COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 23, 2020

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JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 23, 2020

AGENDA

1. Opening Business

A. Welcome and opening remarks

B. **ACTION:** The Committee will be asked to approve the minutes of the January 28, 2020 Committee meeting

C. Status of rules amendments

- Report on rules adopted by the Supreme Court and transmitted to Congress on April 27, 2020 (potential effective date of December 1, 2020)

2. Joint Committee Business

A. Consideration of possible emergency rules in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

B. Other matters involving joint subcommittees

- Report from the E-filing Deadline Joint Subcommittee on progress of consideration of suggestion to change electronic filing deadlines

- Report on the work of the joint Civil-Appellate subcommittee to consider the issue of appeal finality after consolidation and *Hall v. Hall*, 138 S. Ct. 1118 (2018)

3. Report of the Advisory Committee on Appellate Rules

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

- Rule 3 (Appeal as of Right – How Taken) and corresponding and conforming amendments to Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

- Rule 42 (Voluntary Dismissal)

B. **ACTION:** The Committee will be asked to recommend the following for publication:

- Rule 25 (Filing and Service)

C. Information items

- Continued consideration of proposed amendments to Rule 35 (En Banc Determination) that would clarify the relationship between petitions for panel rehearing and rehearing en banc
- Consideration of a suggestion for rulemaking to deal with decisions based on grounds that had not been briefed
- Consideration of a suggestion continue to consider in forma pauperis standards in appellate cases
- Consideration of a suggestion to amend Rule 43 to require the use of titles rather than names in cases seeking relief against officers in their official capacities
- Consideration of a suggestion to amend Rule 4(a)(2) to more broadly allow the relation forward of notices of appeal.

3. Report of the Advisory Committee on Bankruptcy Rules

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

- Rule 2005(c) (Apprehension and Removal of Debtor to Compel Attendance for Examination)
- Rule 3007 (Objections to Claims)
- Rule 7007.1 (Corporate Ownership Statement)
- Rule 9036 (Notice by Electronic Transmission)

B. **ACTION:** The Committee will be asked to retroactively approve the following Official Forms in response to the CARES Act:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy)
- Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation), 122B (Chapter 11 Statement of Your

Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period)

C. **ACTION:** The Committee will be asked to recommend the following be published for public comment:

- Restyled versions of the 1000 series (Part I-Commencement of Case; Proceedings Relating to Petition and Order for Relief) and 2000 series (Part II-Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants)

- Rules to replace the interim rules issued to implement the Small Business Reorganization Act: Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 1020 (Chapter 11 Reorganization Case for Small Business Debtors), 2009 (Trustees for Estates When Joint Administration Ordered), 2012 (Substitution of Trustee or Successor Trustee; Accounting), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case), 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case), Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11), Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement), Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case)

- Rule 3002(c)(6) (Filing Proof of Claim or Interest)

- Rule 5005 (Filing and Transmittal of Papers)

- New subdivision (i) to Rule 7004 (Process; Service of Summons, Complaint)

- Rule 8023 (Voluntary Dismissal)

- Official Forms to replace the interim rules issued to implement the Small Business Reorganization Act: Official Forms 101 (Voluntary Petition for

Individuals Filing for Bankruptcy), 122B (Chapter 11 Statement of Your Current Monthly Income), 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 309E-1 (For Individuals or Joint Debtors; Notice of Chapter 11 Bankruptcy Case), 309E-2 (For Individuals or Joint Debtors under Subchapter V; Notice of Chapter 11 Bankruptcy Case), 309F-1 (For Corporations or Partnerships; Notice of Chapter 11 Bankruptcy Case), 309F-2 (For Corporations or Partnerships under Subchapter V; Notice of Chapter 11 Bankruptcy Case), 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11)

D. Information items
   - Revision to Interim Rule 1020 to implement the CARES Act
   - Approval of three new Director's Forms for Chapter 11 discharge in subchapter V cases resulting from the SBRA

4. Report of the Advisory Committee on Civil Rules

A. **ACTION:** The Committee will be asked to recommend the following for final approval:
   - Rule 7.1 (Disclosure Statement)

B. **ACTION:** The Committee will be asked to recommend the following be published for public comment:
   - Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)
   - Rule 12(a)(4) – extends time to respond when a federal employee or officer is sued in individual capacity

C. Information items
   - Report on the work of the Subcommittee on Multidistrict Litigation
   - Update on the consideration of a suggestion regarding Rule 4(c)(3) and service by the U.S. Marshals Service in *in forma pauperis* cases
   - Update on the consideration of a suggestion to amend Rule 12(a) (Time to Serve a Responsive Pleading) to include recognition of statutes that set different filing times
   - Consideration of suggestion to amend Rule 17(d) (Public Officer's Title and Name)
   - Report on items considered and removed from the committee's agenda

5. Report of the Advisory Committee on Criminal Rules

A. **ACTION:** The Committee will be asked to recommend the following be published for public comment:
   - Proposed amendment to Rule 16 (Discovery and Inspection)

B. Information items
   - Formation of subcommittee to consider suggestions to amend secrecy provisions in Rule 6 (The Grand Jury)
   - Update on status of measures to protect cooperators
   - Report on items considered and removed from the committee's agenda

6. Report of the Advisory Committee on Evidence Rules

Information items
- May 2020 meeting canceled
- Ongoing projects related to potential amendments to the following rules:
  - Rule 106 (Remainder of or Related Writings or Recorded Statements)
  - Rule 615 (Excluding Witnesses)
  - Rule 702 (Testimony by Expert Witness)
- Report on *Crawford v. Washington*

7. Other Committee Business

A. **ACTION:** Judge Carl E. Stewart, Judiciary Planning Coordinator, requests that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* and advise if any further changes are recommended prior to Judicial Conference consideration in September 2020

B. Legislative update

C. Update on the Judiciary's response to COVID-19

D. Next meeting

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date		End Date
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Jesse Furman	D	New York (Southern)		2016	2022
Daniel C. Girard	ESQ	California		2015	2021
Robert J. Giuffra, Jr.	ESQ	New York		2017	2020
Frank Mays Hull	C	Eleventh Circuit		2016	2022
William J. Kayatta, Jr.	C	First Circuit		2018	2021
Peter D. Keisler	ESQ	Washington, DC		2016	2022
William K. Kelley	ACAD	Indiana		2015	2021
Carolyn B. Kuhl	JUST	California		2017	2020
Gene E.K. Pratter	D	Pennsylvania (Eastern)		2019	2022
Jeffrey A. Rosen*	DOJ	Washington, DC		----	Open
Kosta Stojilkovic	ESQ	Washington, DC		2019	2022
Jennifer G. Zipps	D	Arizona		2019	2022
Catherine T. Struve Reporter	ACAD	Pennsylvania		2019	2023

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Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
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TAB 1A

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Item 1A will be an oral report.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 28, 2020 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Phoenix, Arizona, on January 28, 2020. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair (by telephone)
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Liesa L. Richter, Consultant

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter (by telephone); Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers and Julie Wilson, Rules Committee Staff Counsel; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. This meeting is the last for Judge Srikanth Srinivasan, who in a few weeks will become the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Judge Campbell thanked Judge Srinivasan for his contributions as a member of the Committee and wished him well in this new assignment. Judge Campbell welcomed three new members of the Standing Committee: Judge Gene Pratter, Kosta Stojilkovic, and Judge Jennifer Zipps. Judge Campbell also welcomed Judge Raymond Kethledge, who began his tenure as Chair of the Criminal Rules Advisory Committee last October. Judge Campbell noted the addition of a new member of the Rules Committee Staff, Brittany Bunting. Judge Campbell also recognized Julie Wilson, Rules Committee Staff Counsel, for reaching the milestone of 15 years of service with the federal government.

Scott Myers reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2019. The chart also shows the interim Bankruptcy Rules that have been recommended for adoption as local rules with an effective date of February 19, 2020. Also included are the rules approved by the Judicial Conference in September 2019 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2020, provided the Supreme Court approves them and Congress takes no action to the contrary.

Judge Campbell asked the judge members of the Committee if they had occasion in their courts to address new Criminal Rule 16.1, which went into effect on December 1, 2019. No judge member had yet addressed Criminal Rule 16.1. Judge Campbell observed that it would be good to raise awareness about the new Rule. He noted that he had occasion in a recent trial to apply the amended version of Evidence Rule 807, which also took effect last December, and found it much easier to apply than its predecessor. Judge Campbell also noted that the pending amendment to Evidence Rule 404(b) would have been helpful in a recent case, if it had been in effect.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 25, 2019 meeting.**

REPORT ON MULTI-COMMITTEE ITEMS

Judge Chagares, Chair of the Appellate Rules Advisory Committee, reported on the E-Filing Deadline Joint Subcommittee which was formed to analyze whether e-filing deadlines should be earlier than midnight. One key question under study is whether the midnight deadline negatively affects quality of life, particularly for young associates and staff. The subcommittee's consideration of e-filing deadlines is in part inspired by filing rules in Delaware. The rules in Delaware state court were amended effective September 2018 to provide for a 5:00 p.m. (ET) electronic-filing deadline. This accorded with similar local provisions in the District of Delaware that provide for a 6:00 p.m. (ET) electronic-filing deadline. The subcommittee has solicited

comments from the American Bar Association, paralegal and legal assistant associations, and law schools. The first public suggestion on this e-filing proposal voicing support for the proposal was received at 1:48 a.m. on the morning of the Appellate Rules Advisory Committee's fall meeting.

Professor Cooper, Reporter to the Civil Rules Advisory Committee, reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee. The subcommittee was formed to consider the implications of the Supreme Court's holding in *Hall v. Hall*, 138 S. Ct. 1118 (2018), that consolidation under Civil Rule 42(a) of originally-separate lawsuits does not merge those lawsuits for purposes of 28 U.S.C. § 1291's final-judgment rule. The *Hall v. Hall* Court suggested that, if this holding created any problems, the Rules Enabling Act process would be the right way to address them. Dr. Emery Lee of the Federal Judicial Center is undertaking a deep review of cases filed in 2015-2017. Those cases were filed, but may or may not have gone to final disposition, before the Court's decision in *Hall v. Hall*; it may be necessary to expand the period of study to include cases filed in three subsequent years.

Judge Chagares reported on a proposal, concerning the computation of deadlines, that was considered by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules at their respective fall 2019 meetings. The proposal came from Sai, who has submitted helpful rules suggestions over the years. Sai proposed a rule that would require courts to calculate all deadlines and tell the parties the dates of those deadlines. The committees recognized that such a practice would be helpful to litigants, particularly to pro se litigants, but concluded that it would be impracticable, and unduly burdensome, to task the courts with such a duty. Accordingly, the advisory committees have removed this proposal from their agendas.

