court order or local rule.

95 **(4) Signature.** Every written motion and other
96 paper must be signed by at least one attorney of
97 record in the attorney's name—or by a person
98 filing a paper if the person is not represented by
99 an attorney. The paper must state the signer's
100 address, e-mail address, and telephone number.
101 Unless a rule or statute specifically states

102 otherwise, a pleading need not be verified or
103 accompanied by an affidavit. The court must
104 strike an unsigned paper unless the omission is
105 promptly corrected after being called to the
106 attorney’s or person’s attention.

107 **(5) Acceptance by the Clerk.** The clerk must not
108 refuse to file a paper solely because it is not in
109 the form prescribed by these rules or by a local
110 rule or practice.

111 **(c) Service and Filing by Nonparties.** A nonparty may
112 serve and file a paper only if doing so is required or
113 permitted by law. A nonparty must serve every party
114 as required by Rule 49(a), but may use the court’s
115 electronic-filing system only if allowed by court order
116 or local rule.

117 **(d) Notice of a Court Order.** When the court issues an
118 order on any post-arraignment motion, the clerk must
119 ~~provide notice in a manner provided for in a civil~~

120 ~~action~~ serve notice of the entry on each party as
121 required by Rule 49(a). A party also may serve notice
122 of the entry by the same means. Except as Federal
123 Rule of Appellate Procedure 4(b) provides otherwise,
124 the clerk's failure to give notice does not affect the
125 time to appeal, or relieve—or authorize the court to
126 relieve—a party's failure to appeal within the allowed
127 time.

128 ~~(d) **Filing.** A party must file with the court a copy of any~~
129 ~~paper the party is required to serve. A paper must be~~
130 ~~filed in a manner provided for in a civil action.~~

131 ~~(e) **Electronic Service and Filing.** A court may, by local~~
132 ~~rule, allow papers to be filed, signed, or verified by~~
133 ~~electronic means that are consistent with any technical~~
134 ~~standards established by the Judicial Conference of~~
135 ~~the United States. A local rule may require electronic~~
136 ~~filing only if reasonable exceptions are allowed. A~~

137 ~~paper filed electronically in compliance with a local~~
138 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive

construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the “unless” clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court’s electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by “other electronic means,” such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court’s electronic filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been

replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court’s electronic filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court’s electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney’s signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the

media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

Changes Made after Publication and Comment

Subsection (b)(1) was revised to clarify when a certificate must be filed. No certificate is required for service using the court's electronic filing system. Subsection (b)(2)(A) was revised to more clearly define what constitutes a person's signature when a paper is filed electronically. The Committee Note was revised to include a statement that the amendment was not intended to impose any burden on the clerk's office to notify the parties if service was not effective.

Summary of Public Comments

CR-2016-0005-0004. Oscar Amos Stilley. Describes experience as a former attorney who relies on the prison

mailbox rule to “certify that service has been accomplished by CM/ECF”; urges that Rule 49 “should not limit the right of an inmate to certify service on opposing counsel via CM/ECF.”

CR-2016-0005-0006. Pennsylvania Bar Association. Supports the amendment but recommends one revision: the “default rule of non-electric filing should be eliminated for nonparties, who should instead be permitted to elect between electronic and non-electronic service and filing.”

CR-2016-0005-0007. Heather Dixon. Expresses concern that the proposed Rule 49(b)(2)(A) regarding the signature requirement for electronic filing is “very confusing and seems to request that a filer include his/her user name and password on the signature block in the document being filed”; proposes alternative language.

CR-2016-005-0008. New York City Bar Association. Supports the “substantive changes” in the proposed amendment, but expresses concern that the provision regarding electronic signatures “could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed”; proposes clarifying language.

CR-2016-005-0009. Sai. Advocates (1) replacing presumptive prohibition of *pro se* use of CM/ECF filing with presumptive access, (2) treating *pro se* status as “rebuttably presumed good cause for nonelectronic filing; (3) making this presumption irrebuttable in the case of *pro se* prisoners; (4) requiring courts to “allow *pro se* CM/ECF access on a par with attorney filers”; (5) permitting “*individualized* prohibitions on CM/ECF usage for good cause”; and (6) clarifying and relocating the provisions regarding electronic signatures.

CR-2016-005-0010. National Association of Criminal Defense Lawyers. Expresses support for the elimination of a requirement for separate certificate of service,

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified
5 time after being served and service is made under
6 Federal Rule of ~~Civil~~Criminal Procedure ~~49(a)(4)(C),~~
7 ~~(D), and (E)5(b)(2)(C) (mailing), (D) (leaving with~~
8 ~~the clerk), or (F) (other means consented to), 3 days~~
9 are added after the period would otherwise expire
10 under subdivision (a).

Committee Note

Rule 49 previously required service and filing “in a manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

¹ New material is underlined; matter to be omitted is lined through.

Changes Made After Publication and Comment

None.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 12.4. Disclosure Statement**

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

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

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

¹ New material is underlined; matter to be omitted is lined through.

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

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

- 22 (1) file the Rule 12.4(a) statement within 28 days
23 after~~upon~~ the defendant’s initial appearance; and
24 (2) promptly file a ~~later~~supplemental statement if
25 any required information changes~~upon any~~
26 ~~change in the information that the statement~~
27 requires.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has “an interest that could be substantially affected by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of

making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.

Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

Changes Made After Publication and Comment

The language of (b)(2) was simplified to parallel Civil Rule 7.1(b)(2).

Summary of Public Comments

CR-2016-0005-0010. Peter Goldberger and William J. Genego, National Association of Criminal Defense Attorneys. Expresses "confidence that federal judges will not misapply the newly created "good cause" exception when sought to be invoked" and "agrees that the added flexibility that this amendment would afford the government in making the required notification seems entirely unobjectionable."

CR-2016-0005-0006. Sara A. Austin, Pennsylvania Bar Association. "[S]upports the amendment, with one proposed revision: the first clause of proposed Rule 12.4(a)(2) should be modified to read, 'Unless the

government shows good cause bearing on judicial recusal,
it must . . .”

TAB 5C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

- 1 **Rule 16.1. Pretrial Discovery Conference and**
2 **Modification.**
- 3 (a) **Discovery Conference.** No later than 14 days after
4 the arraignment the attorneys for the government and
5 the defendant must confer in person or by telephone,
6 and try to agree on a timetable and procedures for
7 pretrial disclosure under Rule 16.
- 8 (b) **Modification of Discovery.** After the discovery
9 conference, one or both parties may ask the court to
10 determine or modify the timing, manner, or other
11 aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer in person or by telephone shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically

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

stored information (ESI) or other voluminous or complex discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increases. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

**RULES GOVERNING SECTION 2254 CASES IN
THE UNITED STATES DISTRICT COURTS¹**

1 **Rule 5. The Answer and the Reply**

2 * * * * *

3 (e) **Reply.** The petitioner may ~~submit~~file a reply to
4 the respondent's answer or other pleading ~~within a time~~
5 ~~fixed by the judge.~~ The judge must set the time to file
6 unless the time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

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**RULES GOVERNING SECTION 2255 PROCEEDINGS FOR
THE UNITED STATES DISTRICT COURTS¹**

Rule 5. The Answer and the Reply

* * * * *

(d) **Reply.** The moving party may ~~submit~~file a reply to the respondent's answer or other pleading ~~within a time fixed by the judge.~~ The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

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TAB 5D

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 28, 2017, Washington, D.C.

I. Attendance

The Criminal Rules Advisory Committee (“Committee”) met in Washington, D.C., on April 17, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Kenneth A. Blanco, Esq.
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Justice Joan Larsen
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge David G. Campbell, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Julie Wilson, Esq., Rules Support Office
Lauren Gailey, Esq., Law Clerk, Standing Committee
Shelly Cox, Rules Support Office
Frances Skillman, Rules Support Office

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Molloy introduced the Committee’s newest member, Justice Joan Larsen from the Michigan Supreme Court, and he welcomed Assistant Attorney General Kenneth Blanco.

After members had introduced themselves, Judge Molloy recognized two members for whom this is their last meeting: Carol Brook, who has served for six years, and Judge Terry Kemp, who is retiring. He asked each if they would like to make any comments.

Ms. Brook praised the experience of serving on the Committee, noting the fascinating and complex issues. She expressed gratitude for the privilege of working with people who were opening, welcoming, and listened to the defense concerns.

Judge Kemp said that although he was looking forward to retirement, he regretted leaving the committee. He noted the care the Committee takes with each word in the Rules and advisory committee notes to address problems substantively with clear rules that can be applied uniformly. The process also brings together many different perspectives and seeks consensus. Judge Kemp thought if people could see how the process works, they would read the rules and the comments differently.

Assistant Attorney General Blanco thanked the Committee for inviting him to participate and said he was looking forward to the discussion of issues of great importance to the Department.

The draft minutes of the fall meeting were approved unanimously by voice vote with no changes.

Judge Molloy noted that the minutes of the Standing Committee meeting were included in the agenda book and that the Supreme Court has approved the pending rules package. Absent any action by Congress, those rules will become effective Dec. 1, 2017.

Judge Molloy then asked Mr. Wroblewski to comment on legislative responses to the amendment of Rule 41. Mr. Wroblewski reminded the Committee that in December of 2016 an amendment to Rule 41 went into effect that permits a judge to issue a warrant for the remote electronic search of a computer within a district where a crime has occurred—rather than the district in which the computer is located—if anonymizing software has been used to disguise the computer's location. The amendment also allows a judge to issue a single warrant in a botnet situation when there are many computers in multiple districts. The process leading up to that amendment was contentious, and legislation was introduced to block the amendment. A similar bill is pending in the Senate, and the Department is following it carefully. Mr. Wroblewski informed the Committee that just a few weeks before the meeting the Department had taken down a botnet, using the amendment to get a warrant that applied to thousands of computers. The amendment was extremely helpful.

Judge Molloy asked Standing Committee chair Judge Campbell for any initial comments; Judge Campbell responded that he was pleased to be at the meeting.

Judge Molloy then turned the meeting over to Judge Kaplan, chair of both the Criminal Rules Subcommittee on Cooperators and the Cooperators Task Force. Judge Molloy complimented the Task Force, and especially Judge St. Eve, for the work they had completed.

Judge Kaplan agreed that Judge St. Eve had done a prodigious amount of work, with significant help from Judge Molloy, the reporters, and others on the Task Force. He stated that this was a progress report, and that the Subcommittee hopes to make its final report to Criminal Rules Committee in time for full consideration at the fall meeting. There is significant interaction between the Subcommittee and the Task Force. At the moment the Task Force is heavily focused on non-rules approaches to protecting cooperators, and the Subcommittee is focused on rules. Things that the Task Force has done very recently may affect the Subcommittee's tentative conclusions about what might or might not be done with the Rules, and this is likely to continue.

Judge Kaplan reminded the Committee of the background: the Committee on Court Administration and Court Management (CACM) has proposed a variety of measures to protect cooperators. The Subcommittee is working on changes to the rules that would implement CACM's specific recommendations, and it will make a recommendation to this Committee as to whether it thinks those changes should be adopted. The Subcommittee is also considering other rule changes that either go beyond or take a different approach than what CACM has suggested.

The Task Force has been gathering input from all the relevant constituencies, including the Bureau of Prisons (BOP) and the Marshal's Service. As the new administration takes hold, he said, we hope to have a good deal of input from the Department of Justice. When the Criminal Rules Committee makes its recommendation in the fall, the Task Force will be preparing a final report that will cover both Rules and non-rules subjects which we hope to have out at the end of the year.

Judge Kaplan drew the Committee's attention to the Subcommittee's side-by-side comparisons of two sets of possible rules amendments (Appendix A in the agenda book). The left column reflects the Subcommittee's initial draft of rules amendments necessary to implement CACM's approach. CACM has recommended that various documents and transcripts of what happens in court be sealed in every criminal case. In the course of the preparation of the left-hand column, the reporters identified a number of potential rule changes that were not specifically recommended by CACM, which they thought would be necessary to fully implement the premises underlying the CACM report. Some amendments in the left column fall into that category. Subcommittee discussions also identified other similar changes that are not reflected there. The Subcommittee is tentatively of the view that it will limit the left-hand column to amendments necessary to implement CACM's recommendations, but flag in its report all of the other things that probably should be considered if the ultimate decision is to implement the CACM sealing approach full bore.

Judge Kaplan explained that the rules in the right column were the result of his conversations with Judge Molloy and Judge Hodges, leading to the suggestion of another approach that would preserve confidentiality but not involve quite as much sealing as CACM's proposal. The idea was to take advantage of the historic confidentiality of Presentence reports (PSRs). PSRs have traditionally been viewed as internal to the judiciary. In many cases they are never filed, although they are available to an appellate court if needed. The amendments in the

right-hand column, drafted by the reporters, were an attempt to use the PSRs to accomplish as nearly as possible the end product that CACM sought to achieve.

The third approach (shown in Appendix B) being considered by both the Subcommittee and the Task Force, is limiting at least lay public access through PACER. This general approach could be used in combination with or in lieu of the other approaches. There is a good deal of at least anecdotal evidence that anonymous remote public access to PACER is a source of much of the information that gets into prisons about who is cooperating.

Judge Kaplan stressed that these are all preliminary drafts. The Subcommittee may end up recommending one, none, or some combination of them. The draft rules are still under consideration by the Subcommittee, which has already made one decision of significance that would result in substantial changes in the proposed rules in the right-hand column.

Turning to the Task Force, Judge Kaplan stated that the BOP/Marshal Service working group, chaired by Judge St. Eve, had produced a very substantial report to the Task Force, based on a huge amount of work by Judge St. Eve and Judge Molloy. It is enormously enlightening. It deals with what is going on in the prisons and what can be done to change what is going on there, and it is the most important document to be produced in the last year or so.

The information we have from BOP is based on interviews with BOP personnel conducted by Judges St. Eve and Molloy. BOP does not track cooperators when they are in custody as a category of inmate, nor does it link information on assaults and other adverse consequences affecting individual inmates to whether the inmate had cooperated in the past or was cooperating. Thus, BOP has no quantitative data about what is going on. However, the BOP has been tremendously cooperative, totally forthcoming, and made available everybody we wanted to talk to, which is important to recognize.

The BOP working group report describes widespread attempts by inmates to determine if someone newly designated to a particular facility has been a cooperator. In many places a newly arriving inmate is asked for "his papers" (whatever documents the inmate has, such as a PSR, sentencing minutes, judgment and commitment order, transcripts, etc.). If the inmate says he doesn't have his papers, he is told to get them. As a result, inmates ask people outside the prison, often their relatives, to get their papers. There have also been an increasing number of requests by inmates asking the district courts to send their papers to them in prison. The federal judiciary currently has no uniform practice for handling such requests. Some courts, such as the Northern District of Illinois and the Northern District of New York, have adopted practices, but others have not, and some documents are getting into prisons from the courts. The working group also learned that some inmates seeking cooperator information have developed form letters they give to the new inmates to sign and then send off to the court in which they were sentenced. Judge Kaplan said he had received one or two of these letters. There are certain institutions in which inmates, once they get their papers, are required to post them in their cells or outside their cells, so that they are freely available to anyone who wants to come and read them. We have no quantitative data of how frequently that happens, but it does happen. The transcript of a recent hearing before Judge Molloy provided an example of another facet of the problem. Although

inmates do not have access to PACER, they find it easy to call and ask people outside prison to do PACER searches to learn about the cooperator status of other inmates, and to report the information back into the prison by the telephone. This information is relevant to the option of limiting remote access to PACER, at least by lay people.

The BOP working group also found that the problem of physical assaults is not evenly distributed throughout the federal prison system: most assaults occur in high security penitentiaries, and to a lesser extent in medium security. They rarely occur at lower security level institutions.

Judge Kaplan drew attention to the important role of several BOP policies. For some time, BOP has, for most practical purposes, treated an inmate's PSR as contraband and made an inmate's possession of a PSR a disciplinary offense. If the inmate wants to see his own PSR, it can be exhibited to him in a secure environment, but not copied for him. That procedure has not been extended to all other sensitive papers, such as sentencing minutes and plea agreements. The Task Force is considering a recommendation for revisions in the BOP policies. For example, BOP currently has no policy restricting the posting of inmate papers. Another aspect of the problem is that the possession of PSRs is not restricted for pretrial detainees, because they need their PSRs to prepare for sentencing. And there are pretrial and post-conviction inmates in the same lockups. It will be critical to prevent papers not moving into the prison with inmates when they are convicted and designated.

The Task Force's interviews with special investigative agents from the BOP also yielded suggestions about how to reduce these problems. The agents thought limiting public access to PACER would be very helpful. They also favored punishing inmates who press others for their papers (which apparently is not done now).

Judge Kaplan reminded the Committee that the Task Force had not yet met to discuss the working group report, but he commented that it would be surprising if the Task Force did not make some strong and comprehensive recommendations about changes at the BOP.

The Task Force ECF working group, chaired by Judge Phillip Martinez, a member of CACM, has also been active. It is focused on possible changes to ECF that would make cooperation status opaque or nearly opaque to someone who gets access to the docket sheet. The working group has been considering six options.

(1) The first option would track a functionality that is presently available in the bankruptcy courts, but not the federal district courts. Bankruptcy courts have the ability today to make private entries on the docket sheet with an attached PDF document without assigning a sequential docket number to that private entry. The working group has not yet determined whether this function can be made available in the district court ECF system, or what the timetable would be.