Professor Hartnett, Reporter to the Appellate Rules Advisory Committee, described the advisory committees' consideration of another suggestion submitted by Sai. The standards for *in forma pauperis* (i.f.p.) status currently vary across districts, and Sai proposes replacing those varying standards with a nationally uniform one. Sai also raised concern about the Administrative Office forms that courts use to gather information bearing on i.f.p. status; Sai argues that some questions on these forms are ambiguous and/or unduly intrusive. After the advisory committees considered this proposal at their fall 2019 meetings, the Civil Rules Committee removed the proposal from its agenda, but the Appellate Rules Committee retained the proposal on its agenda, and the Criminal Rules Committee expressed the intention to follow the other committees' lead on the matter. The Appellate Rules Committee's interest in this item, Professor Hartnett explained, stemmed partly from the fact that – unlike the other sets of national Rules – the Appellate Rules have an official Form (Form 4) dealing with requests to proceed i.f.p. in the courts of appeals. Further, Supreme Court Rule 39 directs that litigants use Form 4 when seeking i.f.p. status in the Supreme Court. A participant asked why the Civil Rules Advisory Committee had removed the item from its agenda. Judge Bates, the Chair of that committee, explained that although the committee recognized the potential problems with the variation in standards for i.f.p. status, it could not see how to establish a workable single standard for 94 districts given the variety of financial circumstances across the districts. But, he noted, the Civil Rules Advisory Committee referred the forms questions raised by Sai to the Administrative Office, the entity that maintains certain district-court forms (including Forms AO 239 and 240 concerning requests for i.f.p. status). Professor Cooper, Reporter to the Civil Rules Advisory Committee, noted that that committee did not have occasion to reach questions relating to the scope limitation set by the Rules Enabling Act

– i.e., whether rulemaking on eligibility for i.f.p. status would alter substantive rights. Professor Cooper further questioned the feasibility of establishing a nationally uniform i.f.p. standard in light of regional variations in the cost of living.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Campbell prefaced the report by the Bankruptcy Rules Advisory Committee by thanking that committee for its admirably quick action in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA). Judge Dow in turn commended Professor Gibson and Scott Myers, who took the lead in that project; he noted that the courts have already expressed appreciation for the interim rules and forms. Judge Dow and Professors Gibson and Bartell then delivered the report of the committee, which last met on September 26, 2019, in Washington, DC. The Advisory Committee presented one action item and two information items.

Action Item

Official Form Amendments Made to Implement the HAVEN Act. The Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 became effective on August 23, 2019. The HAVEN Act was designed to exclude certain benefits paid to veterans or servicemembers (or their family members) from the Bankruptcy Code's definition of "current monthly income." A debtor's "current monthly income" is used in means testing computations to determine the debtor's eligibility for bankruptcy relief. Professor Bartell explained that the HAVEN Act does not affect the Bankruptcy Rules; however, its provisions require changes to three official forms: Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). The Advisory Committee approved the amended forms and recommends that the Standing Committee retroactively approve (and provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Struve, Reporter to the Standing Committee, commended Professor Bartell and Scott Myers for their work on these forms.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Information Items

Interim Rules and Official Forms to Implement the SBRA. The SBRA will go into effect on February 19, 2020. It creates a new subchapter V of chapter 11 of the Bankruptcy Code and provides an alternative to the current reorganization path for small businesses. Professor Gibson explained that the SBRA requires amendments to a number of Bankruptcy Rules and Forms. Because the SBRA will go into effect before the rules amendments could make it through the full Rules Enabling Act process, the Advisory Committee voted to have the amendments issued as

interim rules for adoption as local rules or by standing orders in each of the districts. The Advisory Committee modeled its approach on an expedited process followed in 2005 when interim rules were needed to respond to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At its fall 2019 meeting, the Advisory Committee discussed the proposed draft interim rules and forms and voted to seek approval for their publication for public comment. (There were some post-meeting revisions to the package, and the Advisory Committee approved those revisions by email vote in October 2019.) The resulting eight proposed interim rules and nine official forms were, in turn, approved for publication by the Standing Committee (by email vote). The package was published for four weeks during October and November 2019. The Advisory Committee received seven relevant comments, which provided helpful suggestions. In response, the Advisory Committee made some revisions to the published package and also approved a few interim changes that had not been published – namely, revisions to four additional rules and the issuance of a new rule. By an email vote that concluded in December 2019, the Advisory Committee unanimously decided to recommend the issuance of thirteen interim rules. It also approved nine new or amended official forms. The Advisory Committee approved the official forms pursuant to its delegated authority from the Judicial Conference to issue conforming or technical official form amendments subject to later approval by the Standing Committee and notice to the Judicial Conference. By email vote in December 2019, the Standing Committee unanimously approved the issuance of the rules as interim rules and approved the promulgation of the forms. Judges Campbell and Dow subsequently requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of the interim rules to the districts for adoption as local rules. The Executive Committee unanimously approved the request. Judges Campbell and Dow sent a memorandum to all chief judges of district courts and bankruptcy courts requesting local adoption of the interim rules to implement the SBRA until rulemaking under the Rules Enabling Act can take place. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules. Professor Gibson indicated that the Advisory Committee expects to bring to the Standing Committee's June 2020 meeting a request for approval for publication of permanent rules and forms.

Judge Dow commended the efforts of all involved in finalizing interim Bankruptcy Rules to be adopted by the districts as local rules in response to the SBRA.

Bankruptcy Rules Restyling. Professor Bartell remarked that the restyling process is going well. The style consultants have provided drafts of Parts I and II of the Bankruptcy Rules. The Restyling Subcommittee, reporters, and style consultants have exchanged different views on some changes to Part I. Professor Bartell noted that they are close to the point of finalizing Part I. The subcommittee has three meetings scheduled in the next six weeks to discuss the draft of Part II. The subcommittee expects to present final drafts of Parts I and II to the Advisory Committee at its spring 2020 meeting and, if approved, to request permission to publish from the Standing Committee at its mid-year meeting. Professor Bartell commended the style consultants for their wonderful work on these rules. The subcommittee is thrilled with what it is receiving from the style consultants and thinks that everyone involved in bankruptcy practice will be pleased with the restyled rules.

Judge Campbell noted that the restyling endeavor will be a multiyear effort and has gone very well over the past year. He commended Judge Krieger for her work chairing the subcommittee. Judge Dow thanked the style consultants, Professor Bartell, and Judge Krieger for their work throughout this process. In response to a question about the anticipated publication process, Judge Dow explained that the Advisory Committee intends to seek publication in stages but will hold all restyled rules for final approval and adoption at one time. Judge Dow expects that Parts I and II will be ready to present to the Standing Committee at the Standing Committee's June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on October 30, 2019, in Washington, DC. The Advisory Committee presented several information items.

Rule 3 (Appeal as of Right — How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Proposed amendments to Appellate Rules 3 and 6 and Forms 1 and 2 are out for public comment. The Advisory Committee has received few comments thus far. The Advisory Committee has been considering this project since fall 2017, and its work finds new support in the Supreme Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act. After identifying inconsistencies among different jurisdictions in how notices of appeal are treated, the Advisory Committee proposed rule amendments to reduce inadvertent loss of appellate rights by the unwary. The Advisory Committee expects to seek final approval of the amended rules and forms from the Standing Committee at its mid-year meeting.

Professor Hartnett explained that some litigants have mistakenly believed that they must designate every order they wish to challenge on appeal. The proposed amendment to Appellate Rule 3 would alert readers to the merger principle without trying to codify it. It would also add a provision stating that a notice of appeal encompasses the final judgment as long as it designates "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or an order described in Appellate Rule 4(a)(4)(A) — i.e., an order disposing of the last remaining motion of a type that restarts the time to take a civil appeal. The rule leaves open the ability for litigants to deliberately and expressly limit the scope of the notice of appeal. "Without such an express statement, specific designations do not limit the scope of the notice of appeal." The proposed amendment to Appellate Rule 6 is simply a conforming amendment. The forms amendments reflect, among other things, the distinction between appeals from final judgments and appeals from other appealable orders. Professor Hartnett noted that courts continue to issue decisions that underscore the importance of these amendments. He described a recent decision in which a litigant filed a notice of appeal designating both a specific summary judgment ruling and the final judgment, "as well as any and all rulings by the court." The court concluded that because there had been a specific designation, the notice of appeal did not encompass orders that it did not list.

Professor Hartnett also noted that the Advisory Committee had received two public comments on the proposed amendments — one supportive and one critical. The main critique of

the proposed amendments stems from the language in proposed Appellate Rule 3(c)(5)(A), which refers to an order that adjudicates "all **remaining** claims and the rights and liabilities of all remaining parties." In contrast, Civil Rule 54(b) omits the word "remaining" and refers to "a judgment adjudicating all the claims and all the parties' rights and liabilities." In the commenter's view, there is not a final judgment until some document is entered that recites the disposition of all claims, not just the remaining claims. The premise of the proposed amendment is contrary to that: once the last remaining claim is resolved, there is a final judgment. The Advisory Committee unanimously supported this approach, which is in accord with leading treatises on federal practice and procedure.

One member inquired as to the purpose behind proposed Rule 3(c)(6), which would allow a litigant to designate a specific part of a judgment or appealable order and expressly exclude others from the scope of the notice of appeal. Professor Hartnett explained that it may sometimes be beneficial for a litigant to limit the scope of their notice of appeal. For example, a litigant may want to appeal an adverse ruling as to one party, without wishing to appeal the court's determinations as to other parties.

Another member asked if the language in subparagraph (5)(A) — "the rights and liabilities of all remaining parties" — creates tension with Civil Rule 58(e), which sets a default rule that an outstanding request for costs and/or fees does not prevent a judgment from becoming final for appeal purposes. The member suggested deleting "the rights and liabilities of all remaining parties" if it is not necessary to the proposed rule. Professor Struve responded that she understood this phrase to be a reference to the language in Civil Rule 54(b) — "the rights and liabilities of fewer than all the parties." Professor Cooper suggested that adding the "remaining" language in Appellate Rule 3(c)(5)(A) has the advantage of making clear that a final judgment need not indicate all claims that may have been previously disposed of. Judge Campbell inquired whether the language "all remaining claims" — without referencing rights and liabilities — would suffice. Professor Hartnett explained that the impetus behind including "rights and liabilities" in the new language was to integrate Appellate Rule 3(c) with Civil Rule 54(b). Professor Cooper noted that "claim" is a word with multiple meanings. He observed that the language in Rule 54(b) has existed for a very long time. It would be better, he suggested, for Rule 3(c) not to emphasize the word "claim" standing alone.

A member raised a related question regarding attorney's fee applications and whether this proposed rule might alter current law under which, as noted, Civil Rule 58(e) sets a default rule that a pending fee application does not prevent a judgment from becoming final for appeal purposes. It was suggested, though, that the same tension currently exists between Civil Rule 58(e) and Civil Rule 54(b). A member noted that Civil Rule 54(b) uses "claims *or* the rights and liabilities" while the proposed language of Appellate Rule 3(c)(5)(A) uses "claims *and* the rights and liabilities." This member suggested that the disjunctive / conjunctive distinction may be significant. Judge Chagares and Professor Hartnett indicated that the Advisory Committee will continue to consider these issues.

Rule 42 (Voluntary Dismissal). Proposed amendments to Rule 42 are out for public comment. Judge Chagares explained that during the restyling of the Appellate Rules, the phrase "may dismiss" replaced the phrase "shall … dismiss[]" in Rule 42(b)'s language addressing the

dismissal of an appeal on agreement of the parties. The concern addressed by the proposed amendment stems from the apparent discretion the current rule would give to the courts of appeal not to dismiss an appeal despite the parties' agreement that it should be dismissed. The amendment would change the relevant "may dismiss" to "must dismiss" in what would become the Rule's subdivision (b)(1). In addition, the Advisory Committee restructured Rule 42(b) for overall clarity and added a subdivision (c) to clarify that the rule does not alter the legal requirements governing court approval of settlements. The Advisory Committee has received no comments on this proposed rule change and expects to seek final approval from the Standing Committee at its mid-year meeting.