(2) A second option would be to create two docket sheets for each criminal case. One would be publicly accessible, and the other would be a sealed docket for sealed entries. There would be sequential numbers assigned to sealed entries (sealed entry number 1, sealed entry

number 2, etc.). Because there would be no gaps in the sequential numbering of entries on the public docket sheet, someone looking at a docket sheet in a criminal case on PACER would not be able to tell if there are any sealed documents or what they might pertain to.

(3) An option used in the Northern District of New York is to lodge the PSR and the district court's statement of reasons—documents that would reveal cooperators status—with the U.S. Attorney's Office or Probation Officer. They would retain custody of the original document, which would not be filed. A variation of that is used in Judge Kaplan's court, the Southern District of New York.

(4) Another option in use in the Western District of Pennsylvania is to create a miscellaneous sealed case, one for every criminal case, which would be linked to the criminal case. All cooperation information would be placed on the miscellaneous sealed docket.

(5) Alternatively, a master sealed event could be created in each criminal case right after the initial entry on the docket sheet in a criminal case, and all cooperation related documents would go into that sealed event. The docket sheet looks identical in all criminal cases regardless of cooperation. This system is in use in the District of Arizona.

(6) The final option is the existing CACM proposal

The ECF working group is seeking to determine which options are feasible on a reasonable timetable.

Judge Kaplan said the Task Force is scheduled to meet on May 18. It will have the full report from the BOP working group and perhaps a full report from the ECF working group. The Task Force may come to tentative views about possible recommendations for non-rules changes, subject to the very important input of the Justice Department and more discussion between May and October after the Task Force has met again.

Judge Kaplan then summed up the progress made by the Subcommittee. The drafting for the CACM sealing recommendations is very far along, though the version in the agenda book may change if we remove the provisions that CACM did not recommend. As to the PSR approach, the Subcommittee met by telephone just before the April meeting, and there was a consensus that it would not support a PSR approach that would change what happens in the courtroom. The Subcommittee rejected a requirement that cooperation be discussed only at the bench, with a transcript added to the PSR. Thus the proposed amendment in the right-hand column will need significant revisions. Moreover, all of the options can affect one another. For example, if a judge seals sentencing minutes because there was a discussion of cooperation, it might be helpful to make a change in the ECF system so that the fact of sealing is not reflected on the docket.

Judge Molloy asked Judge St. Eve to add any comments she may have.

Judge St. Eve responded by thanking Judge Molloy for his assistance with the working group report, and noted that the BOP has been extremely helpful, making sure they had access to what they needed. We have to keep in mind that whatever recommendations we make for the

BOP will have to be negotiated with their union. That cannot be done very quickly, especially to the extent it will impact their employees, which some of our provisions certainly will. Another thing driving some of this is gang membership. This is not surprising, but they learned that the race of the gang has a significant impact on the consequences to cooperators. If the white Aryan brothers find out you are a cooperator, they won't give you a break, whereas other gangs may give the cooperator who is a member of their gang the opportunity to "walk off the yard." The consequences are hard to nail down because of the lack of data linking assaults to cooperators. In talking to investigators on the ground, assaults are certainly happening against cooperators at the higher security facilities. Additionally, we should not lose sight of the Special Housing Unit (SHU). Inmates who become fearful that they are going to be targeted because of cooperation often go into the SHU, and sentences in the SHU are a very different. If you are in the SHU, you are on lockdown, meaning you don't get the same outside exposure, and you don't get to participate in programs such as the GED or drug programs. It is a very different type of sentence.

Judge Molloy commented on several points. First, CACM's position is that whatever changes are made will likely be ineffective in the absence of a national rule, but the 94 district courts and 800 plus district judges all like to do things their own way. Second, the BOP was very supportive of having national policies for the federal prisons. Third, there is a tension between transparency and protecting cooperators. He referenced the reporters' memorandum about the First amendment, and emphasized that these are not simple problems. The more we get into it and learn more factual information, the more complicated the solution becomes.

Judge Campbell noted that the Standing Committee will inherit this problem, and it appreciates the efforts and work that is being done. The Task Force seems to be drilling down to find solutions to this, which is terrifically helpful. The Standing Committee will need to learn all it can from what you are doing. It was evident to him that these are really tough issues, especially when it comes to rulemaking. At this point, he said, he had more questions than helpful thoughts.

Assistant Attorney General Blanco characterized that this is one of the more important issues that the Department is facing. These are hard, important issues, and not something the Department can walk away from. We have to find a solution, though coming to a conclusion won't be easy because of the tension between transparency versus security and safety. What is that balance? Where is it appropriate? Should it be balanced in the judiciary, or is it better handled in the Justice Department? If our system is going to continue to function, this is an issue that must be resolved. He noted that the new Deputy Attorney General had just been sworn in, and these issues will be discussed with him and the Attorney General. Both will be extremely interested in the discussion here. Our system cannot function if we cannot provide safety for witnesses, both cooperators and others, so for the Department this is very critical. He had used cooperators and had them hurt and some killed, both here and abroad, and he emphasized this is a paramount issue. He stays awake at night worrying about people who have cooperated with the government and done the right thing; we need to be able to protect them. The BOP and the way we house our incarcerated people is a whole different world, and where we put our

cooperators must be resolved as well. But this is a tough issue, and it's got to get resolved, and the Committee will have the Department's support in resolving it. Mr. Blanco said that he and Mr. Wroblewski would provide their wholehearted support. He also noted that the new Deputy Attorney General and the Attorney General would have significant input.

Judge Molloy called for preliminary discussion and reactions to the draft amendments, noting it would be helpful to the Subcommittee and the Task Force to hear members' comments and questions.

Judge Campbell asked whether the prevalence of local efforts to protect cooperators reflects the existence of a consensus that justifies a national rule. He noted there seems to be a debate about whether there should be an attempt to amend the criminal rules to implement some sort of uniform national policy, and that debate is concerned in part with First Amendment issues and the transparency of our judicial system. But it seems that every court in the country is trying to do something to protect cooperators, and most or all probably involve to some degree either sealing documents, keeping them out of the record in the hands of some other individual, or putting them in a master file of some sort. Although there are 94 different approaches, that seems to demonstrate that courts think that it's appropriate to do something with our dockets to protect cooperators. If that's true, what not adopt a uniform national rule, so that no one can tell from district to district who cooperators are? The First Amendment and transparency issues are already here, even though we lack a uniform national approach.

Professor Beale responded that the staff of the Administrative Office is helping CACM track what is going on in the 94 districts. There is a third approach in some districts, restricting remote access in criminal cases to protect cooperators. That approach can be found in Appendix B. Judge Dever's district, for example, uses that approach. Other districts have much more selective sealing. Courts have always sealed in individual cases where there is an identifiable problem. Some districts that are much more selective in sealing. They begin from a baseline of transparency and availability, but will seal in individual cases when there is a problem. So in fact the picture is more mixed than all 94 having essentially reached a consensus on this fundamental question. Instead there is quite a wide array of approaches, and we are close to transparency in some of the districts. There are less than a dozen that have adopted the CACM approach. So if your question is there a consensus on a particular approach where we see sealing in every case and inability to tell from the docket, it is certainly not unanimous.

Judge Kaplan responded that with respect to sealing there is a fundamental difference between a uniform national rule to seal certain kinds of documents in all cases and a judgment by an individual judicial officer to seal something in an individual case. From a constitutional and transparency point of view, the Supreme Court has said over and over again that sealing to protect an informant, for example, is acceptable based on particularized findings in that individual case. That's one thing. A determination to seal every plea agreement in every criminal case, just to take a rhetorical example, on the ground that in a few cases there is a real risk, is quite another thing. That is an initial reaction to your question, not a well thought out answer.

A member agreed with Judge Kaplan's comment, and emphasized that there is a national policy: the court can seal only when there is a showing of need in an individual case. The member noted that he had once been a prosecutor and now represents people who cooperate. Protecting cooperators is a terrible problem you do lose sleep over. You do not want to have on your hands responsibility for someone being threatened or losing their life. That said, he preferred to place his trust more in the individual judge to make that determination rather than a flat rule of secrecy. He likened a uniform national policy of sealing in all cases to having two sets of books, and warned that would erode public confidence in the judicial system. With a general sealing policy, the public will not understand why cases are progressing the way they are progressing, victims will not understand why certain rights aren't being vindicated more quickly. Knowing that people are cooperating and progress is being made helps create public confidence. It also allows defense lawyers to determine whether to advise a client whether to continue to fight the charges against him, or to cooperate. Helping the defense in these ways also helps the prosecution to resolve cases. He objected strongly to increasing secrecy in federal criminal proceedings, which is not progress and is not something the judiciary should be involved in. Rather, the judiciary should seek ways to enhance fairness and integrity of the judicial process. The agreement to come up with rules that implement CACM's proposals is wrong, and is a backwards approach. The problem should be solved first by the executive branch. There are no data about whether this is a uniform problem, or about what types of cases are affected, and no data that any of the solutions CACM has proposed would be effective. How could we say under those circumstances we're justified in proposing rules?

Mr. Blanco noted that placing a sealed item in the docket for each case was not inconsistent with the court making particularized findings; the findings could be made and included in a sealed document. That is a consistent approach, which he favored. Responding to the comment that this is an executive branch problem, he noted that judges raised the issue and are concerned about what is happening. The judiciary should be involved. These rules protect the integrity of the judicial system and people's willingness to participate in the judicial system. So the courts should think about whether the rules should be changed.

Judge Kaplan agreed that the sealed docket idea helps with public access to certain sensitive documents. But the essence of the CACM proposal is different. It seals all documents of particular kinds in all cases. CACM believes a sealed docket for items sealed after particularized finding is insufficient, because cooperators can be identified by a process of elimination. So you have to seal everything.

Judge Campbell noted that everyone likes their own system. His court, the district of Arizona, uses a master sealed event. Every third or fourth item on the docket sheet in every criminal case is a master sealed event. If you have access to sealed documents, as a judge does, you will see that the master event is empty in non-cooperator cases. But from the outside you can't tell. In cooperator cases, the judge makes individualized decisions, but the materials that would reflect the cooperation that would otherwise be sealed in a particular docket entry go into that master sealed event. So in the master sealed event in a cooperator case you can see the addendum to the plea agreement that is the cooperation agreement, the 5K1.1 motion, and the

sentencing memorandum that deals with cooperation. All cases are uniform to the outside viewer, but it is still a judge making individual sealed decisions.

Judge Kaplan asked what happens in a case where there are 57 defendants and some cooperators. Do you seal the plea agreements of all 57 or just the ones who are cooperating?

Judge Campbell responded that his court doesn't seal any of the plea agreements, but for cooperators there is a sealed addendum to the plea agreement. All plea agreements (for both cooperators and noncooperators) include a statement that "There may or may not be an addendum to this plea agreement." If there is a cooperation addendum, it is in the master sealed event, filed separately in the court's record. It is not left in the hands of the probation office (which raises concerns about taking documents out of the court's record). But someone who goes to the docket of criminal cases will see a master sealed event and a plea agreement in every one. They can't tell if there is a cooperation addendum, they can't tell if there was a 5K1.1 motion because it would be in the master sealed event, whereas in other courts it would be a separate sealed item. So you are creating uniformity but you are not sealing anything in a non-cooperation case that would otherwise be public.

Judge Kaplan asked how the Arizona district courts handle the situation when a case goes to trial with eight defendants, it is getting close to trial, and someone has cooperated? Everyone knows that one defendant has pleaded. The sentence is being deferred, and deferred. Everybody knows he's a cooperator, right?

Judge Campbell responded that he did not think we can solve that problem. If the cooperator is going to testify at trial, that will be public, the defendants will have the right of confrontation, they are going to see him, and the government has a *Brady* obligation to disclose information. We can't solve that problem. And CACM is not trying to. But what we can do is try to eliminate the clues to cooperator status that are apparent in the docket sheet, without sealing anything more than what is already being sealed in individual cooperation cases.

A member expressed the view that the number of cooperators against whom there are threats is very few. We have been told the BOP hasn't kept the data that would show what kind of cases and reprisals occur in prison as a result of cooperation. That's a big black hole. So why should there be a presumption that there should be sealing in all cases. This reverses the presumption of transparency. There is more public benefit of disclosure that there are cooperators than there is danger of bad consequences. If there is the risk of bad consequences, the judge now has the discretion to respond. And there are plenty of ways that the executive branch can protect cooperators.

A member asked Judge Campbell who has access to the documents in that master sealed file. Does the attorney for the defendant have access to them? Do other attorneys have access to them? And what do you do in court? Is it your court's practice when you take the plea to go through the terms of the plea agreement including cooperation with him? And if so, do you do that in open court?

Judge Campbell responded that the only people that would have access to the master sealed event are the people who would normally have access to the sealed document. It does not change who has access. It is really just a docket management tool to put everything in one location so you do not see the gaps. His court does not use the CACM approach in plea colloquies and sentencings where there is sidebar in every case. He expressed concern about the logistics of that procedure. His court seals the courtroom when they do a plea colloquy with a cooperator, and the judge does go over with the defendant the terms of the cooperation addendum, which can be pretty draconian if the defendant doesn't fulfill the terms. That is discussed on the record. The entire colloquy and the sentencing is sealed if it involves a cooperator. People are excluded from the courtroom so that cooperation can be discussed. It's not a perfect system, because if that person appeals, his plea colloquy and sentencing transcript will be sealed and go into the master sealed event, and somebody looking at the docket can look at the docket and say "Ah ha! You're on appeal but you don't have a sentencing transcript in docket, so you must be a cooperator." So we are not solving that problem with our system. But his court takes 7,000 pleas a year, and CACM's proposal for a bench conference in every case would be unworkable.

Judge St. Eve asked if his court got pushback from defense lawyers seeking to make 3553(a) disparity arguments, objecting that that they can't get the information about who is cooperating. That's one argument the Task Force has been hearing. If the defense counsel can't get access to sealed documents with information about who is cooperating, then they can't make those disparity arguments under 3553(a)(6).

Judge Campbell responded that although no objections were raised when the court adopted its policy in 2011, in some cases the argument is made that the defendant before the court is no more culpable than another defendant who has been given a reduced sentence. The implication is "I don't know if he's a cooperator, but you do judge." So the defense is without that information with some degree. But in many multi-defendant cases, people figure out who the cooperators are even with the Arizona system. So sometimes this will be discussed more by the defense attorneys. This does give less information to counsel for other defendants than in a case where there is information about who has cooperated. But that is also true in every case where there are judges sealing things. You can infer from the fact that the other defendant got a sealed document that he's probably a cooperator.

A member argued that there was no reason to impose this burden on the defense in white collar cases such as insider trading prosecution. For example, in white collar cases in the Southern District of New York, there is no threat to cooperators so it is not sealed. Often, counsel learns initially when one defendant refuses to join a joint defense agreement or later drops out. The member did not understand the need for a rule such as a master sealed event in all cases, and for all defendants, when in many cases there is no risk of threats. The idea of this rule is to protect against threat, and it overreaches substantially. Judges now have the power to give protection when there is a showing of need, and you are suggesting the adoption of rules that will apply in every case to every defendant in every district regardless of whether there is a risk.

Judge Campbell replied that in a system like Arizona's—where there is a master sealed event in every case and you can't tell by looking at the docket what has been sealed—cooperators have a choice. Those who want protection could have the documents put into the master sealed event, but a cooperator who doesn't want protection could tell the judge not to seal anything. When someone starts comparing dockets, they'll see some cooperators, such as white collar defendants in the 10b5 cases. But looking at all the other cases they can't tell who the cooperators are, and they can't see the sealed documents. He asked how that would be different than the current system.

In response, the member characterized the system described by Judge Campbell as one that allows an individual cooperating defendant to opt out of the master sealed event. That is not acceptable, because the burden should be on the government to keep information from the public the press and everybody else. It is the government's burden to show the necessity to seal. This burden is not insurmountable; it is surmounted every day in every district. Moreover, when you are talking about threats that occur in prison, that's a question of protecting the prisoners in prison.

Judge Molloy reminded the Committee that its charge is to come up with a proposed rule change to implement CACM's proposal, and then to make a recommendation to the Standing Committee whether the changes would be a good idea or a bad idea.

Judge St. Eve commented that although BOP doesn't track threats of harm to cooperators and thus cannot provide data, if you talk to the officers on the ground working at the facilities at the higher levels of risk, there are threats, they are pressuring inmates – some percentage of them – for their paperwork to prove they are not cooperators. However, at the lower level security facilities you don't see it. That makes it difficult to argue at sentencing that there will be a threat to a cooperating defendant. That's part of the tension.

Members discussed the significance of the information that the problem occurs largely at the maximum and medium security prisons. A member estimated that the percentage of prisoners in maximum security is less than half, so probably about 99% of defendants are not affected. Judge St. Eve said that more than one percent are threatened, and the member responded that is an important data point. Judge Molloy commented that there are thousands of defendants who receive 5K1 departures per year, although there were some issues about what that represented.

A member returned to the question whether we already have something like the CACM system now. The member explained how much the proposals would change practice in the member's district, and how it would adversely affect the defense function. Defense counsel need information about cooperation to advocate for their clients. The member had just filed a brief in the Seventh Circuit using all the cases that could be located on the docket sheets. Defense counsel must also advise their clients about cooperation, and need to be able to tell them what to expect if they do or don't cooperate. This requires information about the sentences of persons who cooperated in similar cases. There are some cases counsel will not know about now, because some cooperation cases in the Northern District of Illinois are sealed, though not the

majority. The member expressed the view that the Seventh Circuit would never allow mass sealing. Everything must be unsealed within something like 90 days unless we have some good reason. The other consideration is prosecutorial fairness. The member emphasized that she was not casting any aspersions on the fairness of the U.S. Attorney's Office, but the member still wants to be able to see—and thinks the public should be able to see—what is happening in various cases, rather than having mass sealing.