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares explained that the Advisory Committee has engaged in a comprehensive review of these two rules. Amendments to Rule 35 and 40 that set length limits for responses to petitions for rehearing are on track to take effect on December 1, 2020, if the Supreme Court approves them and Congress takes no contrary action. Apart from those pending amendments, Judge Chagares noted that while the Advisory Committee has not received any complaints about the rules, small changes to harmonize the two rules may be beneficial if unintended consequences can be avoided. Professor Hartnett noted that the benefits of a rewrite of these rules must be balanced against the risk of disrupting current practice. The Advisory Committee's consideration of further potential amendments has thus narrowed and is presently focused on two items. First, the Advisory Committee seeks to underscore the difference between the standards for en banc and panel rehearing. Second, it is reassessing the interaction between petitions for panel rehearing and petitions for *en banc* rehearing, particularly given that the procedures are governed by two separate rules. A review of local rules and internal operating procedures of various circuits revealed a widespread practice of treating an *en banc* petition as including a request for panel rehearing. The Advisory Committee is also considering ways to ensure that a panel cannot block litigants from seeking rehearing en banc (the concern focuses on instances when a panel makes changes to its decision and states that no further petitions for rehearing en banc will be permitted). A related question concerns whether post-panel-rehearing *en banc* petitions should be limited to instances when the panel changes the substance of its initial decision.

One member expressed a view that a qualifier based on "changes to substance" should not be included in any potential amendments to Rules 35 and 40. Even changes that may seem small and stylistic, he argued, can have big effects. The member emphasized that timely-filed petitions for panel rehearing or rehearing *en banc* affect the time for filing petitions for a writ of certiorari. That makes it especially important for the rules governing rehearing petitions to operate mechanically, so that litigants will be able to forecast reliably whether a rehearing petition will suspend the deadline to petition for certiorari. The same member observed that one proposed addition — the statement in proposed new Rule 35(b)(4) that if the Rule 35(b)(1) criteria for rehearing en banc are not present, "panel rehearing pursuant to Rule 40 may be available" — would be more appropriate in a committee note rather than in rule text. Another member asked if subdivision (b)(5) of the proposal should explicitly limit a second petition for rehearing *en banc* to those changes made by the panel after the initial petition for rehearing. Professor Hartnett suggested, though, that in a petition after the panel changes its decision, a party might also want to address changes that were requested but not made. For instance, a panel's revised decision might

cite a supervening Supreme Court precedent without sufficiently addressing the import of that new precedent.

Rule 25 (Filing and Service) and Privacy in Railroad Retirement Act Benefit Cases. In response to a suggestion from the Railroad Retirement Board's General Counsel, the Advisory Committee has been considering whether privacy protections afforded Social Security benefits cases under Civil Rule 5.2(c) and Appellate Rule 25(a)(5) should be extended to Railroad Retirement Act benefits cases. Judge Chagares noted the similarity between Social Security and Railroad Retirement Act benefits programs. Unlike Social Security cases, however, Railroad Retirement Act benefits cases go directly to the courts of appeal on petition for review. The Advisory Committee is considering whether other types of benefits cases likewise go directly to the courts of appeals for review and implicate similar privacy concerns. Professor Hartnett added that the Judicial Conference Committee on Court Administration and Case Management (CACM) has not objected to the Advisory Committee pursuing a possible rules amendment in this context.

A member suggested that this may become a slippery slope; he noted that ERISA and disability claims cases often involve the same kind of private personal information. Judge Campbell responded that the current proposal arose because the Railroad Retirement Board brought the suggestion to the advisory committee's attention. And the likelihood that the Appellate Rules would need to address many similar instances is low, given that the goal here is to address instances where an agency decision in a benefits case goes directly to the court of appeals. (In proceedings where agency review is initiated in the district court, Professor Hartnett observed, the Appellate Rules piggyback on the Civil Rules' privacy approach.)

Another member asked whether the draft language "of a benefits decision of the Railroad Retirement Board" is needed – why not just say "a petition for review under the Railroad Retirement Act"? Civil Rule 5.2(c) applies to "action[s] for benefits under the Social Security Act," but the rule language does not specify "a benefits decision by the Social Security Administration." Professor Hartnett responded that there may be other types of Railroad Retirement Board decisions that are subject to review under the Railroad Retirement Act; he promised to check with the Board's General Counsel.

Another member wondered what systems exist for protecting private information in review proceedings under the Longshore and Harbor Workers' Compensation Act and the Black Lung Act and whether those same systems should also suffice to protect privacy in review proceedings under the Railroad Retirement Act. Professor Hartnett explained that the ordinary mechanism available in any case would be a motion to seal. Railroad Retirement Act benefits cases are distinctive because they are essentially Social Security benefits cases for railroad workers; it would be very hard to address privacy concerns in such cases through standard redaction procedures. Judge Chagares added that the committee had not found any other types of proceedings that are as similar (as Railroad Retirement Act benefits cases are) to Social Security benefits cases.

Professor Bartell expressed concern about adding "privacy" to the draft amendment of Appellate Rule 25(a)(5). She noted that if the rule extended only the "privacy provisions" of Civil Rule 5.2(c)(1) and (2) to Railroad Retirement Act cases, it would raise questions about which parts of Civil Rule 5.2(c) are being incorporated.

Suggestion Regarding Decision on Grounds Not Argued. The Advisory Committee is considering a suggestion submitted by the American Academy of Appellate Lawyers. This suggestion would require a court of appeals, if contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground. Judge Chagares formed a subcommittee to consider this issue. The threshold question is whether this suggestion is appropriate for rulemaking, or more appropriate as a subject of best practices. A member commented that, in addition to the difficulty of defining "grounds not argued," the suggested rule amendment may not accomplish anything that litigants could not already achieve through petitions for rehearing.

Suggestion Regarding "Good Cause" Definition for an Extension of Time to File a Brief. The Advisory Committee received a suggestion to specify criteria for finding "good cause" for an extension of time to file a brief. Judge Chagares noted that the term "good cause" appears multiple times in the Appellate Rules and Civil Rules. The Advisory Committee agreed that a good-cause determination depends on many factors and that no bright-line definition would be desirable. The Advisory Committee removed this item from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Civil Rules Advisory Committee, which last met on October 29, 2019, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Social Security Disability Review and Multidistrict Litigation (MDL) subcommittees.

Information Items

Social Security Review Subcommittee. Judge Bates explained that the subcommittee was formed in response to a suggestion submitted by the Administrative Conference of the United States (ACUS). ACUS proposed the adoption of national rules governing district-court review of Social Security Administration decisions, in order to provide greater uniformity and to recognize the appellate nature of such review. The subcommittee has prepared drafts that illustrate possible alternative approaches that a national rule could take. One approach would create a new rule within the Civil Rules; the other would create a new set of supplemental rules. Each of the draft alternatives is more modest than the original suggestion.

Judge Bates explained that the subcommittee and Advisory Committee have again returned to the initial question: whether to embark on this project, notwithstanding the usual preference for keeping the Rules trans-substantive. Beyond trans-substantivity, there are other competing concerns. Some reasons to create special rules for Social Security cases include the support from ACUS and the Social Security Administration, the modesty of the proposal, a preference for uniformity in procedure across districts, and the volume and uniqueness of Social Security cases. Countervailing considerations (in addition to the concerns about substance-specific rulemaking) include the opposition by plaintiffs' organizations and the DOJ, the likelihood that a national rule would not displace all the variations created by local rules, and a question as to the appropriateness of adopting rule amendments in order to address problems that may relate more closely to the

insufficiency of agency funding. Judge Bates also emphasized the trans-substantivity concerns. Uniformity in federal procedures is a laudable goal of the Rules Enabling Act. Judge Bates recognized the concern about carving out categories of cases for specific rules and the risk of favoritism that poses. He noted that the subcommittee considered whether rules should be created that focus more broadly on cases that — like Social Security cases — are based on an administrative record. Such a broad undertaking would be difficult to achieve, given the variety of agencies and matters that come to the district court for review.

Professor Coquillette remarked that the Rules Committees have received numerous requests to carve out special rules over the years, and Congress has at times seemed inclined to carve out particular categories like patent cases and class actions for special rules. If the Advisory Committee moves forward with a proposal, Professor Coquillette suggested that it should create a supplemental set of Social Security rules, rather than a new Civil Rule.

A member expressed the view that the Rules Committees picking specific areas and carving out special rules could be problematic; that might be a task to which Congress is better suited. A different member suggested that this issue ties in with broader issues about specialized courts.

Several judge members expressed support for the proposal. There is a gap in the rules with regard to these types of actions, and the proposal would provide a practical solution. Regarding trans-substantivity concerns, one noted that the federal courts already use local rules to create substance-specific rules for special types of cases. Professor Cooper observed that district judges plainly have authority to establish practices that go beyond the Rules Enabling Act's scope in the course of deciding cases. The question of the appropriate scope of local rules is more difficult. 28 U.S.C. § 2071(a) says only that local rules "shall be consistent with" any national rules promulgated under the Rules Enabling Act. Does the fact that varying local rules now address a topic justify the adoption of national rules on that topic?

Judge Campbell observed that this is a unique situation in which a government agency has asked the Rules Committees to address a problem. The subcommittee has done a great job and has identified some possible rules that could address inefficiencies in the current system. This stands as a compelling argument in favor of rulemaking. While trans-substantivity is a countervailing concern, the Rules Committees have already crossed that bridge with respect to, for example, admiralty cases and habeas proceedings. Social security cases constitute a large part of the courts' dockets, and the matter is important to a government agency, and these considerations may outweigh the concerns about substance-specific rulemaking. Judge Campbell also expressed his view that the proposal is even-handed and would simplify procedures for all parties. The main question at present is whether to publish a proposal. Judge Campbell added that he favored publication for comment.

A member echoed Judge Campbell's comments, noting that the presumption against substance-specific rules can be overcome. The opposition by the claimants' bar and DOJ, this member suggested, should not be dispositive here because their reasons for opposition do not go to the heart of the problem. The claimants' side argues that a uniform rule will displease judges. If that is the case, it is unclear how that would disadvantage only claimants. The DOJ cites trans-substantivity concerns. The Rules Committees can decide the trans-substantivity question on their

own. In this member's view, the proposal would be beneficial and streamline the process through modest improvements without favoring either side. Another member agreed.

A different member asked about the feasibility of a pilot project with this proposal. Professor Cooper explained that the DOJ has crafted a model rule and offered it to district courts as a suggested local rule (though this is not a formal pilot project). Further, the subcommittee has sought input from magistrate and district judges on how the rules work in Social Security cases. The general feedback is that the Civil Rules do not fit Social Security cases and that the proposed national rule reflects what judges are already doing and would be helpful. Judge Campbell agreed that the proposal parallels what many districts are already doing.

A judge member voiced support for publishing the proposal for public comment. The same member asked if the subcommittee had considered drafting a best-practices guide instead of a rule amendment. This member also noted that, in her district, magistrate judges are tasked with handling Social Security review proceedings. Judge Bates responded that the subcommittee continues to consider a best-practices approach but that it currently views a rule amendment as preferable. He also observed that the proposed rule would not affect how districts structure the handling of Social Security disability review cases.

Professor Coquillette agreed that the proposal should be published for comment and reiterated his support for the supplemental set of rules instead of a new Civil Rule.