Judge Kaplan noted that every time we have a discussion of this, he is struck by the fact that people approach the issue from the standpoint of what happens in their own court, which may be entirely different than what happens somewhere else. It was brought home to him again when Judge Campbell talked about the practice in his court, in which all plea agreements are on the public docket, and cooperation is in a sealed addendum. In contrast, in the Southern District of New York and some other districts, the cooperation agreement is part of the plea agreement. This raises the question whether the Justice Department is in a position to establish uniform national practices on that and other issues.

Second, every time these issues are discussed, a new idea emerges. A year ago we sought data in the FJC report about whether this was a problem that was unique or heavily concentrated in certain kinds of offenses, but it was not possible to differentiate. The current discussion suggests another possibility. It seems that the problem is concentrated in the high security, and to a lesser extent medium security, penitentiaries but not in lower security facilities. The BOP has designation criteria, and it might be possible to craft a rule-based approach that would say certain procedures are followed in cases meeting certain criteria that would be closely related to the designation criteria BOP uses. Perhaps the rule could say, if a case gets so many points on a scoring scale, or if a defendant is likely to go into a high security institution if convicted, one set of consequences follows, but otherwise a another set of consequences. This is at least worth thinking about.

Mr. Wroblewski commented that we have to differentiate questions about first, what is actually happening, what gets sealed what doesn't get sealed, and then second, what is transparent to the public, especially online. It seems that Judge Campbell is suggesting that as long as what is available online does not tip off people about whose is cooperating, then we have accomplished a huge amount there, even if some white collar defendants are willing to have that information made public.

A judicial member expressed very serious concerns about the full-bore CACM approach with blanket sealing in every case and the courtroom procedures with sidebars. It is not the business of the federal courts to have that degree of secrecy. In considering the distinction between blanket sealing provisions and individualized determinations to seal, he noted that if the individual sealing determinations are based solely on collaborator status, it's not clear how big the difference is in terms of secrecy—though the docket may look different. But if the determination is more specific to the danger presented to that particular defendant, if that danger is based on what happens inside a particular penitentiary, then the district judge won't know that until something bad has happened. He also noted that the remote access restrictions seem very

appealing. It might get a lot done with a modest impact on access to court information. The concern there is whether outsiders working in concert with prisoners would be able to go down to the courthouse, get the information, and be able to share it with inmates on the phone. Perhaps a little more protective approach would be to limit access, even in person, to counsel, lawyers, and the press. Someone could not walk in off the street and to see anyone's criminal docket and cooperator information. But a federal defender or a member of the press could see them.

A member said that she was unable to choose between the CACM and PSR approaches, because neither would allow the defense to be effective, and they diminish transparency, creating a closed system. That is just backwards. The member expressed interest in the remote access issue, but expressed concern about closing the system in a way that has unanticipated and unintended consequences. Even if lawyers and press will have remote access—and today almost anybody is a member of the press, if you are a blogger—we are in a time when transparency of the criminal justice system seems to be extremely critical. The member hoped the Committee would not do anything to make it less transparent.

Judge St. Eve expressed the view that the real problems are arising from remote public electronic access not what is going on in the courtroom. It is what is available on the docket to inmates and to family members who can easily get this information, and provide it to inmates.

Another member stated he had no direct experience, and was coming at this from a fresh but uninformed perspective. First, it is unfortunate we may not be able to have a better sense about how the access to information is occurring, and what the implications would be if we shut off one way of access, say the online access. Would people go to the courthouse or not? It is hard to respond to the problem without knowing. His instinct is that remote online access is the difficulty, because it is so easy to go online and get cooperator information. It has always been the case that someone can go to the courthouse and get these records, but few people have been willing to do that for a range of reasons, especially when they have a nefarious purpose. So his instinct would be that shutting off or restricting the online access might be a good first step, and we could see how much of a difference that would make. Some of it could be implemented rather easily without a massive change in practice, and it may have a significant impact. If it doesn't, then we can consider more draconian options. It struck him as a good first step. The online access just changes how public this information is. If anybody can go on and get access to these private records, it is the easy way anybody is going to take. It will be easier than having someone walk into the clerk's office and ask for the file.

Judge Molloy stated that one of the people interviewed at the BOP told them that after their release some inmates had set up a private business to check PACER and then communicate the information back.

A member said that this is not a problem in the member's state courts because they have nothing like PACER. It does seem that the immediate problem arises from the online PACER access to without any showing of need or taking the step to go to the courthouse. So it might make sense to explore limiting remote access as a first step. The member also thought it would

be useful to explore whether is a way to find out ex ante which defendants will be going to which facilities.

Another member observed that there is anecdotal evidence, and in some cases just intuition, that some people are being identified as cooperators based upon information that is available online on the courts' dockets. But there are many other ways that people get identified as cooperators, and we don't know how much of the retaliation is triggered when a cooperator has been identified completely independent of what's on the docket. That lack of hard information makes it difficult to evaluate any of these proposals. Every proposal we are looking at has costs—not only administrative costs to the clerk's office and to the judges and lawyers – but also a public informational cost. It is helpful to weigh the costs against the benefits, but we don't know what the benefits of these proposals are.

The member also stated that he concurred completely in the view that the PSR approach has very significant problems. It is a serious problem to give documents that are ordinarily maintained by the court on its court docket to someone else to maintain. One of the functions of the clerk's office is to maintain the integrity of any document used in a court proceeding. Transferring that responsibility to somebody else (even the probation office) jeopardizes some of that integrity. That is a real problem.

The member noted that CACM approach proposes changing the way things are done in open court, as well as how things are done in the docket, and characterized both as real issues. The Committee should not change the way things are done in open court. It is important that courtroom proceedings be as public and transparent as possible, consistent with the need to protect specific people from individual threats of harm. In response to Judge Campbell's question why not replace the efforts of individual districts with a national rule to protect cooperators, the member said we do have a system right now. As another member said earlier, the system is that if the government or defendant makes a sufficient showing of individual harm, then the judge can seal. That's the only system that has a constitutional seal of approval. There are courts that are going beyond those traditional limits, and some of them have been tested. For example, a judge in Ohio was sealing every plea agreement because some of them included information about cooperation, and if he didn't seal them all then it was a red flag about which defendants were cooperators. The member said the Sixth Circuit reversed that practice, holding that sealing required an individualized showing. This should not be a system in which individuals opt out and allow their records to be public. That's backwards, and the member expressed real concerns about the legality. If the anecdotal and intuitive evidence is that there is some problem being created by online access to the docket, then limiting access to that information may be a good first step. Before we had electronic dockets, anybody who wanted to see anything had to walk physically into the clerk's office and ask for the file. There are some concerns about taking a step backwards in this day of electronic information. But for two hundred years, that's the way it was. If we need to restore that system in order to eliminate some harm to cooperators, it doesn't seem to create any significant constitutional problem. The member expressed interest in hearing whether others think it would create other sorts of

problems for practicing lawyers or the press. At least as a starting point he was inclined to support limiting remote access.

Judge Molloy commented that when CM/ECF came online in 2003, CACM recommended that there not be public access to criminal docket sheets.

Mr. Hatten, the Committee's clerk of court liaison, noted that the ECF system is a user input system, which has implications for the resources of the clerks' offices. At present clerks don't control what the users put in or how they put it in. Given their current resources, clerks could not review every document to see whether it should not be filed, and any solution that was designed to have that oversight by clerk's office would probably be ineffective. They would have to change their procedures substantially to be sure that documents that are supposed to be sealed either universally or automatically are actually sealed. Mr. Hatten noted that an Eleventh Circuit case rejected the idea of a secret docket. So in his district nothing can be left off of the docket in a criminal case, but you can have a sealed entry. The sealed entry doesn't identify what the document is, but it does give the person a chance to challenge because he knows something is there. He had not seen anything that addresses the idea of a master sealed entry, and whether that would be considered a secret docket. At least in the Eleventh Circuit the clerk cannot leave anything off the docket, which was one of the things being considered by the Task Force.

Based on discussions with the U.S. Attorney's office and the public defender, Mr. Hatten agreed that limiting remote access would accomplish something, even if it would not eliminate all the means of determining if an individual had cooperated. Remote access is exponentially greater than in-person access. He objected to any proposal to take court documents and give them to other offices. Protecting the integrity of the court record is a core function of the clerk's office. The clerk has to deal with court reporters who create transcripts and have to certify their accuracy. He was unsure what problems might arise if you divide transcripts up. But he acknowledged there are practical problems with any solution.

A judicial member stated that his court limits remote access. When this issue first came up about eight years ago, it was seen as a way to mitigate the risk, which can never be eliminated totally. If we legislated that everybody has to have a tank car that only goes 5 miles an hour, you'd still have traffic deaths because somebody would still drive that tank car off a cliff. But you'd limit the number, reduce the number. After considering the issues associated with transparency, the First Amendment, *Brady*, *Giglio* material, and effective arguments about sentencing disparities, his court concluded that many of the people who want to use information from the docket to harm cooperators would not take the trouble to come to the courthouse. He noted they have to show identification to get into the courthouse (though not at the clerk's office).

The member commended Judge Sutton who set up the Task Force, as well as Judges Kaplan, St. Eve, and Molloy, who have done a wonderful job gathering information. The executive branch is principally responsible for the safety of those charged with crimes and those convicted of crimes. They have the principal responsibility. He said both the CACM approach

and the PSR approach would really be a sea change—not a positive one—would really not mitigate the risk, and raise some serious First Amendment and *Brady/Giglio* issues. He expected defense lawyers and judges to push back on those. Although we have not fine tuned the proposed language on page 229 of the agenda book, using Rule 49.1 would be consistent with what we already do to limit access to other types of information. This would go a long way to mitigating the risk without all of these other things that would cause a great deal more concern.

Another judicial member expressed concern about just allowing limitations on remote access, and wondered if there might be some other forward thinking about that. Certainly there are at least as many different approaches as there are districts, and probably more. In the member's experience very often people want to seal too much, but only a small portion needs to be sealed. So the member was interested in something that allowed us to seal only the part that really should be sealed, not the whole thing. The member also expressed concern about who keeps the record. Other agencies have different means by which they collect their information and send it off somewhere to be stored. That might not be the same as the court. So the court would want to have documents that have to do with sentencing for cooperation in its own file. If forced to choose between the CACM and PSR approaches, except for that one point about keeping the record in the court, the PSR approach appears a little more open. But the member was interested in seeing if you could seal only what actually needs to be sealed. The whole Rule 11 plea agreement doesn't need to be sealed. The rest should still be public.

Another member characterized limiting remote access (Appendix B) as the only approach that is not unwise. The member did not see much harm in that approach, not any big constitutional issue in limiting remote access. His proposal would be to push back and say let's only deal with this rule, and not try to refine all the other rules. It appears there is a pretty good consensus that the Committee will not embrace the CACM approach. So why should the Committee spend its time trying to refine the rules that would implement the CACM approach?

Another judicial member called this a very significant problem and said he was stunned when he saw the statistics, including 31 murders and several hundred assaults over the past three or four years. While this is not Columbia, it is really, really, bad. We can't eliminate the problem, either from the BOP perspective or from a rules perspective. But to the extent that our procedures and our facilities are being used to effectuate that harm, we have a moral obligation to do something about it. When it comes to balancing the very important considerations of access and the First Amendment against the very important essential need to protect cooperators, the member did not find that a hard balance. We need to protect cooperators. But we should not go to an extreme of government secrecy, and we should take a measured approach. But to the extent that our procedures or our facilities are being used to allow people to assault or kill cooperators, we need to do something about it.

That member said it's hard to know where to strike the balance, and even if we do strike the right balance, whether a rules change or a BOP policy change, it's hard to know whether operationalizing those changes would have an impact. He posed a hypothetical. Defendant A is a cooperator, and the relevant portions of the docket are sealed. Defendant B is convicted of a

similar crime, and B's federal defender wants to argue under 18 U.S.C. § 3553(a)(6), based on the need to avoid unwarranted sentence disparities. If the federal defender can't figure out why A got a big break off the bottom of the guidelines range, that may be good for the defense. A defender can tell the judge I'm representing B, and A got a huge break off the bottom of the guidelines range. You have to be consistent across cases, and B ought to get the same consideration. What does the U.S. Attorney do in that situation? He can say there's a difference because A was a cooperator, but B has a right to be present, would hear that explanation, and then the cat's out of the bag. So the U.S. Attorney may decline to explain what happened with A. Then the judge who may have also sentenced A has a dilemma. Should the judge give B a higher sentence? If the judge does so, that reveals A was a cooperator. But if the judge gives B a similar sentence to avoid revealing A's cooperation, that's not fair to A, who then got no benefit from cooperation. If the judge says there is a difference between A and B, the judge has to articulate that on the record. And when the judge articulates on the record that the reason I'm giving defendant B a higher sentence than Defendant A because A was a cooperator. Then of course defendant B, knows that and can tell all of his or her friends. That's why this is a hornets' nest, first to figure out where the balance is, but also in operationalizing it and making it effective.

Mr. Wroblewski described the process the Department of Justice would follow after the meeting. He had already spoken to Mr. Rosenstein, the new Deputy Attorney General, about the issues, and noted Rosenstein had been the U.S. Attorney for the District of Maryland, which follows the CACM approach. The Department will be engaging with his office over the next few weeks, leading up to the Task Force meeting, but our goal, both on Rule 16.1 and cooperators, is that by the June Standing Committee meeting—which the Deputy Attorney General will attend—the Department will have a definitive position.

Mr. Wroblewski also offered his own views. First, restricting remote access in a broad way does not recognize the world that we live in now, so he does not favor that approach. On the other hand, what he had heard made him very optimistic that the process is working towards a solution. Not a 100% solution, but an 80% or 90% solution. Significant changes at BOP will make a huge difference. The Department of Justice has to make changes so there is a uniform rule about what is in the plea agreement and what is in an addendum. That will not be easy lift, but it could be done and would make a huge difference. He expressed enthusiasm for the docket entry master file, which allows continued use of PACER without revealing cooperator status on the docket. Then, determining whether something actually is sealed or whether it's public is different than whether it's going to be masked on PACER. That can be a completely different, a case-by-case determination. Finally, he suggested something that had not yet been discussed. We should think about having all master files sent to the Sentencing Commission, which could issue reports on cooperation. Cooperation would not be a black hole. The public would know, on an aggregate (though not case-by-case) basis how much cooperation there is nationwide and in each district. The Commission's release of such data would add some transparency.

Mr. Blanco said that transparency is critical from the perspective of the Justice Department, and he agreed with Mr. Wroblewski that limiting remote access would be only a

band-aid for a problem that is going to get bigger and bigger. If motivated people can't get remote access, they will find a different way. If there is a way to physically get a record of cooperation and use it, they will do so. He agreed that it is the executive's duty to protect cooperators in prison, but emphasized that it could not do so without assistance from the judiciary. The U.S. Attorney's Manual (USAM) is the result of the culture in the individual districts. And many of the procedures used aren't procedures set forth in the USAM. They are set forth by the courts and the government follows those procedures. So without the judiciary this problem will not be solved. It requires both sides. We're asking the Committee to take a look at the rules, and the Department will come up with an approach as well and do as much as it can. Noting he had twenty-nine years of experience, Mr. Blanco commented that there are sophisticated people who want to do bad things. We should protect our judicial system by coming up with a solution, a solution not just today, but for what's also going to happen in the future, as people become more sophisticated, as you're seeing more with respect to cybercrime. Although he accepted the member's point that threats to cooperators may be more common in organized crime and drug cases, in cybercrime you see sophisticated people threatening each other online, over money and access. He expressed appreciation for the very informative discussion. There is no easy solution, and it will take everyone's best efforts.

Professor Beale observed that limiting remote access raises issues under the E-Government Act, which are discussed on p. 213 of the agenda book. The Act states a very strong policy of openness, though it also provides for exceptions. The Committee would need to conclude that any restrictions on remote access meet the standards for an exception. The E-Government Act does allow for privacy and security based exceptions to be promulgated under the Rules Enabling Act. That is why the current rules require redaction of social security numbers and the names of juveniles. Restricting remote access to all or part of all criminal cases would be a major exception. There are two sides to the problem. One side is that there are people who are cooperating; they may be identified from the courts records, or from other things, such as their in-court testimony or their refusal to join a joint defense agreement. The other side is what happens in the prisons. The BOP Task Force working group noted that the BOP is starting to create some institutions where there is a higher level of protection, not exclusively cooperators, but for people who need more protection from whatever reason. Imagine a world in which the high security and medium security cooperators were in all in prisons either with other cooperators or with people who have committed other kinds of offenses that make them likely to be attacked by other prisoners. Suddenly the problem goes away. The problem is created because people are cooperating, their cooperation can be identified, and they are housed with other people who are not cooperators and who want to do bad things to them.

The problem is not cooperators hurting each other, it is housing them together with non cooperators. Most cooperators who seek protection within an institution housing non cooperators have very limited options for education and other programs. BOP generally assigns inmates within a certain security level to particular institutions for various reasons such as keeping them near their family, but not to separate cooperators and non cooperators. That's half

of what is causing the problem: housing them together. And BOP seems to be slowly moving toward something that would respond to that.

Changes can be made in the rules, but there is also this other side to the equation. And in limiting remote access the question is how much to include from each set of options: only remote access to certain information? Finally, what's the first step on the judicial side, as opposed to all the steps on the BOP?