A judge member observed that he shared the general concern over trans-substantivity. Based on the proliferation of local rules related to Social Security cases, however, trans-substantivity does not seem to be as much of a concern. The question then is whether to pursue uniformity by means of a national rule.

Subcommittee on Multidistrict Litigation. Judge Bates stated that the subcommittee has focused primarily on four areas: third-party litigation funding (TPLF); early vetting of claims through the use of plaintiff fact sheets (PFS) and defendant fact sheets (DFS); interlocutory review in MDL cases; and judicial involvement in the settlement process and review.

The Advisory Committee decided to remove TPLF from the subcommittee's agenda (as this phenomenon is not unique to or especially prevalent in MDL cases) and has returned it to the Advisory Committee for monitoring.

The subcommittee continues to study "early vetting" as a tool to winnow unsupportable claims and jump start discovery. The subcommittee has concluded that plaintiff fact sheets — and defense fact sheets, secondarily — are used in virtually all "mega" tort MDLs and in most other large MDL proceedings, particularly personal injury MDLs. Because plaintiff fact sheets take a lot of time to develop, a simpler practice called "census of claims" has emerged. All groups involved think this is a worthwhile approach to examine. While it gathers less information, the census of claims practice seems to serve very valuable purposes. Several transferee judges are using this approach in current MDL proceedings.

The issue of interlocutory review in MDL proceedings is under active assessment. The subcommittee is considering whether existing procedural mechanisms, chiefly 28 U.S.C. § 1292(b), provide adequate interlocutory appellate review of certain MDL orders. Judge Bates highlighted the subcommittee's study of Judge Furman's order in *In Re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (SDNY 2019), which granted a party's request for certification of an interlocutory appeal under § 1292(b). Judge Bates explained the difficulty of drafting a rule amendment that would expand options for interlocutory review only to certain kinds of MDLs, or to specific subject matters such as preemption or *Daubert* rulings. The subcommittee continues to consider these questions in the context of possible rule amendments.

The subcommittee also continues to consider the issue of judicial supervision in the MDL settlement process and settlement review. Judge Bates explained that the subcommittee is considering whether this issue is appropriate for rulemaking and whether any such rule should be limited to a certain subset of MDLs. While the academic community has expressed support for greater judicial involvement in MDL settlements, neither the bar nor transferee judges share that position. Judge Bates noted that this is an ongoing effort, and the subcommittee is in the early stages. One member, citing his MDL experience in which courts have been heavily involved, inquired whether there is a need for more judicial involvement in the settlement process. Judge Bates clarified that the subcommittee is looking at non-class-action MDLs where the rules do not offer the same mechanism for judicial involvement as under Civil Rule 23.

A judge member expressed the view that rulemaking may not always be appropriate in the MDL context. It would be difficult to carve out a category of MDL cases to which certain rules should apply. Flexibility in MDLs is preferable to a one-size-fits-all approach. Rather than rulemaking, this member suggested, it would be better to promote best practices through guidance from, for example, the Judicial Panel on Multidistrict Litigation (JPML) and the Manual for Complex Litigation. Of the topics under study, this member suggested, the best candidate for rulemaking would be interlocutory appeals; Section 1292(b) is not a good fit for MDLs.

Another member suggested that this is an area where some rulemaking would be helpful because procedural decisions can have huge substantive implications in MDL proceedings. In this member's experience, large MDLs usually result in settlement. Judicial management and decisions regarding interlocutory appeal have a massive impact on the outcome. As to addressing judicial involvement in the settlement process, however, this member suggested a need for caution.

A different member emphasized that in the mass tort MDL context, Civil Rule 23 brings with it a lot of jurisprudence that gives some backbone as to the roles of lead attorneys. The American Law Institute's project on aggregate litigation provides guidance on what ethical obligations lead attorneys have regarding settlement when representing large groups of clients. This member agreed with the earlier comment that some of these issues go beyond the role of procedure and may not be appropriate for rulemaking. In addition, creating a rule for interlocutory review in MDL proceedings may prolong these cases even further. This would cause practical concerns for clients.

A member noted that, in his experience in the Second Circuit, requests for interlocutory review under § 1292(b) are rarely granted. He asked how different courts are treating these

requests. Professor Marcus explained that the difficulty is finding all the cases in which these requests are made but denied. Judge Bates added that the subcommittee hears anecdotally that certain circuits never grant § 1292(b) requests, but clear data are not readily available to support or contradict these comments. A judge member noted that his research revealed little as far as cases dealing with when it is appropriate to grant § 1292(b) requests in MDL cases.

Another judge member commented that the JPML makes available a very fine body of resources for case management. She asked whether the JPML has a view regarding the need for rulemaking. Regarding interlocutory appeals, this member noted that added delay presents a real concern from a case management perspective.

Rule 4(c)(3) – Service by the U.S. Marshals Service. Professor Cooper explained that present language in Civil Rule 4(c)(3) creates an ambiguity by stating both "the court may order" service by a marshal at the plaintiff's request and "[t]he court must so order if the plaintiff" has i.f.p. status. One plausible interpretation is that if a plaintiff is granted i.f.p. status, then the court must order service by a marshal. A second interpretation is that the court's obligation to order service by a marshal is contingent on the plaintiff making a motion. If the rule were amended to remove the ambiguity, the amended rule could adopt either of these approaches, or it could instead adopt a different approach that would direct service by a marshal on behalf of any i.f.p. litigant even when the court does not order the marshals to effect service. The Advisory Committee is in discussions with the U.S. Marshals Service and the Administrative Office regarding possible solutions.

Judge Campbell stated that the staff attorneys in his court confirmed that 100% of prisoner pro se complaints that survive initial screening by the court under 28 U.S.C. § 1915A are served by a marshal, and about 50% of non-prisoner pro se cases are served by a marshal. In the other 50% of non-prisoner pro se cases, Judge Campbell noted that the plaintiffs effect service by other means. This suggests that there is a significant portion of cases where the marshals are not needed.

Rule 12(a) – Filing Times and Statutes. Judge Bates explained that the Advisory Committee has begun looking at Civil Rule 12(a), which sets the time to serve a responsive pleading. The general provision under paragraph (1) — setting the presumptive time at 21 days — includes the qualifying statement: "Unless another time is specified by this rule or a federal statute[.]" The Advisory Committee is considering whether the same qualifier should be added to paragraphs (2) and (3), which apply to the United States and its officers or employees. Judge Bates noted that the Freedom of Information Act sets a 30-day response time, which may apply to cases otherwise governed by Rule 12(a)(2). The Advisory Committee will discuss this issue more in-depth at its spring meeting.

Matters Removed from the Agenda. Judge Bates identified items that the Advisory Committee removed from its agenda after consideration. These items relate to expert witness fees in discovery, proportionality under Rule 26, clear offers under Rule 68, and a proposal that Rule 4(d) be amended to address the practice of "snap removal."

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Richter provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee presented three information items.

Rule 702 – Admission of Expert Testimony. The Advisory Committee has been examining Evidence Rule 702, following a 2016 report which raised concerns about methods used nationwide for forensic feature-comparison evidence. The report by the President's Council of Advisors on Science and Technology (PCAST) recommended the preparation of a committee note to Rule 702 that would guide judges as to the admissibility of forensic feature-comparison expert testimony. The Advisory Committee convened a symposium in October 2017 to discuss the PCAST report and related *Daubert* issues. It has continued to discuss potential rule amendments at subsequent Advisory Committee meetings. At its fall 2019 meeting, the Advisory Committee concluded that creating a free-standing rule governing forensic evidence would be inadvisable because such a rule would overlap problematically with Rule 702. Judge Livingston noted that the Advisory Committee is exploring judicial and legal education options on this issue and the Committee's Reporter is working with the FJC and Duke and Fordham Law Schools to organize judicial-education programming.

The Advisory Committee is continuing to consider a possible amendment that would add an element to Rule 702 to address the problem of experts overstating opinions. Prior to its fall meeting, the Advisory Committee convened a group of judges from around the country for a mini-conference at Vanderbilt University. The panel provided helpful comments about *Daubert* best practices and potential Rule 702 amendments on overstatement in expert opinions. At its spring 2020 meeting, the Advisory Committee will decide whether to move forward with proposed amendments or to put further consideration of Rule 702 on hold. The DOJ has suggested that the Advisory Committee take the position of "watchful waiting" and permit the DOJ to continue its work in this area and to allow its internal changes to percolate through the courts. Judge Livingston noted that the Evidence Rules Committee is working in tandem with the Criminal Rules Committee (which has been developing amendments to Criminal Rule 16 concerning expert disclosures).

Rule 106 – Rule of Completeness. The Advisory Committee received a proposal to amend Rule 106 to provide that a completing statement is admissible over a hearsay objection and to provide that the rule covers oral statements as well as written or recorded statements. Judge Livingston noted that most courts already permit completing oral statements, but under Rule 611 rather than Rule 106. Judge Livingston observed that the original committee note to Rule 106 stated that the rule was limited to writings and recorded statements only "for practical reasons." Those "practical reasons" might concern situations where completing oral statements are made by different declarants. Another practical concern is disrupting the order of proof in a case.

Judge Livingston explained that the hearsay issue presents the strongest reason for a rule amendment. The Sixth Circuit has a published opinion holding that in order to complete a statement under Rule 106, the completing portion of the statement must also be admissible under the hearsay rules. The Advisory Committee is considering whether and how the Evidence Rules

should allow these completing oral statements to come in as evidence. Some Advisory Committee members have taken the position that a rule amendment should, in effect, create a new hearsay exception, such that the completing portion of a statement comes in for its truth. Others took the position that a completing oral statement should come in for completeness, but not its truth unless it satisfies one of the hearsay exceptions. The Advisory Committee will continue to consider this matter at its next meeting.

Rule 615 – Excluding Witnesses. The Advisory Committee is considering a potential amendment to Evidence Rule 615, which provides that a judge may *sua sponte* — or must, upon request — exclude witnesses from a trial or hearing. Professor Richter noted that sequestration orders under Rule 615 tend to be short, and the brevity of these orders, as reflected in transcripts, creates uncertainty about their scope. For example, such orders may be interpreted as only requiring witnesses to physically leave the courtroom. On the other hand, they may extend beyond physical sequestration and regulate behavior and communications by witnesses outside the courtroom. The Advisory Committee identified a conflict in federal case law regarding these interpretations. Some courts say that for a Rule 615 order's scope to extend beyond physical sequestration, a judge's order must explicitly state that external communications are to be limited. Most courts, however, say that it is implicit in the Rule — and thus covered in vague orders — that sequestration extends beyond physical presence in the courtroom. Without specificity in a Rule 615 order, the Advisory Committee is concerned that witnesses will not have notice that the court intends to bar external communications.

The Advisory Committee has identified possible alternative rule amendments to address the issue of the scope of Rule 615 orders. At this point, the Advisory Committee is still considering whether any amendment is appropriate; it will continue to explore these possibilities at its spring meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Criminal Rules Advisory Committee, which met on September 24, 2019, in Philadelphia, Pennsylvania. The Advisory Committee presented three information items.