Professor King requested that members notify her if their courts have a policy for identifying who is a member of the press and who is not. She also asked for more information about any cases that might be similar to hypothetical codefendants A and B. For example, would that exchange take place in briefing, as opposed to in person in the courtroom? If so, how is that handled when these arguments are submitted in writing at the plea or sentencing stage?

Judge Molloy introduced the 16.1 agenda item. The New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers had proposed an amendment to the rule that would have incorporated a very lengthy change to the rules addressing complex cases.

Judge Kethledge reported that the Subcommittee he chaired had been asked to explore the concerns about what he called overwhelming discovery – the production of a massive quantity of documents or data to defense counsel sometimes shortly before trial. He cited two examples given by members: in one case the defense was given 500,000 audio tapes, and another more data than is housed in the Smithsonian. The problem is compounded because the prosecution has typically been investigating and working on the case for a long time, but defense counsel has to learn the case and understand the record in whatever time is available between production and trial. Although the NYCDL/NACDL proposal was far too complex and detailed, the Subcommittee agreed there was a real problem and we should see if we could come up with a reasonable response. The Subcommittee developed its own drafts, which were shared with the full committee at its fall meeting. These were “court-driven” proposals: the court would make a determination whether the case was “complex” (though what “complex” meant was not clear). Those proposals received a mixed reception, and Judge Campbell suggested that we hold a mini conference to get more information about the problems and possible solutions.

The Subcommittee held an extremely helpful mini conference in February, bringing together fourteen invitees from the defense and prosecution, including lawyers dealing with these issues in the field and the drafters of the so-called ESI (electronically stored information) protocol. Although the ESI protocol is very helpful, the Subcommittee learned that counsel's awareness of it is uneven, and adherence varies within and between districts. But where it is being followed it is helpful and things seem to be going pretty well.

The defense lawyers at the meeting were unanimous and emphatic about the existence of a problem with overwhelming discovery, and with the need to do something about it. There is a need for a rule at least to recognize the problem and to encourage some process in the litigation to address it. We reached a consensus triggered by Mr. Wroblewski's lucid summation. The sea

change was to shift from the court-directed process to a party-directed process. The people who were most concerned—the defense lawyers—strongly supported the idea that the parties know the case better than the court does. They ought to take the first look at the case and talk to each other about whether the case warrants some departure from the rules that would normally apply (under Rule 16 or a standing order or the practices in that district). They should be considering whether there should be some departure or modification given the particular record that’s going to be produced in this case. The Department of Justice representatives, some line lawyers and some from Washington, also seemed supportive of the idea of the party-directed approach.

We had two Subcommittee calls after the mini conference to reduce this general concept to a proposal we could bring to the full committee. Our reporters did an excellent job of drafting language that is for the most part before you today. The proposal requires the parties to confer and try to reach agreement about the timing and manner of discovery. They have to meet within 14 days of arraignment and try to reach that agreement. If they do reach it, and if their agreement would require a modification of the order or practices that would otherwise apply in the case in the district, then they can move under subsection (b) to have the district court modify those procedures accordingly. If they don’t agree, the party that is unhappy with the background status quo, the applicable procedures, can go to the district court under subsection (b) and seek a modification. Then the court decides what to do. So it is a process initiated by the parties, but it is ultimately controlled by the district court.

Judge Kethledge drew attention to proposed changes by the style consultants, and expressed the view that he stylists’ revisions inadvertently made several substantive changes. One was brought to his attention before the meeting by a judicial member who pointed out that the proposal would take control of the discovery process away from the district court and give it to the parties. This was certainly not the Subcommittee’s intention. The Subcommittee’s draft provided that one or both parties may request that the court determine or modify the time, manner, or other aspects of disclosure to facilitate preparation for trial. As restyled, subsection (b) said “the parties may ask the court to modify the agreed-upon timetable and procedures for disclosure ...” So in the restyled version the court is modifying what the parties did. This implies that absent such a modification the parties’ agreement has its own effect. That is not what the Subcommittee intended. The Subcommittee concluded that its version of (b) was much better than the restyled version. Relatedly, the member who raised the concern also suggested some language for the committee note that would expressly say that the Rule is not intended to divest the district judge of any control over the discovery process.

In summary, Judge Kethledge said, we started with a very prescriptive proposal, we moved on to a less prescriptive but court-driven proposal, and now our proposal starts with the parties. They have to confer and try to reach agreement. Whether they do or don’t, if they need changes they can go to the district court. There is no need to define a “complex” case, and the rule does not attempt to prescribe procedures or specify factors will still be appropriate in ten years. The Subcommittee hopes this modest step will do some good in this area. It has the Subcommittee’s unanimous support.

Professor Beale noted that when we scheduled the mini conference we did not think we would have a proposal ready for publication at this point, but given the consensus that developed the Subcommittee believes its proposal is ready for publication—though there are still some issues to be worked out with the style consultants. The Subcommittee saw this as a modest but useful change. Subcommittee members learned that discovery issues are becoming more and more common, and are not limited to a few complex cases. Many apparently simple cases now have lots of electronically stored information, and that will not become less frequent. Everyone has a cell phone, and the cell phone is pinging off of the cell phone towers and so forth. So this is likely to become a more common problem, and should be addressed in this relatively uncontroversial way.

Professor Beale requested that subsections (a) and (b) be discussed separately, because the style proposals for (a) were not controversial. The reporters viewed the suggested changes in (a) as style, not substance. Style suggested “try” instead of “attempt,” i.e., “try to agree” instead of “attempt to agree” In contrast, the reporters agreed that the proposed changes to (b) would be substantive.

After a motion to accept restyled Rule 16.1(a) was made and seconded, members discussed the provision.

Mr. Wroblewski thanked Judge Kethledge and reporters for helping to build consensus. He reminded the Committee of several points. First there was initially a divergence as to whether or not this should focus on complex cases. One idea was that we need a calibration for proportionality, as is done in the Civil rules. But Professor Kerr suggested that we focus exclusively on ESI issues. The Department’s focus was being sure any amendment to Rule 16 did not impact on *Brady*, §3500, and other issues that had come before this committee before. We tried to steer clear of all of that, and have come up with a proposal that has support from both prosecutors and defense lawyers from all parts of the country. The ABA, which is currently considering Rule 16, likes the meet and confer aspect of our proposal. He praised the Committee Note, which says to look to best practices and cites the ESI protocol but is not limited to it. He has advised the ABA committee that if they want to have an impact, then they should develop best practices protocols. The Committee note sets for the ESI protocol as the only best practices example, but as other groups produce more examples they will be cited by the parties. That’s what we need. We need to tell judges this is an appropriate way to proceed, because sometimes people accustomed to doing something one way may not realize that this particular case requires that they pause and handle it differently. The proposed rule is a great framework for doing that.

A judicial member commented that this is sort of a criminal procedure parallel to Civil Rule 26(f) conference where the parties are required to get together and attempt to agree on a schedule. Rule 26(f)(2) says the attorneys should attempt in good faith to agree. If we are trying to keep some parallel, it says “attempt” rather than “try,” and it also refers to “good faith.” He wondered if that was intentionally omitted from the proposed rule because it’s implied. Those who had participated in the Subcommittee discussion stated that they had discussed and rejected that language.

In response to the question whether the Standing Committee would favor including “good faith” in to parallel Rule 26(f), Judge Campbell noted that Civil Rule 26(f) includes a lot more than proposed Rule 16.1. Given the limited objective of this rule, he doubted that anyone would suggest that it was necessary to incorporate all of the 26(f) procedures into criminal cases. If we’re not mimicking 26(f) in new Rule 16.1, then he doubted there would be much concern about how parallel the language is. Certainly the absence of the reference to good faith should not be taken by anybody as suggesting that they can participate in bad faith. He did not see the need to be parallel on that one point if we aren’t going to parallel everything else.

Professor Coquillette agreed there was no need to include “good faith” in if we are not acting in parallel with 26(f).

A judicial member asked if the attorneys meet and agree on a timetable, when do they come to the court? Judge Kethledge responded that if the court has a standing order, or the parties have agreed to a departure from the procedures that would otherwise govern, they have to come to the court. A practitioner member offered an example. The lawyers might bring a joint motion, saying given the amount of documents to review, we ask that instead of the six months your honor allocated for review, we ask that you give us 18 months, and that we’ll identify all of these exhibits by this date and all the other exhibits by __ date. Several speakers agreed that if what the parties have agreed to is consistent with the court’s standing procedures or prior orders in the case, then they do not need to come back to the court.

Another judicial member stated that he did not have a problem with 16(a) or with the Subcommittee’s version of 16.1(b), but he suggested adding language at the end of line 14 of the Committee Note, agenda book p. 174 to make clear what the intention had already been. He proposed adding “or limit the authority of the district judge to determine the timetable and procedures for disclosure.” Judge Kethledge expressed support for that suggestion.

Professor Coquillette expressed approval for pointing to examples of best practices in the Committee Note, but he cautioned that it is very important not to put anything in the note that actually changes the operation of the rule. Judge Kethledge said that addition would not change the operation of the rule as drafted by the Subcommittee.

A judicial member asked whether there is any value to the parties in having this conference before the arraignment. If so, she noted a recent case about exactly this language, “within x days after the arraignment,” in which the action had taken place before the arraignment. On appeal the issue was whether disclosure before arraignment complied. The member suggested that if the rule is intended to allow the parties to meet and confer before arraignment, it should be clarified to avoid litigation.

Discussion focused on whether there are cases where the parties want to meet and confer before arraignment. A practitioner member said that sometimes judges send timetables for motions to the magistrate judges at the bond hearing, so defense counsel would be talking to the government earlier than arraignment, especially in cases with a lot of discovery. Another

practitioner expressed doubt that the change was necessary, but said he had no objection to changing it to “no later than.”

A participant noted that the issue comes up in his district most often in complex cases, typically after all of the defense counsel have been identified, which usually happens at arraignment. They get together, and as a defense team, they talk about what they’re going to need and then the group or a designated individual goes to talk to the prosecutor. He doubted that would happen within 14 days of the first defendant’s arraignment, and he would not want the rule to force the parties to have premature discussions, before everybody is on board and can have a more meaningful discussion. Should the rule say “within a reasonable time”?

In response to an alternative suggestion that the rule might say “or as such as is designated by the court,” the member who had raised the issue said he would not want the parties coming to the court in every case to ask if they could have more than 14 days. So the question is whether we are trying to require this to happen early in the case. Or can we say you need to do it and you need to do it within a reasonable time?

A member responded that part of the problem is that often this meeting and discussion doesn’t happen. When these meetings are not occurring, it would not be helpful to specify “a reasonable time.”

Judge Molloy brought up the relationship to Speedy Trial issues. If there will be a request to extend the time for trial, setting a time for this conference 14 days after the arraignment will set the stage for making the determination under Speedy Trial Act. A member observed that (b) does not require that the parties go to the court within 14 days. Rather, within 14 days they have to meet and try to agree. But they can then take the time needed for their discussions and report to the court when they are ready.

A judicial member stated that in his district the U.S. Attorney’s policy on their website is that it will provide exculpatory evidence and their Rule 16 disclosures within 21 days after indictment or initial appearance whichever comes later. District practices around the country vary, and this may not be unusual. So to avoid disrupting local rules and practices, the “not later than” is an important change. Because they do it a lot earlier than this rule contemplates in our district in every case.

Professor King stated that defense attorneys at the mini conference expressed concern that they were not able to get the Assistant U.S. Attorneys to talk to them, and that they needed some sort of push from the rules. The response to the concern about 14 days being too soon was that in cases in which 14 days is too early to know what to do with specific pieces of information, the parties can have a quick early conversation, which satisfies the rule, then continue their discussions as they learn more. She noted that the ESI protocol provides for an ongoing continuing dialogue.

Professor Beale said if there is a multi-defendant case where some of the defendants haven’t been arraigned or don’t have their lawyers, but two defendants are coming up to the 14 days, counsel could pick up the phone and say here’s what we’re seeing now but we think we

should wait for the rest of the defendants. A quick conversation would be enough, kicking the can down the road to have the further meeting. But if the lawyers said actually I need to know right now, that discussion would be teed up by the fact that there is a deadline. The reporters were not sure if 14 days was the right number. Some local rules had a 7-day period, which is even shorter, so the reporters put 14 days in brackets to focus discussion. It would be fine to have it “no later than” because that was the intent. For example, if there is a codefendant who hasn’t been arraigned yet but he knows he’s in the case and he’s got the lawyer, he may want to join the group that is meeting and conferring. That would fall within the “no later than.”

A member moved to amend line 3 of 16.1(a), agenda book p. 173, to substitute “not later than” for “within.” The motion as seconded and passed unanimously by voice vote.

In response the Judge Molloy’s query whether all members were comfortable with 14 days, there was general agreement that this was satisfactory and that the brackets should be removed.

A member asked whether the Subcommittee discussed a question that came up at the mini conference: should the meet and confer requirement include “motions and other pretrial matters”? Professor Beale and Judge Kethledge responded that the Subcommittee focused, for the time being, on discovery, the issue upon which it had consensus.

In response to a query from Judge Molloy about the Department’s position, Mr. Wroblewski said that so far the Department did not object. He also noted the Committee should remember Rule 17.1. So this will not be the only pretrial conference.

There was a motion to approve restyled Rule 16.1(a) as modified, it was seconded, and approved unanimously by voice vote. The Committee then turned to proposed subsection (b).

Professor Beale noted several changes recommended by the style consultants. They broke up “modify and determine,” and their version seems to allow the court to modify the agreed-upon timetable only if the parties come to the court. That would restrict the authority of the judge. If the parties agree, they don’t come into the judge; it’s done. But that is not at all what the Subcommittee meant. And style suggests the court can “determine if the parties didn’t agree,” which is not what the Subcommittee agreed to and is not a good idea. The court should retain control. That sends us back to the Committee’s version. The earlier suggestion of an amendment to the Committee Note, on page 174 line 14, would highlight the fact that the rule doesn’t limit the authority of the district judge. The parties have to request that the court “determine or modify” aspects of discovery that would otherwise be governed by local court rules or an order to the parties at arraignment. Those are the background assumptions, and the parties are asking for a “modification.” The parties are saying this case requires something different from the ordinary, and they are asking the court to make an adjustment. That is the purpose of (b). Does it require any additional clarification for everyone to understand that’s all it’s doing?

Professor King returned to an earlier question by a member who was not clear what the judge was being asked to do as well as concerns about the style consultants’ apparent

misunderstanding of what the Subcommittee had intended. She suggested some clarifying language, but also noted the problems of trying to do drafting “on the fly.”

A judicial member who had raised this issue earlier said he favored retaining the Subcommittee’s language in the text, but revising the committee note. He reiterated his proposal that at the end of line 14, agenda book p. 174. After the word requirements, he would insert “or limit the authority of the district judge to determine the timetable and procedures for disclosure.” He expressed concern that, as drafted, the rule might be susceptible of arguments about its meaning over who has the ultimate control, because it speaks in terms of the parties requesting that the court determine the timing. That might be read as implying unless the parties make a request the court doesn’t have a say. The Committee Note, at line 13, says the rule does not displace local rules or standing orders. But suppose what we’re talking about is the judge giving the parties the schedule for their case at the first appearance with disclosure to be completed by x date. By not referring to the district court’s authority, the Committee Note could be read to allow displacing the court’s original order. That is not what’s intended. If the note is modified, there is no problem.

Members discussed whether to omit the word “determine,” and a practitioner member urged that it be retained because many judges do not have the practice of setting a schedule at the beginning of a case, so the parties are asking the judge to do this for the first time. Some judges don’t have preemptive rules. They don’t have the schedule at the arraignment. So it is important the rule includes both “determine” and “modify.”

Professor Coquillette endorsed making the rule itself explicit, rather than putting this in the Note though he acknowledged that that the problem here was caused by the Note itself rather than by the text.

Judge Kethledge stated that if there are downsides to removing “determine,” he favored retaining it. A member expressed concern about the draft Committee Note, which said that the rule does not displace standing rules and local orders. That might implicitly be read to allow it to displace a judge’s scheduling order unique to that case, which is neither a standing order or a local rule. The member expressed a preference to leave (b) as the Subcommittee drafted it (including “determine or modify”), and add language to the Note that removes the implication that was inadvertently created by lines 13 and 14. He favored adding this language: “or limit the authority of the district judge to determine the timetable and procedures for disclosure.”

Another member moved that the Committee approve subsection (b) as drafted by Subcommittee, with addition the amendment 14 of the Committee Note, and the motion was seconded.

Judge Campbell noted his approval of several aspects of the Subcommittee’s version of subsection (b), but he questioned whether it was necessary to include “other aspects of disclosure to facilitate preparation for trial” because the parties may seek modifications for other reasons (e.g., reducing the expense of production or avoiding a scheduling conflict with another case). So why limit the reasons for which a modification may be sought?

One member responded that the original defense proposal arose from the difficulty of preparing for trial in what the proposal had called complex cases. This language captures the idea of preparation for trial and being able to defend the case effectively. The defense needs to know what it's up against

Members suggested alternatives such as "preparation for trial or another reasons," "otherwise promote the efficiency of the litigation," or "in the interests of justice." Professor King noted her impression that for the defense bar the language "to facilitate preparation for trial" was essential. It was the whole reason for the rule. She noted, however, that this language could be moved within the rule. Some members expressed concern about the emphasis on preparation for trial, since more than 90% of cases are resolved by guilty plea.

There was a motion to revise the amendment to allow determination or modification "to facilitate preparation for trial or in the interests of justice." A member expressed concern with the breadth of this phrase and noted that Rule 16.1 isn't intended to control all of litigation. An attorney who has a trial somewhere else will make a motion to continue the trial. Rule 16.1 is not going to deal with that. He cautioned against trying to add too much to the proposed rule. He was also concerned that we don't know what the phrase "interests of justice" means. It could create an incentive to use this rule to resolve all sorts of issues.

Professor Beale urged the Committee to return to the reason that the amendment is being proposed, and not load other things in there. Counsel have been going to the court forever asking for delay because they have another trial. Those things are already occurring and don't need to be included in the amendment.

In response to a comment, Judge Kethledge reiterated that (b) just describes what the parties may ask to court to do. It does not circumscribe the district court's authority. Judge Campbell said this is describing the basis on which the parties can come to the court. He did not want it to have the appearance that they are limited to doing it only in situations where it will facilitate trial preparation. There are other reasons that they should be able to come in. We could just make clear with another sentence there that these are not words of limitation, there are other reasons that would justify.

Judge Molloy called for any motions to amend.

The first motion was to change "may request that" on line 9 to "may ask the court to." This change was included in the version proposed by the style consultants. It was seconded and passed unanimously.

The second proposal was to amend line 11 by omitting "to facilitate preparation for trial." Judge Kethledge emphasized the importance of this language to the defense, and urged that it be retained in the text of the rule. Wroblewski noted that his concern had been about broadening the rule to include open ended language such as "in the interests of justice," not this phrase. Mr. Blanco agreed that it was desirable to keep the rule narrow. Judge Campbell favored leaving the language in the rule because of its significance to the defense members. Perhaps it is so obvious

that the parties can ask to have the schedule extended that we can just leave it as it is. So he withdrew his suggestion.

There was a motion to approve (b) as presented in the agenda book with the style change on line 9. It was seconded and approved by voice vote.

Discussion turned to the Committee Note, and the proposed amendment to line 14, was approved. The suggestion to change “judge” to “court” was accepted as a friendly amendment, and the note, as amended, was approved unanimously.

Judge Feinerman then presented the Rule 49 amendments.

The Committee had approved the amendments for publication as part of a cross committee effort to update the rules on e-filing. The Criminal Rules Committee decided to delink Criminal Rule 49 from Civil Rule 5 for several reasons, including eliminating the need for those using the Rule to toggle back and forth between the two sets of rules, and more importantly, to accommodate the differences for e-filing between the criminal and civil contexts. Pro se criminal defendants, the Committee decided, should not have presumptive access to the CM/ECF system. The architecture of CM/ECF allows for filing by the defendant and the government and nobody else in criminal cases, unlike the civil context. The proposed amendments were published last fall, we received comments, and the Civil Committee received comments that our Committee will have to consider as well so that we can keep the amendments as uniform as possible.

The first set of comments dealt with the e-signature provision. Three commenters regarded the amendment as ambiguous, possibly requiring a filer to add her user name and password to the filing. But of course that was not what was intended. Together with the other three committees we came up with new language that will make it very clear:

An authorized filing [made] through a person’s electronic-filing account, together with the person’s name on a signature block, serves as the person’s signature.

Professor Beale also added that the Civil Committee has deleted the brackets around the word “made,” in that language, which we should consider as well so that the amendments are uniform. A motion to approve the new language (not including the brackets) was made, seconded, and approved unanimously without further discussion.

The next set of comments addressed who should receive presumptive permission to e-file. Three comments took issue with the policy judgment under the amendment as published that only represented parties receive that presumption, and others may e-file only with permission from the court. One commenter wanted inmates to be able to presumptively file electronically, another wanted non-parties, and another wanted all pro se filers. The Subcommittee discussed the comments, and it decided to stick with the original conclusion that in criminal cases presumptive electronic filing should be limited to the lawyer for the

government and the lawyer for the defendant, and not expanded to these other categories. Respectfully disagreeing with these public comments, the Subcommittee suggested no change be made to the published version.

Judge Molloy asked if anyone disagreed with that position, and no one did. In response to an inquiry about whether the commenters would receive a letter, Ms. Womeldorf explained that the Rules Office does not usually follow up.

Judge Feinerman turned to the comments on the Civil Rule that would impact our Rule as well. The published versions of both rules said that service is not effective if the serving party learns that the service was not effective. Some court clerks were concerned that this language might be read to place an obligation on the clerk's office to let the party know if the clerk of the court found out that the person to be served somehow wasn't served. They were concerned that the rule not suggest that they have an obligation to let the serving party know. The Civil Rules reporter addressed this concern by suggesting language for the Note.

Professor Beale explained that we were able to accept the sentence proposed by the Civil Rules, though a difference in the structure of the Civil and Criminal Rules is reflected in another portion of the note. The Subcommittee thought that it was unlikely that this language, which had long been included in Civil Rule 5, would suddenly be interpreted to impose a duty on the clerk. However, when the Civil Rules Committee decided to include new language in the note accompanying Rule 5, it was appropriate to include it in the note to the Criminal Rule as well. The proposed change to the note after publication must be approved by the Committee.

A member asked whether there was any concern that the clerk's office might feel that this language created an obligation to notify the party for whom the failed communication was intended? He related a case that dealt with the consequences of the failed receipt of a notice of appeal that divested his client of a right of appeal. It came about because the lawyer did not update his ECF registration to include his changed email address and he argued that should be ignored because his correct address was on some paper filed in the case and the clerk should have known and should have told him. Should the note say something like "the rule does not make the court responsible for notifying *any person* if an attempted transmission by the system fails"?

Professor Beale noted that Rule 49 as published tracks the language of Rule 5, and that would be difficult at this point to go back and alter that.

Judge Campbell stated the Civil Rules clerk liaison was not concerned that this language would place a general obligation on clerks to go track down people whose contact information is outdated. They were concerned only about letting the serving party know.

Mr. Hatten, the Criminal Rules clerk of court liaison, explained that the clerk gets a bounce-back message if the receiving party does not receive it, and they generally try to follow up. But they do not turn around and let the sending party know. Users of the CM/ECF system have an obligation to maintain their updated information.

Judge Campbell noted the issues raised by the number of users and bounce-back messages. An email to all users in his district, which is relatively small, goes to about 60,000 people and produces more than 5,000 bounce-backs. So a significant percentage is always out of date. Requiring the clerk to notify the lawyers every time they get a bounce-back it would be a huge burden. And the bounce-back often is not from the lawyer or the party but from a legal assistant or paralegal. So there was a good reason for this change.

Judge Feinerman moved that the Committee accept the new language for the Note; the motion was seconded and approved unanimously by the Committee without further discussion.

Judge Feinerman added that in at least one district, the Northern District of Illinois, the clerk's office puts something on the docket indicating there was a bounce-back so the serving party would know. But there is no obligation for other districts to do that.

He then turned to public comments received on the portion of the published amendment dealing with whether a certificate of service is required when a paper is e-filed, and whether others connected with the case have been served. In drafting the amendment, we implicitly assumed that if you e-file you don't need a certificate of service. A comment to the Civil Rules asked whether this should be made explicit. The proposal before the Committee would amend the published version to make this clear. As revised, the amendment would state:

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served must be filed within a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system.

Prof. Beale noted that the language was drafted to make it clear for anyone using the rule, not just lawyers.

A motion to adopt the proposed change (lines 58-63 on p. 104 of the agenda book) was made and seconded, and passed unanimously without further discussion.

The next change, to the same section (lines 63-66), pertains to certificates of service when there is a non e-filer in the case (a pro se criminal defendant, a non-party, or a lawyer who was able to opt out of e-filing). The rule as published said that when a paper is served by other means, a certificate of service must be filed "within a reasonable time after service or filing, whichever is later."

Professor King explained that the Civil Rules Committee had decided to revise the published language because there may be simultaneous filing of the paper and the certificate of service. They proposed to revise the language to allow the certificate to be served "with it, or within a reasonable time after service." After a clarifying question by one member, Professor Beale indicated that she believed the language has been accepted by the other committees as well as style.

Judge Feinerman moved for approval of the revised language for this sentence: “When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service.” The motion was seconded and adopted unanimously, without further discussion.

Finally, Judge Feinerman returned to the first sentence of proposed Rule 49(b)(1), which stated “Any paper that is required to be served must be filed within a reasonable time after service.” He expressed concern that a reasonable person could read this as barring what happens 95% of the time. It seems to say that any paper required to be served must be filed after service. But that’s not what happens. The problem is serving non-e-filers. It is conceivable that the filing would be made before service was made. If service occurred after filing, that would violate the rule. It is also common practice in serving a non-e-filer to first file the paper using the electronic filing system, print off the CM/ECF version with the docket number at the top, copy it, and then serve the copy on the non-e-filer. Again this would be service after filing. Because the language could be read as mandating that the filing must occur after service, he proposed that the Committee replace “after” with “of” or “not later than.”

Professor Beale noted that the published language had been drawn from current Civil Rule 5, which presently governs in criminal cases as well. Given the effort to coordinate the Rules, this would require Civil to make the same change. So the question is whether the Criminal Rules Committee wants to make this change and try to convince the other committees to adopt it as well to maintain uniformity.

Judge Campbell advised the Committee to do what it thought was correct, and to delegate authority to chair and reporters to coordinate before the proposed amendment gets to the Standing Committee. Although the language could be read as Judge Feinerman suggested, Judge Campbell doubted it would cause a judge to reject something because it was filed before service.

A motion to substitute the word “of” for the word “after” was made and seconded.

A member questioned the need to make the change. The Civil Rule has been in effect for many years, apparently no one has raised this issue, and if someone did raise the issue they presumably would have to show some prejudice. Since this is a rule about notice, and they just got notice too early, one wonders whether there would ever be relief, even if technical violation of a possible interpretation of the rule. Since this is a long standing rule and there are no problems, why change it? The member also expressed concern that this could create a negative implication problem with other provisions.

Judge Feinerman responded that he would agree if this were the only change being made in Rule 49. But “we have the body on the operating table,” so to speak, and while we are operating on it we should take the opportunity to make the change. The Committee Note could say this is a clarification, and no change in meaning is intended.

A member agreed that since the language is technically wrong and the provision is being amended, the Committee should correct it.

Judge Campbell commented that because the Committee is writing a new criminal rule, it should do what it thinks is right. If you have a better way to write it, do that. Maybe it would cause the Civil Rule Committee to make a parallel change. It would tee up the issue for the other committees to consider. Of course it might then be changed by the style consultants.

The motion to change “after” to “of” in the revised language passed unanimously.

Professor Beale asked the Committee to recognize that the reporters would need to revise the Committee Note to reflect the changes just made, subject to review by Judge Feinerman and Judge Molloy, as well as review by the reporters and chairs from the other committees. Last minute changes may be made before the Rule goes to the Standing Committee. And there will be another wave of style changes. Judge Molloy said this was consistent with the Committee’s prior practice.

Prof. Beale said no changes were suggested for Rule 45. There was a motion to approve and send to Standing as published the changes to Rule 45. The motion was seconded and approved unanimously without further discussion.

Judge Molloy recognized Judge Kethledge to introduce the discussion of Rule 12.4.

Judge Kethledge, chair of the Rule 12.4 Subcommittee, reminded the Committee that amendments to the rule were published in the fall. The amendment was originally requested by the Department of Justice because the existing rule was burdensome in particular cases, such as those with a large numbers of corporate victims all suffering very small losses. The amendment addressed this problem in Rule 12.4(a), but it also included changes in Rule 12.4(b).

Professor Beale explained that the amendment as published made three changes to Rule 12.4(b). The first was adding a 28-day period for filing. The second replaced the term “supplemental” with “later” because if there is no initial filing, a later filing does not “supplement” anything. No comments were received on these first two changes. A third revision made it clear that the government must file a statement not only when there was a change in earlier information, but also when there was “additional” information. During the review period the Subcommittee learned that making that third change was problematic because it altered language that was common to other rules, particularly Civil Rule 7.1(b)(2). The Subcommittee agreed that creating this inconsistency would be undesirable, and that Rule 12.4 should be parallel to and consistent with the Civil Rule.

Judge Kethledge said there were two public comments. The National Association of Criminal Defense Lawyers said the proposed amendment was “unobjectionable.” The Pennsylvania Bar Association suggested that good cause should be explicitly limited to cause bearing on judicial recusal. The Subcommittee thought that was already clear and declined that suggestion.

A motion to revise the published language to track the Civil Rule, as shown in the agenda book, p. 124, lines 24-27, was made, seconded, and unanimously approved without further discussion.

A final motion to send the amendment to the Standing Committee was made, seconded, and unanimously approved. Mr. Wroblewski indicated that the Justice Department was grateful for the Rules Committee's attention to this.

Judge Molloy recognized Judge Kemp to introduce the discussion of Rule 5.

Judge Kemp, chair of the Rule 5 Subcommittee, presented the proposed amendments to Rule 5 of the 2255 rules and Rule 5 of the 2254 rules. These amendments grew out of a dispute about the meaning of this rule, which was intended to make it clear that there is a right to file a reply. The Committee decided that part of the problem was that judges were relying upon outdated precedent and also that the current rule was ambiguous, because some were construing it to allow a reply only if the judge fixes a time to do that. To address this problem, the Committee asked the Subcommittee to separate the two parts of the sentence. That is the proposal before the Committee. The Subcommittee discussed whether to replace the word "may" in the current rule with something such as "is entitled to," but "may" appears in many of the Rules, and changing it in one rule might cause problems. Separating the two sentences makes this much clearer, and the Committee Note is explicit. Judge Kemp thanked the reporters for their work.

Discussion focused on the Committee Note. Professor King added that the note to the 2254, at p. 137 of the agenda book, contains two errors that will be changed: the reference to 2255 should be changed to 2254, and the reference to (d) will be changed to (e). Further, Judge Campbell's suggestion that "throughout" was intended to be "through" was accepted as a friendly amendment. Professor Coquillette advised the Committee that notes are not subject to review by the style consultants.

Judge Molloy asked why the 2255 rules use "moving party" and 2254 uses "petitioner." Professor Beale indicated that that this is the language of the current rules, and the terminology was not being changed.

Judge Campbell noted that the proposed note refers to the court's discretion "to set the time" for filing a response, which could still read to mean to set or not to set a time. Should it be changed to "in setting or determining" a time for reply? Members offered other suggestions for rewording the note, and the Committee agreed that the Reporters, in consultation with Judge Kemp, should revise the language to prevent misunderstanding.

A motion to approve Rule 5(d) amendments was made, seconded, and unanimously approved, with the understanding that changes to the note will be made to address members' concerns.

A motion to approve parallel changes to Rule 5(e) for 2254 proceedings was made, seconded, and unanimously approved, with the understanding that parallel changes will be made to the note for the 2255 rules, plus the two additional corrections noted by Professor King.

The proposed amendments will be presented to the Standing Committee with the recommendation that they be published for public comment.

The next item on the agenda was discussion of our suggestion that the Federal Judicial Center (FJC) prepare a manual for complex criminal litigation. Judge Jeremy Fogel, the Director of the FJC, has asked the Committee to develop a list of the five to ten issues it would be most important to cover. An email from one of those at the mini-conference suggested some topics, largely related to discovery, including funding of discovery assistance for Criminal Justice Act (CJA) attorneys and others.

A member suggested it would be important for the FJC to reach out to the CJA Review Committee. Judges have lots of budgetary issues, and in these cases the CJA lawyers don't always get the appointment they need early enough, or the money they need to get the experts they need. If that alone could be covered in this manual, that would be a huge help. Members also noted that there are a handful of coordinating attorneys that handle these issues, but there are not enough of the specialists to handle all of the cases.

Ms. Hooper stated that she would be happy to take a list of topics back to Judge Fogel, and noted that the FJC would also be likely to reach out to other judges and experts. A member agreed that it would be important to get information from the federal defenders, support analysts, and CJA lawyers to find out what kind of problems they have.

Judge Molloy asked the Rule 16.1 Subcommittee, chaired by Judge Kethledge, to develop a list of the most important topics to be included in a FJC manual for handling complex criminal cases, and to present the list for discussion at the next meeting. If any member has suggestions, they should contact Judge Kethledge.

Judge Campbell suggested that the Rule 16.1 Subcommittee reach out to several Judicial Conference committees: defense services, criminal law, and CACM.

Judge Molloy asked Mr. Wroblewski to present the next information item. Mr. Wroblewski explained that the Department of Justice has new software that tracks grand jury subpoenas and their return. An issue was raised regarding whether the software complies with Rule 17. CACM said it does comply. The Department is still responding to questions and concerns from some clerks of court, and the criminal chiefs from the U.S. Attorney's Offices will report any problems that require a rules amendment to him. Mr. Wroblewski concluded that he thought the issue was being resolved, and there will be no need for an amendment.

Judge Molloy announced that the fall meeting will be in Chicago on October 24, 2017.

In closing, Judge Molloy thanked the reporters for their extraordinary work and the amount of time they put in. He also thanked the staff of the Administrative Office and the FJC, who provided wonderful help. And he extended a final thanks to Ms. Brook and Judge Kemp, who have been great contributors to the work of the Committee.

TAB 6

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TAB 6A

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

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CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2017

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on April 21, 2017 in Washington D.C.

The Committee recommends that a proposed amendment to Evidence Rule 807 be issued for public comment.

The Committee also reports on several information items concerning, among other things, an ongoing review of Rules 801(d)(1)(A) and Rule 404(b).