Rule 16 – Discovery Concerning Expert Reports and Testimony. The Advisory Committee's draft amendments to Criminal Rule 16 seek to improve the specificity and timeliness of expert disclosures. The Advisory Committee undertook this project following public suggestions that Rule 16 be amended to track more closely the Civil Rule 26 approach to expert disclosures. The Advisory Committee has held two informational sessions in the past two years. Following these sessions, the Advisory Committee identified the main problems with Criminal Rule 16: timing of the disclosure, and disclosures that are too cursory and vague to allow the parties to adequately prepare for trial. The reporters and Rule 16 Subcommittee developed a proposal to address these problems. At its fall 2019 meeting, the Advisory Committee discussed and refined the draft amendments, and unanimously approved them and a proposed committee note.

Judge Kethledge summarized the Advisory Committee's main points of discussion and debate. First, the Advisory Committee debated whether a numerical or functional deadline for

disclosure would be preferable. The Advisory Committee decided a functional standard — "sufficiently before trial to provide a fair opportunity for" each party to meet the opponent's evidence — was appropriate because a one-size-fits-all approach does not work well in this context. The rule requires the district court to specify a deadline using this standard. Second, the Advisory Committee considered whether to term the disclosed document something other than a "summary" (as the current Rule calls it). The Advisory Committee elected to eschew the terms "summary" and "report" and instead to focus on the verb "disclose" – thus allowing the amended provisions to speak for themselves regarding required content of the disclosure. The proposed amendments would add to the list of required contents "a complete statement of all opinions" that the party will elicit in its case-in-chief.

While the proposal would not require the witness to prepare the document to be disclosed under Rule 16, it would require that the witness review and sign the document. Judge Kethledge explained that this provision serves an impeachment function. Judge Kethledge noted some of the concerns expressed by the DOJ about the proposal. For the signing requirement, the Department indicated that it does not always have control over the expert witness and may face difficulty getting the witness to sign; the draft includes an option for the disclosing party to "state[] in the disclosure why it could not obtain the witness's signature through reasonable efforts."

Judge Kethledge emphasized the deliberative process undertaken by the Rule 16 Subcommittee and the full Advisory Committee in developing this proposal. He commended those involved for contributing constructively and in good faith. The Advisory Committee's proposal is a product of a fairly delicate compromise. He explained that the Advisory Committee is confident that this proposed amendment would improve practice in criminal cases and allow expert testimony to be more effectively tested than it is at present.

Professor Beale added that the proposal will bring Criminal Rule 16 closer to Civil Rule 26 but she emphasized that criminal practice is different. Professor Beale explained the differences in pre-trial disclosures and discovery between civil and criminal practice. The goal of the proposed amendment is to allow the parties adequate time and opportunity to prepare for trial, and the proposal provides the necessary flexibility for that in the criminal context. Thus, the Advisory Committee drew on certain aspects of Civil Rule 26 but tailored the proposal for criminal practice. Professor King noted that the proposal limits the required disclosure to the expert opinions that will be elicited in the party's case-in-chief. This reflects special constitutional concerns in criminal cases.

The DOJ representative commented on the Advisory Committee's excellent process that took into account the Department's concerns and input and reached a consensus proposal agreeable to everyone.

A judge member inquired whether the "reasonable efforts" standard for obtaining the expert witness's signature could be clarified. Professor Beale responded that the committee note, which will be considered again at the Advisory Committee's spring meeting, could address this issue.

Professor Marcus commented that the proposal's duty to supplement the disclosure may cause problems, based on experience with a similar provision under the Civil Rules. Professor King responded that Criminal Rule 16(c) contains a continuing duty to disclose.

Judge Campbell asked what the defendant's "case-in-chief" refers to under the proposed Rule 16(b)(1)(C)(i). Professor Beale explained that "case-in-chief," as it applies to the defense, is when the defense puts on its own witnesses after the government rests. The current rule uses "case-in-chief" in several places – with respect to discovery obligations of both the government and the defense – but not with respect to the defense's expert witness disclosure obligations. Instead, under current subsection (b)(1)(C), the defense must disclose expert witnesses it intends to use as evidence at trial. The Advisory Committee was concerned that the absence of the restricting language "case-in-chief" in subsection (b)(1)(C) might inadvertently require the defendant to disclose *more* than the government. Professor Beale emphasized that it was the Advisory Committee's goal to make the party's obligations both parallel and reciprocal.

Judge Campbell expressed concern about adding the "case-in-chief" language to the defense's expert disclosure obligations. In his view, neither the current rule nor the proposed amendment make the disclosure obligations equal. He pointed out that adding the "case-in-chief" language to the defendant's disclosure obligations could be interpreted as expanding the disclosure obligation to all expert witnesses the defense intends to use, including any rebuttal experts. In contrast, it is not clear that the government would be obligated to disclose rebuttal expert witnesses.

Professor Beale explained that the issue of unequal disclosure standards has not been coming up in practice. She suggested that the language is worth looking at again but added that there may be concern about opening up the disclosure requirements to encompass more than "case-in-chief." Judge Kethledge noted that it is hard to find the right phrase; one possibility might be "disclose every witness you will use." Judge Campbell responded that this is what the rule already requires of the defendant, but not of the government; the Rule, he stressed, should be even-handed.

A member raised the question about the risk of one party trying to game the system under this proposal by under-disclosing and later supplementing. This member highlighted the door-shutting aspect of the Civil Rule 26 approach. The reporters responded that this potential issue had not been raised in any discussions and would be beneficial to address with the Advisory Committee.

A judge member commented that the defendant's "case-in-chief" language already existed in subdivision (b) and that there are practical reasons to use that term. Because a defendant has no obligation to preview his or her defense before trial, the government may not know what expert witnesses it needs for rebuttal. The same situation can arise where a defendant needs to call an expert witness in sur rebuttal. This member suggested that this is a reason to use parallel language and refer to "case-in-chief." Professor King explained that even though the proposal is reciprocal, it is situated within the larger context of various defense rights, including the protection against self-incrimination.

Another member remarked that the duty to supplement expert disclosures under Civil Rule 26 is critical to prevent trial by ambush. The member observed that this concern may not carry over to criminal practice to the same degree.

Professor King asked the Standing Committee members whether it makes sense to close the door on a criminal defendant's ability to supplement when the defendant identifies an additional expert witness during and because of an issue that arises at trial. She noted as a backdrop that the defendant has no duty to put on a defense at all.

Judge Campbell emphasized the tension present in criminal practice: there is an interest in avoiding sandbagging, but the system also must preserve the defendant's rights.

Professor Beale acknowledged these concerns. She reiterated that practitioners have not been reporting problems with delayed supplementation or parties gaming the system. Unlike with new Criminal Rule 16.1, there was no push to add an explicit good-faith element to the duty to supplement in this proposal. Judge Kethledge added that the Advisory Committee developed this proposal with the approach of limiting its efforts to actual, existing problems and building a consensus around them, rather than focusing on speculative problems.

Task Force on Protecting Cooperators. Judge Kethledge noted that the Task Force, chaired by Judge Lewis Kaplan, has made its recommendations, which related primarily to changes in the CM/ECF system and changes to Bureau of Prisons operations and policies. Some of the recommendations are proving challenging and expensive to implement.

In Forma Pauperis Status Suggestion. Judge Kethledge explained that the Advisory Committee chose not to pursue the suggestion regarding i.f.p. status because eligibility under the Criminal Justice Act involves different standards. The Advisory Committee would be interested in being involved with this multi-committee item, if it continues, as far as i.f.p. status relates to habeas cases.

OTHER COMMITTEE BUSINESS

Legislative Report. Julie Wilson delivered the legislative report and directed the Committee to the tracking chart in the agenda book. The chief legislative development concerning the rules committees is the SBRA, which was discussed previously. Along with CACM and the Office of Legislative Affairs, the Rules Committee Staff provided support to Judge Audrey Fleissig and Judge Richard Story last fall when they testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. The hearing and their testimony primarily focused on sealing of court records, cameras in federal courts, and access to the Public Access to Court Electronic Records (PACER) database. Representative Nadler recently introduced H.R. 5645, the "Eyes on the Courts Act of 2020." The bill would provide for media coverage of all federal appellate proceedings, including Supreme Court proceedings. A Sunshine in Litigation Act bill will likely be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Ms. Wilson reported on the *Strategic Plan for the Federal Judiciary*, which sets out the core values of the federal judiciary and strategies for realizing those values. The *Plan* is updated every five years, and 2020 is an update year. Ms. Wilson directed the members to the agenda book containing an update from Judge Campbell on the *Plan* and the Rules Committees' work. Discussion was invited; Judge Campbell will continue to communicate with the Judiciary's Planning Officer regarding updates to the *Plan*.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Washington, DC on June 23, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1C

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NEWLY EFFECTIVE AMENDMENTS
TO THE FEDERAL RULES

Effective December 1, 2019 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2019); approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised May 2020

INTERIM BANKRUPCY RULES

Effective February 19, 2020 The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code—adding a subchapter V to chapter 11—made by the Small Business Reorganization Act of 2019		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Revised May 2020

PENDING AMENDMENTS
TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2020 Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2020) REA History: approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019); approved by Standing Committee (June 2019); approved by relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised May 2020

PENDING AMENDMENTS
TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2021 Current Step in REA Process: approved by advisory committees (Apr/May 2020) REA History: published for public comment (Aug 2019-Feb 2020); unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. Also, the phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3). A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised May 2020

Agenda E-19 (Summary)
Rules
March 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

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 or Committee) met on January 28, 2020. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair (by telephone), and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; Professor Liesa Richter, consultant to the Advisory Committee on

Evidence Rules; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees, and discussed an action item regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

The Advisory Committee met on October 30, 2019. Discussion items included: the rules and forms published for public comment in August 2019; potential amendments to Rules 25, 35, and 40; a suggestion that parties be given notice and an opportunity to respond if a decision will rest on grounds not argued; and the standard for in forma pauperis participation in appellate cases.

Rule 25

The Advisory Committee continued its discussion of potential amendments to Rule 25(a)(5) to ensure privacy protections in Railroad Retirement Act cases. A proposed rule amendment will be considered at the spring meeting.

Rules 35 and 40

Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Hearing) imposing length limits on responses to a petition for rehearing have been approved by

the Conference and submitted to the Supreme Court for its consideration, with a potential effective date of December 1, 2020. Beyond these specific pending amendments, the Advisory Committee continued to consider a suggestion that Rules 35 and 40 be revised comprehensively to make the two rules dealing with rehearing petitions more consistent, but has been dissuaded from doing so given the absence of a demonstrated problem calling for such a comprehensive solution, as well as potential unintended consequences and the general disruption of significant rules amendments. The Advisory Committee will continue to discuss more limited amendments to Rule 35 that would clarify the relationship between petitions for panel rehearing and rehearing en banc.

Finally, the Advisory Committee determined to retain on its agenda a suggestion that parties be given notice and an opportunity to respond if a decision may be based on grounds not argued. The Advisory Committee will also continue to consider in forma pauperis standards in appellate cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no action items.

Information Items

The Advisory Committee met on September 26, 2019. The bulk of the agenda concerned responses to two recently enacted laws and an update on the restyling of the Bankruptcy Rules.

Response to Enactment of the Honoring American Veterans in Extreme Need Act of 2019: Notice of Amendments to Official Forms 122A-1, 122B, and 122C-1

In response to the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act, Pub. L. No. 116-52, 133 Stat, 1076), which became effective on August 23, 2019, the Advisory Committee approved amendments to Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of

Commitment Period). It submitted the amendments for retroactive approval by the Standing Committee, and for notice to the Judicial Conference.[1]

The HAVEN Act amends the definition of "current monthly income" in Title 11, U.S. Code, § 101(10A) to exclude:

> any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

The exclusions set forth in the HAVEN Act's amended definition of "current monthly income" supplement the current income exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of terrorism. The HAVEN Act also limits the inclusion of certain pension and retirement income.