II. Action Item—Proposed Amendment to Rule 807

The Committee has been considering possible changes to Rule 807—the residual exception to the hearsay rule—for the last two years. The project began with exploring the possibility of expanding the residual exception to allow admissibility of more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation—including discussion with a panel of experts at a Conference held at Pepperdine Law School—the Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review—Rule 804(b)(6) forfeiture—is not based on reliability at all. A review of the case law indicates that the “equivalence” standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one. Given the difficulty and disutility of the “equivalence” standard, the Committee has determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee has determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration is a typical source for assuring that a statement is reliable. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the drafters’ avoidance of the term “materiality” in Rule 403—and that avoidance was well-reasoned, because the term “material” is used in so many different contexts. The courts have essentially held that “material” means “relevant”—and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be—and has been—used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a “just” result. The Committee has determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

- The current notice requirement is problematic in at least four respects:

1. Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

2. The requirement that the proponent disclose “particulars” has led to unproductive arguments and unnecessary case law.

3. There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4. The requirement that the proponent disclose the declarant’s address is nonsensical when the witness is unavailable—which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the “more probative” requirement indicates that there is no intent to expand the residual exception, only to improve it. The “more probative” requirement ensures that the rule will only be invoked when it is necessary to do so. Furthermore, the Committee has made it clear in the amendment that the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions. This assures, again, that parties will be able to invoke the exception only when they can establish the need to do so.

The Committee unanimously recommends that the Standing Committee issue the following proposed amendments to Rule, and accompanying Committee Note, for public comment:

Rule 807. Residual Exception

(a) **In General.** Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay; ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;

~~(1 2) the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

~~(2) it is offered as evidence of a material fact;~~

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; ~~and~~

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~an intent to offer the statement ~~and its particulars, including the declarant's name and address,—including its substance and the declarant's name—~~so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.” Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

III. Information Items

A. Proposal to Amend Rule 801(d)(1)(A)

Over the last five meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses—the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. The Committee’s discussions are now focused on whether Rule 801(d)(1)(A) should be amended to provide for greater substantive admissibility of prior inconsistent statements. Currently the rule is very narrow—prior inconsistent statements are admissible substantively only if they were made under oath at a formal proceeding. The two possibilities for expansion presented are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof—other than a witness’s statement—that the prior statement was ever made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee has concluded that it will not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee is concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there is a substantial dispute that it was ever made. Cross-examination of a declarant as to the prior statement might be difficult if she denies ever making it. And it might well be costly and distracting to take evidence and to determine whether a prior inconsistent statement was made, if there is no reliable record of it.

The Committee is primarily considering whether to amend the rule to allow for substantive admissibility if the prior inconsistent statement has been recorded by audiovisual means. If the statement is audiovisually recorded, any denial that it was made becomes implausible, and the proof of its making is a fact easily determined. Any dispute about the circumstances under which it is made—for example, whether police officers induced the statement—probably can be straightforwardly evaluated by the factfinder, who can watch the recording. Moreover, allowing substantive admissibility of audiovisually recorded inconsistent statements could lead to more statements being recorded in the expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.

The Committee is also considering a proposal from the Justice Department to add another ground of substantive admissibility—for statements that the witness acknowledges having made. The reasoning is that when a witness concedes that she made the statement, there is obviously no question that the statement was made. But practice in one state that has an acknowledgement

provision shows some practical difficulty, and litigation costs, in determining whether the witness has in fact acknowledged a whole statement a part of a statement, or any statement at all.

The Committee is being cautious in deciding whether to expand substantive admissibility for audiovisually recorded inconsistent statements. It is concerned about whether a change might lead to a proliferation of recorded statements, or to strategic recording of statements that may not be reliable. The Committee will be engaged in interviewing and seeking information from interested parties to get their thoughts on the consequences of a rule change. And the Committee is working with the FJC to prepare a survey on the subject.

B. Consideration of a Possible Amendment to Rule 606(b)

Federal Rule of Evidence 606(b) generally prohibits juror testimony concerning juror deliberations when offered to attack the validity of a verdict. The Supreme Court recently held, in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), that the Colorado counterpart to Rule 606(b) violated a criminal defendant's Sixth Amendment rights when it was applied to bar testimony about statements demonstrating clear racial bias by a juror during deliberations. The scope of the constitutional right remains to be developed. It is likely that counsel will seek to expand the *Pena-Rodriguez* holding to other constitutional violations in the jury room, such as jurors drawing an unconstitutional adverse inference as a result of defendant's failure to testify; and it is likely that parties will seek to extend the decision to civil cases, especially in light of the Supreme Court's 2014 decision in *Warger v. Shauers*, 135 S.Ct. 521 (2016), in which the Court intimated that racist statements of jurors in civil cases might demand a constitutional exception to the Rule 606(b) exclusion.

The Committee recognizes that after *Pena-Rodriguez*, Rule 606(b) is unconstitutional as applied at least to racist statements made by jurors while deliberating in criminal cases. The Committee has always sought to remedy situations in which an Evidence Rule could foreseeably be applied in an unconstitutional manner, and has responded to Supreme Court decisions that raise constitutional questions about an Evidence Rule.

At its Spring meeting, the Committee discussed whether to propose an amendment to Rule 606(b) to eliminate the possibility of an unconstitutional application. The Committee considered three potential amendments:

- The Committee could amend Rule 606(b) to codify the specific holding of *Pena-Rodriguez*, creating an exception to the prohibition on juror testimony to impeach a verdict in cases involving statements of racial bias only. But while there was some sympathy in the Committee for this solution, other members were opposed on the ground that if *Pena-Rodriguez* ends up being extended to other types of juror conduct or to civil cases, another amendment would then be needed.

- The Committee could amend Rule 606(b) to expand on the *Pena-Rodriguez* holding and to permit juror testimony about the full range of conduct and statements that may implicate a defendant's constitutional rights. The Committee rejected this option, because it would raise difficult policy issues and could end up undermining Rule 606(b) itself—a rule that

is essential to preserve the finality of verdicts, the privacy interests of jurors, and the integrity of jury deliberations.

- The Committee could include a generic exception to the Rule 606(b) prohibition of juror testimony, allowing such testimony whenever it is “required by the Constitution.” This potential amendment would be intended to capture only the right announced in *Pena-Rodriguez* for now, but would adapt to any future expansion of that right in later cases. The possible downside to this option is that the amendment could be interpreted to permit juror testimony about any type of juror misconduct or statement that could be argued to violate the Constitution. It could be read as a suggestion that *Pena-Rodriguez* should be expanded, at least at this point, given the recency of the decision.

The Committee resolved to postpone consideration of an amendment to Rule 606(b) in favor of monitoring the cases following *Pena-Rodriguez*.

C. Consideration of Possible Changes to Rule 404(b)

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application. The focus has been on three areas:

- 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
- 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
- 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

The Committee has considered several textual changes to address these case law developments, but is also still discussing and debating whether: 1) there is actually a problem that needs to be addressed; and 2) whether any textual changes will actually solve a problem without creating another one. The Department of Justice has taken the position that no changes to Rule 404(b) are justified (other than a minor change that dispenses with the requirement that a defendant must request notice). Other members of the Committee believe that there are significant problems, and conflict in the case law, that can be remedied by an amendment to Rule 404(b).

Part of the Committee’s review focuses on possible changes to the notice provision of Rule 404(b). The Committee is considering specifically whether the problem of bad acts being admitted for propensity purposes might be addressed by requiring the prosecutor to articulate in the notice the chain of non-propensity inferences that justify admissibility for the proper purpose. Other possible changes to the notice provision include a requirement for earlier notice (so that

the parties and the court can be attuned to the need to assess whether there are non-propensity inferences that support admissibility); and a requirement that the government provided something more specific than the “general nature” of the evidence, as is currently all that is required,

One alternative that is being considered by the Committee is to amend Rule 404(b) to require a more exclusionary balancing test for bad act evidence offered against a criminal defendant—more protective than the Rule 403 test, under which the prejudicial effect must substantially outweigh the probative value. The test could require the probative value of the other crime, wrong, or act to “substantially outweigh” (or to “outweigh”) the unfair prejudice to the defendant from a potential propensity use. This solution might have an advantage of providing protection against misuse of bad act evidence, without adding possibly problematic new language and standards to Rule 404(b) regarding “propensity” and “active contest.”

The Committee will continue to study Rule 404(b) and the developing case law. The Reporter will provide the Committee with a Rule 404(b) case outline for its Fall meeting, including district court opinions, to help determine the level of care applied to Rule 404(b) rulings in criminal cases. It is possible that the Committee’s research might be used to formulate a best practices manual for Rule 404(b) evidence, should the Committee decide not to proceed with amendments to the Rule.

D. Conference on Rule 702

The Committee is preparing a Conference on Rule 702—specifically on developments regarding expert testimony that might justify an amendment to Rule 702. The major development to be addressed is the challenges raised in the last few years to forensic expert evidence. In 2009, the National Academy of Sciences issued an important report, concluding that many forensic techniques were not scientific. This report has led to many new challenges to such forensic testimony as ballistics, bite mark identification, and handwriting identification. Then a few months ago the President’s Council of Scientific and Technical Advisors (PCAST) issued a detailed report challenging the reliability of various forms of forensic testimony and providing suggestions for how these forensic inquiries can be validated. The Chair of PCAST contacted the Committee to discuss how the PCAST suggestions might be implemented as “best practices” under Rule 702. The Conference on Rule 702 is the first step in that process.

Besides the new challenges to forensic expert testimony, there are a number of other issues regarding expert testimony that judges and members of the public have asked the Committee to review. Among them are:

- Are courts accurately applying the admissibility factors established in the 2000 amendment to Rule 702—specifically that the expert must have a sufficient basis and the methodology must be reliably applied?
- How should a court assess the reliability of non-scientific or “soft science” experts?

- What special problems in evaluating challenges to expert testimony arise in criminal cases?

The Conference will be convened to discuss all of the above issues, though the major focus will be on forensic experts. The Conference will take place before the Fall Committee meeting on Friday, October 27, 2017 at Boston College Law School. A transcript of the Conference will be published in the *Fordham Law Review*. The Committee invites and would appreciate input and participation from the members of the Standing Committee.

E. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee has, however, continued to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

The review on recent federal case law involving eHearsay indicates that there are few if any instances of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. Moreover, the study conducted by the Committee’s FJC representative on social science research counsels caution in adopting an eHearsay exception. The social science studies indicate that lies are more likely to be made when outside another person’s presence—for example, by a tweet or Facebook post.

The Committee will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

F. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Spring 2017 Meeting

The draft minutes of the Committee's Spring 2017 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Appendix: Proposed Amendment to Fed.R.Evid. 807.

TAB 6B

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE***

1 **Rule 807. Residual Exception**

2 (a) **In General.** Under the following ~~circumstances~~
3 conditions, a hearsay statement is not excluded by the
4 rule against hearsay: ~~even if~~

5 (1) the statement is not specifically covered by a
6 hearsay exception in Rule 803 or 804;

7 ~~(12)~~ ~~the statement has equivalent circumstantial~~
8 ~~guarantees of trustworthiness~~ the court
9 determines that it is supported by sufficient
10 guarantees of trustworthiness—after considering
11 the totality of circumstances under which it was
12 made and any evidence corroborating the
13 statement; and

14 ~~(2)~~ ~~it is offered as evidence of a material fact;~~

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

15 (3) it is more probative on the point for which it is
16 offered than any other evidence that the
17 proponent can obtain through reasonable efforts;

18 ~~and~~

19 ~~(4) admitting it will best serve the purposes of these~~
20 ~~rules and the interests of justice.~~

21 (b) **Notice.** The statement is admissible only if, ~~before~~
22 ~~the trial or hearing,~~ the proponent gives an adverse
23 party reasonable notice of ~~the~~an intent to offer the
24 statement and its particulars, ~~including the declarant's~~
25 ~~name and address,~~ including its substance and the
26 declarant's name—so that the party has a fair
27 opportunity to meet it. The notice must be provided
28 in writing before the trial or hearing—or in any form
29 during the trial or hearing if the court, for good cause,
30 excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.” Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be

superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same

exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

TAB 6C

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 21, 2017

Washington, D.C

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 21, 2017 at the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. William K. Sessions, III, Chair
Hon. James P. Bassett
Hon. Debra Ann Livingston
Hon. John T. Marten (by phone)
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Traci Lovitt, Esq.
A.J. Kramer, Esq., Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James C. Deaver, III, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Professor Liesa Richter, Consultant to the Committee
Professor Kenneth Broun, Former Consultant to the Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelly Cox, Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Lauren Gailey, Rules Committee Law Clerk
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Susan Steinman, American Association of Justice

I. Opening Business

Announcements

Judge Sessions welcomed attendees to the meeting and announced that the Fall Advisory Committee meeting will be held at Boston College on October 27, at which the Committee will sponsor a Conference on Rule 702, which would be discussed later in the meeting. Judge Sessions also announced that Professor Liesa Richter will serve as the academic consultant to the Advisory Committee with the departure of Professor Ken Broun. Judge Sessions reported that Judge Woodcock will be leaving the Committee and acknowledged his invaluable service to the Committee.

Judge Sessions also informed the Committee that Judge Livingston has been selected to be the Chair of the Advisory Committee. He noted that it had been an honor to serve as Chair and that he was grateful for the support he has received from the Reporter, from Judge Campbell, and from the Rules Committee Support Office. Judge Sessions remarked that Judge Livingston is a thoughtful, experienced evidence expert whose supportive style will make her a perfect Chair. Judge Livingston noted her appreciation for Judge Sessions' incredible service to the Committee.

The Reporter announced that Professor Ken Broun had asked to step down as academic consultant to the Committee after more than 20 years of service to the Committee. The Reporter noted that Professor Broun was a Committee member for several years before becoming the academic consultant, and that Professor Broun had performed invaluable research for the Advisory Committee --- particularly in connection with the extensive privilege project, and with the development of Rule 502. The Reporter stated that Professor Broun has been a loyal and supportive member of the Committee and that all are sad to see him depart. Judge Sessions stated that Professor Broun had been an incredible contributor to the Committee, who brought a stable and thoughtful perspective that helped the Committee navigate difficult issues. Professor Broun stated that serving the Advisory Committee was the highlight of his professional career and that he was grateful to his many incredible Chairs, especially Judge Sessions. He also expressed his gratitude to the Reporter for his work on behalf of the Committee.

Approval of Minutes

The minutes of the October 2016 meeting at Pepperdine Law School were approved.

January Meeting of the Standing Committee

The Reporter made a short presentation on the January, 2017 meeting of the Standing Committee. There were no action items from the Evidence Committee for the January meeting. The Reporter informed the Standing Committee of ongoing projects, including potential amendments to the Rule 807 residual exception to the hearsay rule; proposals to amend Rule 801(d)(1)(A) governing prior inconsistent statements by testifying witnesses; and a review of the operation of Rule 404(b) governing prior bad acts and potential proposals to improve the Rule. He noted that the Standing Committee was very enthusiastic about the upcoming fall conference on forensic evidence and Federal Rule of Evidence 702. In addition, the Standing Committee

was interested in Rule 404(b) proposals and thought it was important to review the Rule whether or not amendments are proposed.

II. Proposal to Amend the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be amended. Part of the original motivation for an amendment was to consider expanding its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. But another reason for an amendment was the Committee's determination that the Rule could be improved to make the court's task of assessing trustworthiness easier and more uniform; to eliminate confusion and unnecessary effort by deleting superfluous language; and to provide improvements to the notice provision.

Amendments to the notice provision were unanimously approved at the Spring 2016 meeting, but have been held back while the Committee has been considering changes to the substantive provisions of Rule 807. With regard to substantive changes, the Committee, after substantial discussion at prior meetings, has preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted --- without regard to expansion of the residual exception. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.
- Trustworthiness can best be defined in the Rule as requiring an evaluation of both 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102.
- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the principle that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

At the Spring meeting, Judge Sessions noted that the question before the Committee was whether to forward a proposed amendment to Rule 807 to the Standing Committee with a recommendation that it be published for public comment. The Reporter presented the following working draft of proposed changes to Rule 807 for the Committee’s consideration:

Rule 807. Residual Exception

(a) **In General.** Under the following conditions, circumstances, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;₂

~~(1 2) the statement has equivalent circumstantial guarantees of trustworthiness~~
the court determines that it is trustworthy, after considering the totality of circumstances under which it was made, [the presence or absence of] any corroborating evidence, [and the opponent’s ability or inability to cross-examine the declarant]; and

~~(2) — it is offered as evidence of a material fact;~~

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; ~~and~~

~~(4) — admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address, -- including its substance and the declarant's name --~~ so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

The Reporter noted that the objective of the proposed amendment to Rule 807 had changed over the course of the Committee's research into Rule 807 and as a result of the Fall 2016 conference at the Pepperdine University School of Law, that brought together noted experts and litigators to discuss potential amendments to Rule 807. Although the Committee originally considered amendments to Rule 807 in order to expand the scope of the Rule and permit more liberal admission of hearsay through the residual exception, the Committee's current working draft is not intended to expand the coverage of the Rule. Instead, the goal of the working draft is to engage in good rulemaking that assists courts in applying the trustworthiness standard and resolves conflicts among the courts with respect to the evidence to be considered in evaluating admissibility. The Reporter emphasized that sound rulemaking based on exhaustive research and broad input often results in changed goals over time.

The Reporter stated that a slight expansion of the residual exception might occur through a Committee Note, if the Note were written to express an intent that the changes be read in a manner that would expand judicial discretion; or the Note might state that the original legislative history of the Rule --- which emphasized that it could be used only in "rare and exceptional" cases --- cannot be found in the text of the Rule as amended. To that end, the Reporter prepared two Committee Notes for the Committee to consider: the first describing the changes as simply good rulemaking, resolving conflicts and making the Rule more user-friendly; the second expressing an intent to apply the amended Rule somewhat more broadly.