To address the statutory change, at its September 26, 2019 meeting, the Advisory Committee approved conforming changes to lines 9 and 10 of Official Forms 122A-1, 122B, and 122C-1. The revised forms were posted on the judiciary's website on October 1, 2019. The Standing Committee approved the changes and now provides notice to the Judicial Conference. The revised forms are set forth in Appendix A.

Response to the Enactment of the Small Business Reorganization Act of 2019: Distribution of Interim Bankruptcy Rules; Notice of Amendments to Official Forms 101, 201, 309E1, 309E2 (new), 309F1, 309F2 (new), 314, 315, and 425A

The Small Business Reorganization Act of 2019 (SBRA, Pub. L. No. 116-54, 133 Stat. 1079) creates a new subchapter V of chapter 11 for the reorganization of small business debtors, which will become effective February 19, 2020. The enactment of the SBRA requires

[1] Because the HAVEN Act went into effect immediately upon enactment, the Advisory Committee voted to change the relevant forms pursuant to the authority granted by the Judicial Conference to the Advisory Committee to enact changes to Official Forms subject to subsequent approval by the Standing Committee and notice to the Judicial Conference (JCUS-MAR 16, p. 24).

amendments to several bankruptcy rules and forms. Because the SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee voted to issue needed rule amendments as interim rules for adoption by each judicial district. In addition, the Advisory Committee recommended amended and new forms pursuant to the authority delegated to make conforming and technical amendments to Official Forms (JCUS-MAR 16, p. 24).

The Advisory Committee's proposed interim rules and form changes were published for comment for four weeks starting in mid-October 2019. As a result of the comments received, a subcommittee of the Advisory Committee recommended changes to several of the published rules and forms, changes to four rules that were not published for public comment, and promulgation of a new rule.

By email vote concluding on December 4, 2019, the Advisory Committee voted unanimously to seek the issuance of 13 interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference (JCUS-MAR 16, p. 24). By email vote concluding on December 13, 2019, the Standing Committee unanimously approved the Advisory Committee's proposed interim rules and Official Form changes required to respond to SBRA. This report constitutes notice to the Judicial Conference of amendments to Official Forms 101 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 201 (Voluntary Petition for Individuals Filing for Bankruptcy), 309E1 (For Individuals or Joint Debtors), 309E2 (For Individuals or Joint Debtors under Subchapter V) (new), 309F1 (For Corporations or Partnerships), 309F2 (For Corporations or Partnerships under Subchapter V) (new), 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11). The revised forms are set forth in Appendix B.

Following the Standing Committee's approval, the chairs of the Standing Committee and the Advisory Committee requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so that they can be adopted locally to facilitate uniformity in practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. On December 16, 2019, the Executive Committee approved the requests as submitted.

The chairs of the Standing Committee and the Advisory Committee sent an explanatory memorandum to all chief judges of the district and bankruptcy courts on December 19, 2019. The memorandum included a copy of the interim rules and requested that they be adopted locally to implement the SBRA until rulemaking under the Rules Enabling Act can take place.

A copy of the December 19 memorandum and the Advisory Committee's December 5 Report to the Standing Committee are included in Appendix B. The interim rules and amended forms are also posted on the judiciary's website.

At its spring 2020 meeting, the Advisory Committee will consider the issuance of permanent rules to comply with the SBRA and anticipates seeking the Standing Committee's approval at its June 2020 meeting to publish the rules and forms for public comment in August 2020.[2]

Bankruptcy Rules Restyling

The Advisory Committee also reported on the progress of the work of its Restyling Subcommittee in restyling the Bankruptcy Rules. The Advisory Committee anticipates that

[2] Although the Official Forms have been officially promulgated pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish them again under the regular procedure to ensure full opportunity for public comment.

restyled versions of the 1000 and 2000 series of rules will be ready for publication for public comment this summer, subject to the Standing Committee's approval at its June 2020 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on October 29, 2019. In addition to its regular business, the Advisory Committee heard testimony from one witness regarding the proposed amendment to Rule 7.1 addressing disclosure statements, which was published for public comment in August 2019. The proposed amendment to Rule 7.1 remains out for public comment, and the Advisory Committee plans to consider the draft rule and anticipates seeking final approval from the Standing Committee at its June 2020 meeting. The Committee discussed a suggestion regarding service by the U.S. Marshals Service for in forma pauperis cases. In addition, the Committee received updates on the work of a joint Civil-Appellate subcommittee and two subcommittees tasked with long-term projects involving possible rules for social security disability cases and multidistrict litigation (MDL) cases.

Service by U.S. Marshals for In Forma Pauperis Cases

At the January 2019 Standing Committee meeting, a member raised an ambiguity in the meaning of Rule 4(c)(3), the rule addressing service by the U.S. Marshals Service for in forma pauperis cases. The rule states that "[a]t the plaintiff's request, the court *may* order that service be made" by a marshal and that the court "*must* so order" if the plaintiff is proceeding *in forma pauperis* (emphasis added). The ambiguity lies in the word "must" – when is it that the court "must" order service? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require marshal service even if the plaintiff does not make a request. The

ambiguity appears to be an unintended result of changes made as part of the 2007 restyling of the Civil Rules.

According to the U.S. Marshals Service, service practices for in forma pauperis cases vary across districts. Greater uniformity would be welcome, as would reducing service burdens on the Marshals Service. While it is not clear that a rule change would accomplish either goal, the Advisory Committee is exploring amendment options that would resolve the identified ambiguity. The Advisory Committee will continue to gather information on current practices and possible improvements in consultation with the U.S. Marshals Service.

Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

As previously reported, a joint subcommittee of the Advisory Committees on Civil and Appellate Rules is considering whether either or both rule sets should be amended to address the effect of consolidating initially separate cases on the "final judgment rule". The impetus for this project is *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that a judgment in one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. As a first step, the subcommittee is working with the FJC to gather data about consolidation practices. The FJC's study will

initially include actions filed in 2015-2017 and may eventually include post-2017 actions. The subcommittee will not consider any rule amendments until the research is concluded.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases 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 subcommittee continues to work on a preliminary draft Rule 71.2 for discussion purposes. The subcommittee made the initial decision to include the rule within the existing Civil Rules framework with the goal of obtaining a uniform national procedure. Some members at the Advisory Committee's October 2019 meeting expressed concern that including subject-specific rules within the Civil Rules conflicts with the principle that the Civil Rules are intended to be rules of general applicability, i.e., "transubstantive." The DOJ has expressed concern about the precedent of adopting specific rules for one special category of administrative cases. The subcommittee has drafted a standalone set of supplemental rules to be considered as an alternative to including a rule within the existing Civil Rules.

The subcommittee will continue to gather feedback on the draft Rule 71.2, the supplemental rules and, of course, the broader question of whether rulemaking would resolve the issues identified in the initial ACUS suggestion. The subcommittee plans to decide whether pursuit of a rule is advisable and to recommend an approach at the Advisory Committee's April 2020 meeting.

MDL Subcommittee

The MDL Subcommittee was formed in November 2017 to consider several suggestions from the bar that specific rules be developed for MDL proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members continue to gather information and feedback by participating in conferences hosted by different constituencies, including MDL transferee judges.

The MDL Subcommittee has considered a long list of topics and narrowed that list over time. At the October 2019 meeting, the subcommittee reported its conclusion that third-party litigation financing (TPLF) issues did not seem particular to multidistrict litigation and in fact appear more pronounced in other types of litigation. For that reason, the subcommittee recommended removing TPLF issues from the list of topics on which to focus. Given the growing and evolving importance of TPLF, the Advisory Committee agreed with the subcommittee's recommendation that the Advisory Committee continue to monitor developments in TPLF. The MDL Subcommittee's continued work now focuses on three areas:

a. Use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery;

b. Interlocutory appellate review of some district court orders in MDL proceedings; and

c. Settlement review, attorney's fees, and common benefit funds.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on September 24, 2019. The meeting focused on a proposed draft amendment to Rule 16 that would expand the scope of expert discovery. The scope of discovery in criminal cases has been a recurrent topic on the Advisory Committee's

agenda for decades. Most recently, the Rule 16 Subcommittee was formed to consider suggestions from two district judges to expand pretrial disclosure of expert testimony in criminal cases under Rule 16 to more closely parallel the expert disclosure requirements in Civil Rule 26. At the Advisory Committee's October 2018 meeting, the DOJ updated the Advisory Committee on its development and implementation of policies governing disclosure of forensic and non-forensic evidence. The Rule 16 Subcommittee subsequently convened a miniconference in May 2019 to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. Participants were asked to identify any concerns or problems with the current Rule 16 and to provide suggestions for improving the rule.

While the DOJ representatives reported no problems with the current rule, the defense attorneys identified two problems: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Participants discussed ways to improve the current rule to address these identified concerns.

Based on the feedback, the Rule 16 Subcommittee drafted a proposed amendment that addressed the timing and contents of expert disclosures while leaving unchanged the reciprocal structure of the current rule. First, the proposed amendment provides that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. That time must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. Second, the proposed amendment lists what must be disclosed in place of the now-deleted phrase "written summary."

After thorough discussion at the October 2019 meeting, the Advisory Committee unanimously approved the draft amendment in concept. The Rule 16 Subcommittee continues to refine the draft rule and accompanying committee note and will present the final draft to the

Advisory Committee at the May 5, 2020 meeting. The Advisory Committee plans to seek approval to publish the proposed amendment in August 2020.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 25, 2019. That morning, the Advisory Committee held a miniconference on best practices for judicial management of *Daubert* issues. The afternoon meeting agenda included a debrief of the miniconference, as well as discussion of ongoing projects involving possible amendments to Rules 106, 615, and 702.

Miniconference on Best Practices in Managing *Daubert* Issues

The miniconference involved an exchange of ideas among Advisory Committee members and an invited panel regarding *Daubert* motions and hearings, including the questions about the interplay between *Daubert* and Rule 702. The panel included five federal judges who have authored important *Daubert* opinions and who have extensive experience in managing *Daubert* proceedings, as well as a law professor who has written extensively in this area.

Rule 702

Following the miniconference, the Advisory Committee continued the discussion, noting that its consideration of these issues began with the Advisory Committee's symposium on forensics and *Daubert* held in October 2017. The Advisory Committee formed a Rule 702 Subcommittee to consider possible treatment of forensics, as well as the weight/admissibility question described below.

The Advisory Committee has heard extensively from the DOJ about its current efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment addressing overstatement of expert opinions, especially directed toward

forensic experts. The current draft being considered by the Advisory Committee provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." At its next meeting on May 8, 2020, the Advisory Committee plans to consider whether to seek approval to publish for public comment a proposed amendment to Rule 702.

Rule 106

The Advisory Committee continues its consideration of various alternatives for an amendment to Rule 106, which provides that when a party presents a writing or recorded statement, the opposing party may insist on introduction of all or part of a writing or recorded statement that ought in fairness to be considered as well. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to seek admission of such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence. The Advisory Committee plans to consider at its May 8, 2020 meeting whether to recommend a proposed amendment to Rule 106 for public comment.