The Committee's discussion of the working draft and of the two versions of the proposed Notes proceeded as follows:

Y The DOJ representative questioned whether the Committee wanted to abandon the objective of expanding Rule 807. She noted that consideration of the amendment began in connection with public comment on the proposal to abrogate the Ancient Documents exception to the hearsay rule, in response to comments suggesting that courts are extremely reluctant to utilize Rule 807 to admit even highly reliable hearsay. She noted that the Department prefers a Committee Note to the proposed amendment that would signal expansion of Rule 807. Several Committee members, however, expressed a preference for a good rulemaking proposal that foregoes expansion of the Rule. Other Committee members articulated concern about a Committee Note that could be construed to alter the meaning of the rule text. The Committee ultimately concluded that any proposed amendment would be accompanied by a Committee Note emphasizing that the

intent of the amendment is to clarify the trustworthiness analysis, resolve conflicts, and make other minor improvements --- and not to expand the residual exception.

- Y One Committee member suggested that the removal of the “materiality” and “interests of justice” requirements in existing Rule 807 could be construed to expand admissibility under Rule 807 if indeed those requirements served as “tone-setters” that cautioned against frequent resort to Rule 807. Courts might interpret their abrogation as a signal to admit hearsay more freely under an amended Rule 807. Judge Sessions and Professor Capra both noted that the proposed Committee Note that would accompany the proposal expressly provides that the “materiality” and “interests of justice” requirements were removed only because they were “superfluous” and not with the intent of expanding access to Rule 807. Moreover, there is plenty in the amendment that cautions against frequent resort to Rule 807 --- including retention of the “more probative” requirement, and the required finding that the hearsay is not admissible under any other exception before the residual exception may be invoked.
- Y Another Committee member expressed concern about the language in Rule 807 that permits admission of hearsay through Rule 807 only if “it is not specifically covered by a hearsay exception in Rule 803 or 804.” That Committee member feared that this language could be interpreted to exclude any hearsay within subject areas covered by the Rule 803 and Rule 804 exceptions, thus making Rule 807 more restrictive than it is currently. The Reporter noted that this language is in the original Rule --- the amendment just places that language as a specific admissibility requirement rather than a description in an opening clause, as it is currently. The Reporter conceded that under the current Rule, there is some dispute concerning what to do about “near-misses” --- hearsay that fails to meet all the admissibility requirements for a particular exception, but is nonetheless reliable enough to qualify as residual hearsay. He stated that a minority of courts have opted to exclude “near-misses” that approach too closely to an established exception, but that most courts are loathe to exclude such a statement if it is actually found to be trustworthy. He further explained that the “near-miss” issue would be difficult to resolve through rulemaking and that the working draft of the proposed amendment to Rule 807 did not intend to address that issue. He noted that the public comment process might provide valuable insights into how best to tackle the “near-miss” issue. One Committee member suggested that good rulemaking should aim to resolve ambiguities in the case law and proposed that the language in the draft rule could be changed from hearsay “not specifically covered” by a Rule 803 or 804 exception to hearsay “not specifically admissible through a Rule 803 or 804 exception” --- in order to avoid any suggestion of a “near-miss” prohibition and to codify the approach of the majority of courts. Although Committee members agreed that this language could work, the consensus was to retain the “covered” language through the comment period to see what input might be forthcoming from the public on the issue. The Committee did resolve to delete a sentence in the Committee note accompanying the proposed Rule that read: “It [the amendment] is not intended to be a device to erode or evade the standard exceptions” to avoid any suggestion that the amendment intends to disqualify “near-miss” hearsay from being admitted pursuant to Rule 807.

Ÿ One Committee member concluded that courts do have trouble with the equivalence standard, and that there is a demonstrated conflict on whether corroborating evidence is to be considered in the trustworthiness inquiry. So these are good, rulemaking-based reasons for the change. The member expressed concern, however, about language in the draft Rule allowing hearsay to be admitted through Rule 807 “if the court determines that it is trustworthy.” This Committee member observed that other evidence rules reference indicia of trustworthiness or circumstantial guarantees of trustworthiness, focusing a trial judge more on the presence of factors and circumstances that add trustworthiness, rather than on the trial judge’s inherent belief in the trustworthiness of the evidence. Concern was expressed that this instruction to determine whether the hearsay “is trustworthy” could be viewed as a higher standard that could restrict admissibility more than current Rule 807. Judge Campbell noted that the trial judge should focus on whether the hearsay is trustworthy enough to be admitted more than on his or her own view of the evidence. The Committee unanimously agreed to modify the language in the working draft to provide that a hearsay statement may be admitted if: “the court determines that it is supported by sufficient guarantees of trustworthiness --- after considering the totality of the circumstances under which it was made and any evidence corroborating the statement.” The draft Committee Note was changed to hew to the change in the Rule’s text.

Ÿ The Committee also discussed amendments to the notice provisions of Rule 807. Judge Campbell noted that the draft Rule required “written” notice, but that the Committee Note explained that notice need not be written if provided at trial after a finding of good cause. Judge Campbell suggested that the Rule text ought to excuse the writing requirement in good cause circumstances rather than leaving that to the Note. The Committee agreed with these comments, and modified the working draft to clarify that the notice could be in “any form” during the trial or hearing where the judge excuses pretrial notice for good cause. Changes were also made to the Committee Note to conform to the added rule text. Judge Campbell also expressed concern about language in the Committee Note suggesting that courts excusing pretrial notice should consider protective measures, such as a continuance, “to assure that the opponent has time to prepare for the particularized argument that is necessary to counter hearsay offered under the residual exception.” Judge Campbell noted that there could be other reasons that an opponent of a hearsay statement offered pursuant to Rule 807 might need protective measures. After discussion, the Committee agreed that there could be many reasons to consider protective measures and that seeking to spell them out in the Note could risk being under-inclusive. Therefore, Committee members agreed to delete the language in the Note describing the reasons justifying protective measures, leaving such considerations to the discretion of the trial judge.

Ÿ Committee members all agreed that requiring the court to consider corroborating evidence was useful to resolve a split in the courts, and that it was important to include corroboration in the trustworthiness inquiry because its presence or absence is highly relevant to a consideration of whether the hearsay statement is accurate. One Committee member suggested adding language instructing courts to consider evidence corroborating “the statement” to avoid any suggestion that the credibility of a witness relating a hearsay

statement should be considered. Committee members agreed with that change, and with language in the Committee Note instructing that the reliability of the in-court witness is not to be considered in the trustworthiness inquiry.

- Y All Committee members agreed that it was unnecessary to direct a trial court to consider both the presence or absence of corroboration, noting that courts will appreciate the importance of both, as well as of the quality of the corroboration without any express language to that effect.
- Y One Committee member described a state residual exception allowing admissibility of hearsay so trustworthy “that adversarial testing would add little.” Some members noted that, while the ability to cross-examine a declarant-witness at trial might militate in favor of admissibility, the absence of cross-examination should in no way counsel against admissibility because it is the hearsay of absent and unavailable declarants that is most often admitted through Rule 807. The Committee agreed to delete any express reference in the text to cross-examination, given that trial judges will understand the importance of cross in considering the admissibility of hearsay statements through Rule 807.

After further discussion, a motion was made and seconded to approve the proposed amendments to Rule 807 and a Committee Note, both as revised at the meeting, with the recommendation to the Standing Committee that the Rule and Note be released for public comment. The Rule and Note, as sent to the Standing Committee, provide as follows:

Rule 807. Residual Exception

(a) **In General.** Under the following conditions, ~~circumstances~~, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;

(1 2) the statement has equivalent circumstantial guarantees of trustworthiness the court determines that it is supported by sufficient guarantees of trustworthiness --- after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

~~(2) — it is offered as evidence of a material fact;~~

~~(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~

~~(4) — admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) **Notice.** The statement is admissible only if ~~before the trial or hearing~~ the proponent gives an adverse party reasonable notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address, -- including its substance and the declarant's name --~~ so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing -- or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees making it more likely than not that the statement is trustworthy.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.” Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the

witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the Rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- Second, the rule now requires that the pretrial notice be in writing --- which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness

who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

III. Proposal to Amend Rule 801(d)(1)(A)

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. Since beginning its review of Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

- Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about

whether it was ever made. In such circumstances, it would be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

- Addressing the basic concern about whether the statement was ever made, a majority of Committee members have concluded that this concern could be answered by a requirement that the statement be recorded by audiovisual means. That expansion could lead to more statements being videotaped in expectation that they might be useful substantively --- which is a good result even beyond its evidentiary consequences. Moreover, expansion of substantive admissibility would ameliorate one of the major costs of the current rule --- which is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is audiovisually recorded --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away. Finally, beyond assuring that a witness could not deny the statement, audiovisual recording would promote an effective opportunity for cross-examination and a meaningful evaluation of the prior statement by the jury.

The Committee developed a tentative working draft of an amendment that would allow substantive admissibility for audiovisually-recorded prior inconsistent statements --- but the Committee is not in agreement on whether substantive admissibility under Rule 801(d)(1)(A) should be expanded.

In light of discussion at the previous meeting, the working draft was modified for the Spring meeting to adopt a further ground for substantive admissibility --- if the witness acknowledges having made the prior inconsistent statement. This additional ground of admissibility was proposed by the Justice Department, the reason being that acknowledgment of the witness eliminates any concern that the prior statement was never made. The Committee was made aware, however, of research that Professor Richter conducted on the Illinois evidence rule that allows acknowledged prior inconsistent statements to be admitted for their truth. This research suggests that providing for substantive admissibility for acknowledged statements can raise difficult questions of whether the statement is truly acknowledged by the witness --- the witness might waffle, or acknowledge reluctantly, or provide only a partial acknowledgment, etc. The Reporter suggested that it would be best to forward any proposed amendment with an acknowledgement provision in brackets that could be considered a subject of separate comment.

Thus, the working draft of Rule 801(d)(1)(B) and a Committee Note, reviewed by the Committee at the Spring meeting provided as follows:

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) ~~was~~ given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) was recorded by audiovisual means, and the recording is available for presentation at trial; or

[(iii) is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own statement; or]

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate --- because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative --- not widely available at the time the rule was drafted --- to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Given this important safeguard, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by "audiovisual" means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. "Off-camera" statements are not substantively admissible under the amendment.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable --- for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they “render the recording as a whole untrustworthy.” *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas*, 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the witness’s prior statement for substantive admissibility.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

[New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment.]

While the amendment allows for somewhat broader substantive admissibility of prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness’s testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) is inapplicable if the proponent is not offering the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

At the Spring meeting, the Committee engaged in a substantial and detailed discussion of the proposed amendment to Rule 801(d)(1)(A). The Committee recognized the potential benefits and costs of the proposal, which could be summarized as follows:

Potential Benefits

- Admissibility of audiovisually recorded statements could incentivize law enforcement officers and others to record more interrogations and interviews, which could be an improvement on current practices and a net positive in the creation of additional available evidence to ascertain the truth.
- Prosecutors and plaintiffs could get to a jury in additional cases with the help of audiovisual statements by waffling and turncoat witnesses.
- Incomprehensible limiting instructions cautioning the jury against substantive use of audio-visually recorded statements would be eliminated.
- Summary judgment practice on the civil side could be impacted by the availability of audio-visually recorded statements, which could be a net positive to the extent that there is additional evidence for the court to consider.

Potential Costs

- The substantive admissibility of audio-visually recorded statements could lead to manipulation and gamesmanship in videos for tactical use, both by law enforcement officers and by civil parties who could now make audiovisual recordings of witnesses likely to turn against them at trial. In addition, corporations could be motivated to make audiovisual recordings in anticipation of litigation for fear of witnesses giving unfavorable testimony at trial. Many of these statements may be made without reflection, or subject to persuasion, and so may not be reliable.
- An amendment that permits substantive admissibility of audiovisual recordings that are inconsistent with a witness's trial testimony could serve to advantage the powerful, such as prosecutors and corporations with incentives to record and a systemized approach to the creation of evidence.
- The proliferation of video recording outside an interrogation or interview setting, such as by police body or dash cameras, could raise difficult questions about the admissibility of off-camera statements or of on-camera statements completed and contextualized by statements made off-camera in a chaotic and rapidly evolving situation.
- Audiovisual recordings on Facebook or YouTube could present difficult issues of reliability.
- Admitting "acknowledged" witness statements could require a laborious and inefficient process of acknowledgment that could hinder trial efficiency.
- Summary judgment practice could be negatively affected if possibly unreliable recorded statements are generated after an event and then the declarant testifies inconsistently (but accurately) at a deposition. If the recorded statement can be used substantively, then summary judgment may be denied in some case where perhaps it should be, and would otherwise be, granted.

Two Committee members posed the question whether audiovisually recorded statements will enjoy the same reliability possessed by prior statements under oath in a trial, hearing proceeding or deposition, noting the necessary involvement of lawyers and potential perjury consequences that may make witnesses in that environment think twice about lying. The Reporter noted that Rule 801(d)(1)(A) is not primarily about the reliability of a statement at the time it is made, but is rather about the fact that the witness who made the statement is on the stand, subject to cross-examination --- and that audiovisual recording will ensure that the fact-finder will be able to view and weigh the circumstances surrounding the statement, in addition to observing in-court cross-examination. One Committee member emphasized that any amendment to Rule 801(d)(1)(A) should avoid inefficient reliability hearings prevalent in some state jurisdictions with more expansive admissibility of prior inconsistent statements. Another Committee member remarked that practices under the current rule do aim to ensure reliability through the oath and prior proceeding requirements and that the availability of cross at trial does not fully capture the purpose of the current rule. Conversely, the Department of Justice representative noted that it would be irrational to restrict the amendment to audiovisual statements, because acknowledged statements carry the same guarantee that the statement was made.

Finally, one Committee member noted the possibly problematic timing of a rule providing for more admissibility of recorded statements, especially given the increase in recordings of police-citizen interactions, and the more prevalent use of police body cameras. The suggestion was made that the Committee should seek to insure that a broadened rule would not have unintended consequences with regard to such recordings.

As a result of the extensive discussion, the Committee resolved that more research should be conducted into the consequences of a rule change that would grant substantive admissibility to audiovisual recordings that are inconsistent with a witness's testimony. The Reporter noted that he could inquire with the ABA, the AAJ and other groups prior to publication of the proposal for formal comment. Another Committee member suggested consultation with the Innocence Project concerning potential consequences of such an amendment, because it has been exploring improvement of police practices through measures like increased audiovisual recording. Another suggestion was to solicit feedback from lawyers and judges in states that currently allow recorded prior inconsistent statements to be admitted for their truth. The Reporter also noted that the Committee had previously conducted a survey in conjunction with the Federal Judicial Center prior to publishing a proposed amendment to Rule 801(d)(1)(B) governing prior consistent statements, and that such a survey could be crafted and circulated prior to recommending publication of a proposed amendment to Rule 801(d)(1)(A). The FJC representative agreed to work on preparing such a survey. Judge Campbell noted that recent changes to the Federal Rules of Civil Procedure were criticized for a lack of sufficient study and foundation, and that additional research could demonstrate that the Committee has done its due diligence before issuing the amendment for public comment.

At the end of the discussion, the Chair asked the Committee to vote on what next step should be taken. Two options were presented: 1. Hold back the rule proposal and conduct more research; and 2. Recommend that the working draft and Committee Note be released for public

comment. The Committee voted 5-4 in favor of gathering additional information and in favor of conducting a survey about proposed changes to Rule 801(d)(1)(A), before sending any proposal to the Standing Committee for release for public comment.

IV. Possible Amendment to Rule 606(b)

Federal Rule of Evidence 606(b) prohibits juror testimony concerning juror deliberations when offered to attack the validity of a verdict, but permits proof of outside influence or extraneous prejudicial information. The Supreme Court recently held, in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), that the Colorado counterpart to Rule 606(b) violated a criminal defendant's Sixth Amendment rights to the extent that it excluded testimony about statements demonstrating clear racial bias by a juror during deliberations. The Reporter noted the likelihood that counsel will seek to expand the *Pena-Rodriguez* holding to other constitutional violations in the jury room, such as jurors drawing an unconstitutional adverse inference as a result of defendant's failure to testify. He also noted that the holding could impact civil cases through the Due Process Clause, as signaled by the Supreme Court's 2014 decision in *Warger v. Shauers*, 135 S.Ct. 521 (2016), in which the Court intimated that racist statements of jurors in civil cases might demand a constitutional exception to the Rule 606(b) exclusion.

The Committee recognized that after *Pena-Rodriguez*, Rule 606(b) is unconstitutional as applied at least to racist statements made by jurors while deliberating in criminal cases. The Reporter observed that the Evidence Rules Committee has always strived to ensure that the Evidence Rules will not be subject to unconstitutional application. Although it is conceivable that an evidence rule might violate the constitution in an unusual case, the practice of the Committee has been to amend a rule where an unconstitutional application is specifically foreseeable as a result of a Supreme Court case. Both Rules 412 and 803(10) were amended to account for constitutional concerns.

The Committee discussed whether to propose an amendment to Rule 606(b) to eliminate the possibility of an unconstitutional application. The Reporter outlined three potential amendments:

- Y The Committee could amend Rule 606(b) to codify the specific holding of *Pena-Rodriguez*, creating an exception to the prohibition on juror testimony to impeach a verdict in cases involving statements of racial bias only. The problem with this potential amendment would be that expansion of the *Pena-Rodriguez* holding to other types of juror conduct would necessitate yet another amendment to the Rule.
- Y The Committee could amend Rule 606(b) to expand on the *Pena-Rodriguez* holding and to permit juror testimony about the full range of conduct and statements that may implicate a defendant's constitutional rights. An expansive amendment obviously would involve the Committee in significant policy decisions and would require extensive time and research, and could end up undermining Rule 606(b) itself --- a rule that is essential to preserve the finality of verdicts, the privacy interests of jurors, and the integrity of jury deliberations.

Ÿ The Committee could include a generic exception to the Rule 606(b) prohibition of juror testimony, allowing such testimony whenever it is “required by the constitution.” This potential amendment would be intended to capture only the right announced in *Pena-Rodriguez* for now, but would adapt to any future expansion of that right in later cases. While this amendment would not alter the status quo (in that Rule 606(b) is necessarily already displaced to the extent of *Pena-Rodriguez*), it would avoid a trap for the unwary and provide a signal in rule text for lawyers that juror testimony may be constitutionally mandated. This approach is consistent with the approach taken in other evidence rules like Rule 412 that conditions exclusion on satisfaction of a defendant’s constitutional rights.

The Reporter suggested that an amendment employing a generic reference to constitutional rights was likely the best option for responding to the *Pena-Rodriguez* holding, if any response is to be made. Such an amendment would not extend beyond the Supreme Court’s holding, but would allow for potential future expansion by the Supreme Court. Some Committee members in support of such a rule change favored a Committee Note emphasizing that an amendment was not intended to retreat from the important policies underlying the general rule prohibiting juror testimony. Several Committee members, however, expressed concern that an amendment to Rule 606(b) adding a generic reference to allowing juror testimony “required by the Constitution” could be interpreted to permit juror testimony about any type of juror misconduct or statement that could be argued to violate the Constitution. One member of the Committee advocated the first alternative, codifying the specific holding of *Pena-Rodriguez*.

Ultimately, the consensus of the Committee was that any amendment at this time could suggest expected expansion and potentially contribute to it. Therefore, the Committee resolved to postpone consideration of an amendment to Rule 606(b) in favor of monitoring the cases following *Pena-Rodriguez*. The Reporter agreed to monitor the cases and to keep the Committee apprised.

V. Consideration of Possible Changes to Rule 404(b)

The next topic for discussion was Rule 404(b), governing admissibility of other crimes, wrongs, or acts. The Reporter began the discussion of Rule 404(b) by noting that there was no action item concerning the Rule before the Committee, but that the Rule was the subject of intensive discussion at the Pepperdine Conference and the Committee has expressed an interest in, at the very least, monitoring developments in the case law on Rule 404(b). The Committee’s review, and discussion at the Pepperdine Conference, has shown problems in the application of the Rule. In some cases, it seems that the prosecutor is allowed to admit other act evidence against a criminal defendant simply by reciting the list of permissible purposes from Rule 404(b)(2), without demonstrating how the other act evidence is relevant for a non-propensity purpose. In other cases, courts seem to be abusing the “inextricably intertwined” doctrine, admitting other acts as part of a charged offense exempt from the limits of Rule 404(b) altogether. Recently a few Circuits have issued opinions seeking to eliminate propensity uses and the overly broad application of the “inextricably intertwined” doctrine permitted in other Circuits. Over the past two meetings, the Committee has been exploring whether the problems

in the application of Rule 404(b) revealed by the cases can be resolved or ameliorated by an amendment to Rule 404(b).

The Reporter noted that there are several possibilities for amending the Rule. First, the Reporter prepared a draft for the Committee's consideration that would:

- Change the placement of “other” to modify crimes and wrongs.
- Specify that the rule applies to all evidence that indirectly proves the disputed event and so is fairly characterized as “other act” evidence.
- Add a requirement that the proper purpose articulated for the evidence must be an issue that is actively contested by the opponent.
- Include a substantive provision requiring the probative value for the articulated proper purpose to proceed through a non-propensity inference.
- Eliminate the requirement that the criminal defendant request notice before it must be provided --- a proposal that has already been unanimously accepted by the Committee, but is being held back while the Committee is considering other amendments to Rule 404(b).
- Delete from the notice requirement the provision that the notice need only provide the “general nature” of the Rule 404(b) evidence, and replacing it either with nothing or with “substance of”.
- Require articulation in the notice of the proper purpose for which the evidence is offered, and the chain of reasoning supporting the proper purpose.
- Rearrange the notice provision so that the good cause exception applies not only to providing notice about the evidence but also to the articulation requirements.
- Require notice to be provided at least 14 days before trial.

Second, the Reporter presented an amendment proposed by another Committee member that would eliminate the list of permitted purposes currently in Rule 404(b)(2) in favor of a four-step test that would require: 1) an other crime, wrong or act to be relevant to “a specific purpose other than propensity;” 2) the proponent to establish that the relevance of the act does not rely on a character inference; 3) a Rule 403 analysis taking into account the extent to which the non-propensity purpose is “in issue;” and 4) a limiting instruction upon request. The Committee member who proposed this amendment noted that eliminating the time-honored Rule 404(b)(2) list of purposes would cause consternation, but opined that rewriting the Rule to set forth a step-by-step analysis would ensure that any possible propensity use for the evidence would be miniscule.

Third, the Reporter outlined a proposal to amend Rule 404(b) by requiring a more exclusionary balancing test for other crimes, wrongs, or acts offered against a criminal defendant --- more protective than the Rule 403 test, under which the prejudicial effect must substantially outweigh the probative value. The test could require the probative value of the other crime, wrong, or act to “substantially outweigh” (or to “outweigh”) the unfair prejudice to the defendant from a potential propensity use. Such an amendment would ensure admissibility of other act evidence when the point for which it is offered is actively contested, but would not foreclose the government’s ability to argue for admissibility in the absence of such an active contest. There is precedent for providing such protection to a criminal defendant in Rule 609, governing impeachment of testifying witnesses with prior convictions. All witnesses other than a criminal defendant are protected by a Rule 403 balancing test, but a criminal defendant may be impeached with a prior felony conviction only if its probative value outweighs the propensity prejudice to the defendant. The Reporter suggested that this proposal would be an elegant solution that would parallel Rule 609 and that would avoid adding significant and possibly problematic new language and standards to Rule 404(b) regarding “propensity” and “active contest.” This amendment could be accompanied by changes to the Notice provision if the Committee so desired. This potential amendment would make the “inextricably intertwined” issue more meaningful because other acts offered against a criminal defendant would have to survive a heightened balancing, whereas inextricably intertwined acts would need to clear only the lower Rule 403 balancing. Additional amendments could be explored to resolve this concern.

Thereafter, the Department of Justice representative addressed the Committee’s concerns about the use of Rule 404(b) in criminal cases and discussed potential amendments. First, the representative explained that the Department of Justice does not accept that there is a problem in the application of Rule 404(b) in criminal cases. While many appellate cases may seem to give superficial treatment to Rule 404(b) evidence, examination of trial court records reveals careful and thorough consideration of these issues. To the extent that there are concerns about the application of Rule 404(b), Circuits like the Third and Seventh are taking a closer look to ensure that the Rule is operating properly. Second, the Department of Justice representative opined that adding an “active contest” requirement to Rule 404(b) would be unworkable and unfair. She first noted that the requirement would contradict the Supreme Court’s statement in *Old Chief v. United States* that the government has a right to seek admission of Rule 404(b) evidence regardless of active contest by the defendant. Further, the Department believes that such a requirement would invite gamesmanship by the defense in seeking to avoid other act evidence that should properly be admitted. The Department representative opined that a “reverse 403 balancing” amendment would result in fewer other acts admitted, would be contrary to legislative history favoring admissibility of Rule 404(b) evidence, and could attract Congressional attention. Finally, the Department opposed any amendment to require specificity in a Rule 404(b) pre-trial notice because such a requirement would not account for the fluidity of trial and the need for a trial judge to manage such evidence as the case progresses. The Department of Justice does not oppose an amendment that would eliminate a defendant’s obligation to demand notice of Rule 404(b) evidence, however.

The representative for the Federal Public Defender expressed a different view of Rule 404(b) practice at the trial level, noting that prosecutors offer such evidence in almost every criminal case. He explained that the government’s Rule 404(b) notice often simply lists all the

“permitted purposes” authorized by Rule 404(b)(2) and often seeks to admit four or five other crimes, wrongs, or acts by the defendant. Trial judges may take a “split the baby” approach to the multiple other acts, allowing two or three and excluding others, almost assuring affirmance under the forgiving Rule 403 test and abuse of discretion review. The defense often receives no report or other description to assist in identifying the alleged other act evidence the government seeks to offer. The representative of the Federal Public Defender argued that everyone understands that the prosecution wants to admit this evidence because it is so prejudicial, and that the government is often overt in arguing that a defendant “did it before” so he probably had “intent” this time. When the evidence is admitted, the jury instructions seeking to protect the defendant from a propensity inference are incomprehensible to jurors. According to the representative for the Federal Public Defender, Rule 404(b)(2) needs to be rewritten to resolve these problems, and amending the notice provision alone cannot offer a complete solution.

Other Committee members weighed in on the many potential amendments to Rule 404(b). One member suggested that the notice provisions could be improved by requiring more specificity to assist the trial judge in determining admissibility in advance of trial. Committee members agreed that a change to the notice provisions alone could not resolve all the concerns about the admissibility of Rule 404(b) evidence because such a change would not alter the current standard for admitting Rule 404(b) evidence. Still, greater specificity could assist the defense and the trial judge in considering such evidence.

Committee members also discussed whether there is a “Circuit-split” with respect to the admissibility of Rule 404(b) evidence that could be resolved by an amendment to the Rule. The representative for the Department of Justice noted that the Solicitor General has taken the position before the Supreme Court that there is no genuine Circuit-split with respect to Rule 404(b) evidence. The Reporter noted that the cases in the Seventh and Third Circuits --- that prohibit any other act evidence relying on a propensity inference --- do depart from decisions in other Circuits that permit such inferences, and could reasonably be seen as creating a “split.”

At the conclusion of the discussion, Judge Sessions noted that the question for the Committee was whether to continue consideration of Rule 404(b) at the Fall meeting or whether to abandon efforts to improve the operation of the Rule for the time being. The consensus of the Committee was that Rule 404(b) is one of the most important and most litigated evidence rules and that the issues it raises merit further consideration. The Committee members agreed that adding an “active contest” requirement to the Rule was ill-advised, but resolved to devote more attention to the issues of the “inextricably intertwined doctrine,” the division in courts about proper articulation of non-propensity inferences, and the Rule 404(b) notice requirements. The Reporter stated that he would provide the Committee with a Rule 404(b) case outline for its Fall meeting, including district court opinions, to help determine the level of care applied to Rule 404(b) rulings in criminal cases. One Committee member suggested that the Committee, at the very least, could rely on the case digest to formulate a best practices manual for Rule 404(b) evidence, should the Committee decide not to proceed with amendments to the Rule.

V. Conference on Expert Evidence

The Reporter gave the Committee an update on preparations for the Conference on expert evidence, to take place on the morning of the Fall Advisory Committee meeting, October 27, at Boston College Law School. The Reporter stated that the Conference will address the admissibility of forensic evidence, as well as other issues under Rule 702, including problems applying *Daubert* to various practice areas, problems with non-forensic expert testimony in criminal cases, and inconsistent applications in the courts. The Reporter informed the Committee that he had already secured the participation of noted experts in the field of forensic evidence, as well as Judge St. Eve to speak on *Daubert* as applied to soft-science, and Judge Grimm to comment on criminal cases. He invited the Committee to offer suggestions for invitees, as well as other Rule 702 topics for discussion. The Reporter announced that a transcript of the Conference, as well as supporting articles by participants, will be published in the Fordham Law Review.

VI. Closing Matters

The Reporter referred the Committee to case law digests on Confrontation Clause jurisprudence and on the purported need for a recent perceptions exception to the rule against hearsay. These digests are maintained and updated to assist the Committee in monitoring case law developments as they might bear on the need to propose rule amendments in these important areas.

Finally, once again Committee members expressed their deep gratitude to Judge Sessions for his stellar leadership as Chair of the Committee.

VII. Next Meeting

The Fall, 2017 meeting of the Evidence Rules Committee --- together with a Conference on Expert Evidence --- will be held at Boston College Law School, on Friday, October 27.

Respectfully submitted,

Daniel J. Capra
Liesa L. Richter

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TAB 7A

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Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA) <i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)	CV 23	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

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			<p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p> <p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees • 1/30/17: Introduced in the House
	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing</p>	<ul style="list-style-type: none"> • 2/1/17: Letter submitted by Rules Committees • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

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			<p>the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Stopping Mass Hacking Act	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) “Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110</p> <p><i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Conyers (D-MI) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) “(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant.”</p> <p>Summary (authored by CRS): This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

TAB 7B

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MEMORANDUM

TO: The Rules Committees

FROM: Scott Myers -- Rules Committee Support Office

RE: Rules Coordination Report

DATE: May 25, 2017

At its June 2016 meeting, the Standing Committee asked the Rules Committee Support Office (RCSO) to identify and coordinate proposed changes to rules that have implications for more than one set of rules. The proposed changes listed below implicate more than one rule set.

Rules recommended for final approval in 2017

Electronic filing, service, and signature. Proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49 to address electronic filing, signatures, service, and proof of service; conforming amendments to Bankruptcy Appellate Rule 8011.

The advisory committees coordinated and published proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49 to address electronic filing, signatures, service, and proof of service and have refined and coordinated their recommendations in light of comments received. In addition, the Bankruptcy Rules Committee has recommended approval without publication conforming amendments to Rule 8011 (the bankruptcy counterpart to Appellate Rule 25).

Stay of Proceedings to Enforce a Judgment. Proposed amendments to Civil Rules 62 and 65.1, Appellate Rules 8, 11, and 39, and Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.

The proposed amendment to Civil Rule 62 would substitute the phrase “bond or other security” for the term “supersedeas bond.” The Appellate Rules Committee published conforming amendments to its Rules 8, 11, and 39 that eliminate the term “supersedeas bond,” and also broaden related references to the term “surety” to include other security providers. Parallel changes are reflected in proposed amendments to Civil Rule 65.1. The Appellate and Civil Rules Committees considered comments at their spring 2017 meetings and recommended versions for final approval. The Bankruptcy Rules Committee recommended at its spring 2017 meeting technical conforming amendments to eliminate the term “supersedeas bond” from Bankruptcy Rules 8007, 8010, 8021, and 9025.

A second proposed amendment to Civil Rule 62 recommended for final approval would extend the automatic stay for judgments from 14 to 30 days after entry of judgment. The change is designed to prevent the judgment from taking effect before the 28-day time period for post judgment motions in civil practice expires. Rule 62 is incorporated into Bankruptcy Rule 7062 to stay the judgment in adversary proceedings until post judgment periods have run. In

bankruptcy however, the time period for post judgment motions is 14 rather than 28 days. Accordingly, the Bankruptcy Rules Committee recommended an amendment to Rule 7062 that would continue to incorporate Rule 62, but with the references to 30 days being read as 14 days in bankruptcy cases.

Proposed Amendments to Criminal Rule 12.4 (Disclosure Statement).

The Criminal Rules Committee published amendments to its Rule 12.4(a) and (b) in 2016. The proposed changes have implications for various subsections of the appellate, bankruptcy, and civil disclosure rules.

CR 12.4(a)

The proposed amendment to Rule 12.4(a) provides an exemption to the government's requirement to disclose organizational victims where the impact of the crime on the victim is relatively small. The Appellate Rules Committee has recommended publishing a parallel amendment to Rule 26.1(a) this year. This amendment is not applicable in civil or bankruptcy practice.

CR 12.4(b)

As published, the proposed amendment to Criminal Rule 12.4(b) made two changes. It changed the time for making disclosures from "upon the initial appearance" of the party to "within 28 days from the initial appearance." It also added language to explicitly emphasize that a supplemental, or later, filing is required not only when information that was previously disclosed changes, but also when *additional* information subject to disclosure comes to light. Reporters from other advisory committees objected to the proposal to add language explicitly addressing disclosure of "additional" information arguing that such a requirement is already included in existing disclosure language that requires a supplemental disclosure "if any required information changes." Civ. R. 7.1(b)(2). In light of the concerns raised by the other advisory committees, the Criminal Rules Committee has recommended final approval of the 12.4(b) changes without the reference to "additional changes."

Rules recommended for publication in 2017

Proposed Bankruptcy Rule 9037(h)

In response to a suggestion from CACM to address redaction of personal information from improperly filed proof of claim attachments, the Bankruptcy Rules Committee proposes that an amendment to its privacy rule, Bankruptcy Rule 9037(h), be published for public comment in August 2017.

The Appellate, Civil, and Criminal Rules Committees have each concluded that a parallel amendment to their versions of the privacy rule is unnecessary.

At its January 2017 meeting, the Standing Committee was presented with the views of the Civil and Criminal Rules Committees and no member expressed the view that there was a need to amend the civil and criminal privacy rules to parallel the proposed amendment to Bankruptcy Rule 9037(h).

Proposed Appellate Rule 26.1 (Disclosure Statement)

The Appellate Rules Committee has recommended proposed amendments to its disclosure rule (Appellate Rule 26.1) that would conform to some of the published amendments to Criminal Rule 12.4. It has also recommended a new subsection to the rule that would require disclosures of certain actors when an appeal originates from a bankruptcy proceeding. The Bankruptcy Rules Committee will have to consider whether conforming amendments are needed to Bankruptcy Rule 8012, which addresses corporate disclosures in bankruptcy appeals.