Rule 615

Finally, the Advisory Committee continues to consider a rule amendment to address problems identified in the case law and reported to the Advisory Committee regarding the scope of a Rule 615 order, regarding excluding witnesses. The Advisory Committee plans to consider

whether to recommend a proposed amendment to Rule 615 for public comment at its May 8, 2020 meeting.

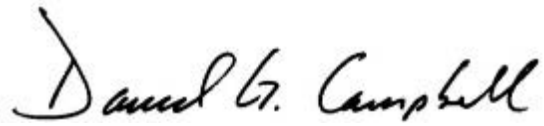
OTHER ITEMS

The Standing Committee's agenda included two additional information items and one action item. First, the Committee heard the report of the E-filing Deadline Joint Subcommittee, the subcommittee formed to consider a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership includes members of each of the rules committees as well as a representative from the DOJ. The subcommittee's work is in the early stage and it will report its progress at the June 2020 meeting.

Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, at the request of Judge Carl E. Stewart, Judiciary Planning Coordinator, the Committee discussed whether there were any changes it believed should be considered for inclusion in the 2020-2025 *Strategic Plan for the Federal Judiciary* (*Strategic Plan*). It is the Committee's view that, while committed to supporting the *Strategic Plan*, its work is very specific – evaluating and improving the already-existing rules and procedures for federal courts – and often does not involve the broader issues that concern the Judicial Conference and the strategic planning process. With this reality in mind, the Committee did not identify any specific additional rules-related suggestions but authorized the Chair to convey to Judge Stewart ongoing rules initiatives that should support the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Gene E.K. Pratter
Robert J. Giuffra Jr.	Jeffrey A. Rosen
Frank Mays Hull	Srikanth Srinivasan
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Appendix A – Official Bankruptcy Forms (form changes made to implement the HAVEN Act)
Appendix B – Memoranda, Interim Bankruptcy Rules, and Official Bankruptcy Forms regarding implementation of the SBRA

TAB 2

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MEMORANDUM

DATE: June 4, 2020

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

RE: CARES Act project regarding emergency rules

This memo briefly summarizes the genesis of the advisory committees' current project to consider possible rules for use in emergencies. The advisory committees' reports may set out additional details. The Standing Committee's June meeting will offer an opportunity for the advisory committee chairs and reporters to provide an initial update on their research and to gather input from members of the Standing Committee.

The COVID-19 pandemic gave rise to urgent challenges in the courts. In the federal courts, the most pressing problems have arisen in criminal cases, as in-person proceedings became hazardous or impracticable and pressures mounted from case needs and Speedy Trial Act requirements. A principal difficulty was that the Criminal Rules were quite limited in their authorization of video conferences and telephone conferences.

Congress responded by enacting the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act,"[1] which addresses the use of video conferences and telephone conferences in criminal cases during the period of the current national emergency relating to COVID-19. I enclose a copy of the relevant section of the CARES Act (Section 15002).

In addition to addressing these criminal-procedure issues for purposes of the current emergency, Section 15002 also assigns a broader project to the Judicial Conference and the Supreme Court for consideration within the Rules Enabling Act framework:

> The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

[1] Pub. L. No. 116-136, March 27, 2020, 134 Stat 281.

CARES Act § 15002(b)(6).

As this provision indicates, the scope of the project is not limited to pandemics, but extends to other possible types of emergencies. The advisory committees have already begun their work on this project. In an effort to be fully responsive to Congress's direction, the goal is to move forward at a somewhat faster pace than is usual for rulemaking. If possible, the advisory committees will develop any proposed amendments so that drafts could be discussed at the advisory committees' fall 2020 meetings, and so that publication-ready versions could be presented at the advisory committees' spring 2021 meetings. That would permit any resulting proposals to be published for public comment in the summer of 2021, if the relevant advisory committee and the Standing Committee decide that proposed amendments may be warranted. Such proposals would then be on track to take effect in December 2023 (if they were to be approved at each stage of the Enabling Act process and if Congress took no contrary action).

On May 1, the Administrative Office published a request for public comment on possible emergency procedures, and publicized the request by means of, among other things, an email to 27,000-plus subscribers to a list for email updates on federal rulemaking. The request sought comment by June 1. I enclose a copy of that request, which is posted at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-emergency-rulemaking. Additional inquiries are also underway.

Some issues may be common to all or most of the sets of national rules, while others may be specific to a single set of rules. The advisory committees are maintaining close cooperation as they consider these questions.

Encls.

One Hundred Sixteenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, two thousand and twenty

An Act

To amend the Internal Revenue Code of 1986 to repeal the excise tax on high cost employer-sponsored health coverage.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

or internationally, including costs associated with the extended filing season and implementation of the Families First Coronavirus Response Act: *Provided*, That such funds may be transferred by the Commissioner to the "Taxpayer Services," "Enforcement," or "Operations Support" accounts of the Internal Revenue Service for an additional amount to be used solely to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided further*, That the Committees on Appropriations of the House of Representatives and the Senate shall be notified in advance of any such transfer: *Provided further*, That such transfer authority is in addition to any other transfer authority provided by law: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Commissioner shall submit to the Committees on Appropriations of the House of Representatives and the Senate a spending plan for such funds: *Provided further*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

THE JUDICIARY

SUPREME COURT OF THE UNITED STATES

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", $500,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", $6,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DEFENDER SERVICES

For an additional amount for "Defender Services", $1,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

ADMINISTRATIVE PROVISION—THE JUDICIARY

VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS

SEC. 15002. (a) DEFINITION.—In this section, the term "covered emergency period" means the period beginning on the date on

which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

(b) VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS.—

(1) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court), upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following events:

(A) Detention hearings under section 3142 of title 18, United States Code.

(B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.

(C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.

(D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.

(E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.

(F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.

(G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.

(H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.

(I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.

(J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

(2) FELONY PLEAS AND SENTENCING.—

(A) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit

that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video teleconferencing is not reasonably available.

(B) APPLICABILITY TO JUVENILES.—The video teleconferencing and telephone conferencing authority described in subparagraph (A) shall apply with respect to equivalent plea and sentencing, or disposition, proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act").

(3) REVIEW.—

(A) IN GENERAL.—On the date that is 90 days after the date on which an authorization for the use of video teleconferencing or telephone conferencing under paragraph (1) or (2) is issued, if the emergency authority has not been terminated under paragraph (5), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the authorization and determine whether to extend the authorization.

(B) ADDITIONAL REVIEW.—If an authorization is extended under subparagraph (A), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the extension of authority not less frequently than once every 90 days until the earlier of—

(i) the date on which the chief judge (or other judge or justice) determines the authorization is no longer warranted; or

(ii) the date on which the emergency authority is terminated under paragraph (5).

(4) CONSENT.—Video teleconferencing or telephone conferencing authorized under paragraph (1) or (2) may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

(5) TERMINATION OF EMERGENCY AUTHORITY.—The authority provided under paragraphs (1), (2), and (3), and any specific authorizations issued under those paragraphs, shall terminate on the earlier of—

(A) the last day of the covered emergency period; or

(B) the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the

National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) no longer materially affect the functioning of either the Federal courts generally or the district court in question.

(6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

(7) RULE OF CONSTRUCTION.—Nothing in this subsection shall obviate a defendant's right to counsel under the Sixth Amendment to the Constitution of the United States, any Federal statute, or the Federal Rules of Criminal Procedure.

(c) The amount provided by this section is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DISTRICT OF COLUMBIA

FEDERAL FUNDS

FEDERAL PAYMENT FOR EMERGENCY PLANNING AND SECURITY COSTS IN THE DISTRICT OF COLUMBIA

For an additional amount for "Federal Payment for Emergency Planning and Security Costs in the District of Columbia", $5,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

INDEPENDENT AGENCIES

ELECTION ASSISTANCE COMMISSION

ELECTION SECURITY GRANTS

For an additional amount for "Election Security Grants", $400,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle: *Provided*, That a State receiving a payment with funds provided under this heading in this Act shall provide to the Election Assistance Commission, within 20 days of each election in the 2020 Federal election cycle in that State, a report that includes a full accounting of the State's uses of the payment and an explanation of how such uses allowed the State to prevent, prepare for, and respond to coronavirus: *Provided further*, That, within 3 days of its receipt of a report required in the preceding proviso, the Election Assistance Commission will transmit the report to the Committee on Appropriations and the Committee on House Administration of the House of Representatives and the Committee on Appropriations and the Committee on Rules and Administration of the Senate:

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Invitation for Comment on Emergency Rulemaking

Request for Input on Possible Emergency Procedures

The Committee on Rules of Practice and Procedure and its five advisory committees invite public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations. Congress has directed the Judicial Conference and the Supreme Court to consider such amendments in light of the COVID pandemic. [Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 15002(b)(6) (/file/28099/download)]. As a result, the advisory committees for the appellate, bankruptcy, civil, criminal, and evidence rules are considering whether rule amendments are needed to deal with future emergencies.

The committees seek input on challenges encountered during the COVID pandemic in state and federal courts, by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees are particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions.

Suggestions should be sent to RulesCommittee_Secretary@ao.uscourts.gov (mailto:%20RulesCommittee_Secretary@ao.uscourts.gov). Because the rules committees are moving forward quickly, responses are requested by June 1, 2020.

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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

MEMORANDUM

To: Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure

From: Honorable Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

Re: Report of the Advisory Committee on the Appellate Rules

Date: June 1, 2020

I. Introduction

The Advisory Committee on the Appellate Rules met by telephone conference call on Friday, April 3, 2020. The draft minutes from the meeting are attached to this report.

The Committee approved proposed amendments previously published for comment for which it seeks final approval. One group of proposed amendments relates to the contents of notices of appeal (Rules 3 and 6; Forms 1 and 2). Another proposed amendment deals with agreed dismissals (Rule 42). These proposed amendments are discussed in Part II of this report, and are attached as Appendix A.

The Committee also approved a proposed amendment to Rule 25, dealing with privacy in Railroad Retirement Act cases, for which it seeks approval for publication. This is discussed in Part III of this report, and is attached as Appendix B.

In addition, the Committee considered several other items, removing one of them from its agenda. These items are discussed in Part IV of this report.

II. Action Items for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. These amendments were published for public comment in August 2019.

A. Rule 42 – Voluntary Dismissal

The proposed amendment to Rule 42 would require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word "may." Prior to restyling, the word "may" was "shall"; the proposed amendment would replace the word "may" with the word "must."

Here is the proposed text of Rule 42 as published:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

The Committee received two comments on this proposal.

The Association of the Bar of the City of New York (ABCNY) suggested adding language to proposed Rule 42(b)(3). First, it suggested that the phrase "setting aside or enforcing an administrative agency order" be added to the list of examples of the kinds of actions that require a court order. Second, it suggested that the phrase "if provided by applicable statute" be added to the end of the subsection.

The Committee decided against making either change. Proposed Rule 42(b)(3) does not purport to be exhaustive, nor does it purport to authorize courts of appeals to take actions by order that are not otherwise authorized by law.

The National Association of Criminal Defense Lawyers (NACDL) found the proposal "well taken," but suggested that two sentences should be added to protect criminal defendants from inappropriate dismissals by counsel.

The Committee decided against making this change. The Federal Rules of Appellate Procedure do not generally address the particular responsibilities that counsel owe to criminal defendants, leaving that to other bodies of law.

Further reflection on a drafting suggestion made in connection with the January meeting of the Standing Committee did lead the Committee to make a minor revision to proposed Rule 42(b)(3): rephrasing it to eliminate the word "mere" and to make clear that it applies only to dismissals under Rule 42(b) itself. The Committee changed the relevant sentence of the Committee Note to reflect this rephrasing.

This is the only change to the proposed Rule made by the Committee since publication:

> **(3) Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.
>
> **Committee Note**
>
> The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

The style consultants have suggested adding the article "a" before the word "payment" in proposed Rule 42(c).

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a

settlement, a payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

B. Rules 3 and 6; Forms 1 and 2 – Content of Notice of Appeal

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal. The proposed amendment to Rule 3 is designed to reduce the inadvertent loss of appellate rights. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment. Accordingly, discussion has focused on Rule 3.

Here is the proposed text of Rule 3 as published:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment~~,~~ ~~—~~or the appealable order~~—~~from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Nine public comments were submitted. Five were generally supportive. Two were critical. Two were nonresponsive.*

* These two comments questioned some bankruptcy matters.

Thomas Mayes offers his "full support" and urges adoption "without delay" because filing a notice of appeal "ought to be straightforward and ministerial." Professor Bryan Lammon also supports the proposed amendments, finding them "important and necessary," but as discussed below, offered a proposed simplification and expansion. The ACBNY supports the amendments, but offered a minor edit. The NACDL "supports these amendments, which are of particular importance in criminal cases," and suggested an expansion, discussed below. (Its stylistic suggestions for the forms were referred to the style consultants.) The Council of Appellate Lawyers of the American Bar Association has no objection to the proposed rule except, as discussed below, it suggested that it would be better not to allow appellants to limit the scope of a notice of appeal.

The two critical comments, one submitted by Michael Rosman and one submitted by Judge Steven Colloton, are discussed below.

Wholesale Critiques

The Committee received two critical comments that, if accepted, would derail the project.

At the Fall 2019 meeting, the Committee considered the comments of Michael Rosman, who contends that the proposal is inconsistent with Civil Rule 54(b). As he sees it, Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists "all the claims in the action . . . and the counterclaims, cross-claims, and intervenors' claims, if any—and identify what has become of all of them." On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6) and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction.

The Committee was not persuaded in the Fall. It is generally understood that a decision disposing of all remaining claims of all remaining parties to a case is a final judgment, without the need for the district judge to recite the prior disposition of all previously decided claims. At the January meeting of the Standing Committee, no member expressed agreement with Mr. Rosman's critique. And at the Spring meeting, the Committee adhered to its view; it does not recommend any changes in response to Mr. Rosman's comment.

The second critical comment was submitted by Judge Steven Colloton, who urged the Committee to abandon the proposal. Judge Colloton pointed to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to

hold appellants to their choices to limit the notices of appeal. He observed that it is not hard for appellants to designate everything for appeal, and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

In contrast to Judge Colloton, the comment submitted by the NACDL emphasized the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed.

As the Supreme Court has recently explained, at the time a notice of appeal is filed, "the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, and may well be in custody, making communication with counsel difficult. And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case." *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019) (citations omitted). Accordingly, filing a notice of appeal is "generally speaking, a simple, nonsubstantive act," and filing requirements for notices of appeal "reflect that claims are . . . likely to be ill defined or unknown" at the time of filing. *Id*.

As a result, the Committee was not persuaded to abandon the project.

Judge Colloton also urged that if the project goes forward, references to "trap for the unwary" should be deleted from the committee note as pejorative.

The Committee declined to delete the phrase, not viewing it as pejorative. As reflected in Black's Law Dictionary, a trap can exist even if no one intended to set it.

Suggested Simplification

Professor Bryan Lammon suggested simplification by deleting proposed (c)(4) and (c)(5) and instead adding the following to the end of (c)(1) the sentence: "Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review."

The Committee declined to adopt this suggestion, concerned both that it would seem to make the designation irrelevant and that it might not clearly overcome the *expressio unius* rationale that is the target of the proposed amendment.

Suggested Broadening

Two comments were submitted suggesting that the project be broadened.

First, the NACDL suggested that proposed Rule 3(c)(5) be expanded to cover criminal cases.

The Committee declined to do so. First, such an expansion would require further review and republication. Second, the NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an *expressio unius* rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. To deal with this concern, the Committee added a passage to the committee note:

> These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

Second, Professor Bryan Lammon suggested that the proposed amendment provide that there is no need to file a new or amended notice of appeal after the denial of a Rule 4(a)(4)(A) motion. The Committee declined to adopt this suggestion because it would require further review and republication. It decided to roll this suggestion into the new agenda item (20-AP-A) dealing with the relation forward of notices of appeals, discussed below in Part IV.

Attorney's Fees

At the January meeting of the Standing Committee, a concern was raised about whether the proposed amendment might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. One suggestion was that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The Committee decided against making either change. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and," referring to "entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." In addition, keeping "rights and liabilities" in the proposed amendment preserves the intended connection between the proposal and Civil Rule 54(b).

To deal with the concern about attorney's fees, the Committee added to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014). Under these cases, attorney's fees incurred in the action are collateral—and can be understood as neither "claims" nor "rights and liabilities of the parties" within the meaning of Civil Rule 54(b). As the Court put it in *Budinich*:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich, 486 U.S. at 200.*

The addition to the committee note is as follows:

> The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

Avoiding the Creation of a New Trap for the Unwary

Judge Colloton also suggested that the proposed rule might create its own trap for the unwary. Suppose a party waits until final judgment, but instead of designating the final judgment (or the final judgment and some interlocutory order or orders)

* The Committee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney's fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The Committee concluded that this situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

designates *only* an interlocutory order in the notice of appeal. If Rule 3(c)(1)(B) requires that either a final judgment or an appealable order be designated, might a court conclude that the notice is ineffective?

To guard against this possible result, the Committee added a provision to what would become Rule 3(c)(7):

> ~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

It also added an explanation to the committee note:

> On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

Designating Only Part of a Judgment or Order in a Notice of Appeal

Throughout the pendency of this proposed amendment, a persistent question has been whether to permit a party to limit the scope of a notice of appeal or to leave such limitations to the briefs. It is a difficult and close issue. Indeed, on all of the issues discussed above, the Committee reached consensus. But on this issue, it was closely divided, five to three.

Rule 3(c)(1)(B) currently permits a party to designate "the judgment, order, or part thereof being appealed." Believing that the phrase "or part thereof" has contributed to the problem of confusing the judgment or appealable order with the issues sought to be reviewed on appeal, the Committee deleted that phrase in the proposed amendment. But to preserve the ability of a party to limit the scope of a notice of appeal by deliberate choice, proposed Rule 3(c)(6) as published provides: "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

The Council of Appellate Lawyers of the American Bar Association submitted a comment suggesting that it would be better not to include a provision allowing for a limitation of the scope of a notice of appeal. The Council is concerned that proposed 3(c)(6) may give rise to strategic attempts to limit the jurisdiction of the court of appeals, particularly when cross-appeals are involved. It supports leaving the narrowing of the issues on appeal to the briefing.

The majority of the Committee decided not to change this aspect of the proposal as published. Current law allows limited notices of appeal, and the point of the current project is to avoid miscommunication, not to change what a party can and cannot do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, particularly in multi-party cases, enabling an appellant to assure a party that no challenge is being raised as to that party.

Eliminating the ability to limit the scope of the notice of appeal might upset settlement agreements, in which a defendant might have agreed not to appeal a judgment's award of damages to one plaintiff but is still free to appeal the same judgment's award of damages to a second plaintiff. There is utility in binding oneself in the notice of appeal rather than with some assurance on the side.

Eliminating the ability to limit the scope of the notice of appeal might also interfere with the district court's ability to reconsider or modify existing rulings if a particular order does multiple things, of which some may be appealable, some may be unappealable, and some may be uncertain.

Moreover, the current proposal does not appear to give cause for the Council's worries regarding cross-appeals. Rules 4(a)(3) and 4(b)(1) give other parties additional time to file a notice after a timely notice of appeal, but they do not limit such cross-appeals to the same part of the judgment or order referenced in the initial notice.

While not persuaded to eliminate the ability to limit the scope of the notice of appeal, the Committee, cognizant of the competing concerns, decided to retain the matter on its agenda, with a plan to revisit the issue in three years.

A minority of the Committee, on the other hand, would delete proposed (c)(6) and add the following sentence to the end of proposed (c)(4): "Specific designations do not limit the scope of the notice of appeal."

In their view, such an approach would be a "cleaner" alternative, create less uncertainty, and avoid inadvertent loss of appellate rights. Concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not

breaching the settlement agreement could be provided separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal.

Disagreement about this aspect of the proposal did not lead any member to withhold support for the proposal as a whole. Once the Committee resolved this issue by a divided vote, the Committee without dissent approved submitting the proposed amendment to the Standing Committee for final approval.

The style consultants suggested a minor change to proposed (c)(4): changing "all orders that merge for purposes of appeal into the designated judgment" to "all orders that, for purposes of appeal, merge into the designated judgment."

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment~~,~~ ~~—~~or the appealable order~~—~~from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the

merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final

judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties. . . ."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be

appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

The proposed amendment to Rule 6 is a conforming amendment. No comments directed to Rule 6 were received, and the Committee requests final approval as published.

The NACDL also noted with approval a minor stylistic change to the forms as published and suggested more stylistic streamlining. The style consultants reviewed those suggestions, and the following revised forms are presented first in redline and then as the clean result:

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~[*] ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment) (from an order (describing it))~~ entered ~~in this action~~ on _____ (state the date the judgment was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

[*] See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants) in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order _____ (describe~~ing~~ the order ~~it))~~ entered ~~in this action~~ on _____ (state the date the order was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal)*_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision ~~of this court~~ entered ~~in the above captioned proceeding~~ on _____ (state the date the decision was entered)~~the _____ day of _____, 20__ (relating to _____)~~.

(s) _____
~~*Counsel*~~ *Attorney for* _____
Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment of a District Court.

United States District Court for the _____
District of _____
Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

_____(name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the final judgment entered on _____ (state the date the judgment was entered).

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court.

United States District Court for the _____
District of _____
Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

_____(name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the order _____(describe the order) entered on _____ (state the date the order was entered).

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

_____ (name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the decision entered on _____ (state the date the decision was entered).

(s) _____
Attorney for _____
Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

III. Action Item for Approval for Publication

The Committee seeks approval for publication of a proposed amendment to Rule 25 extending the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.

Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): "An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal."

This piggyback approach works fine for categories of cases that can be heard in both the district courts and the courts of appeals. But unlike Social Security benefit cases, Railroad Retirement benefit cases go directly to the courts of appeals.

There is little doubt that there are close parallels between the Social Security and Railroad Retirement programs. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 898 (2019) ("Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other."). Accordingly, the Committee believes that it makes sense to accord the same kind of privacy protection to both kinds of cases.

The Committee requests publication of the following, which has not changed since the Standing Committee saw a working draft in January:

Rule 25. Filing and Service

(a) **Filing**

* * * *

(5) **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a

benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

At the January 2020 meeting of the Standing Committee, questions were raised about the scope of the proposal compared to the scope of the work of the Railroad Retirement Board (RRB).

The Committee has confirmed that the RRB renders decisions that are not under the Railroad Retirement Act. In particular, it administers the Railroad Unemployment Insurance Act. The RRB also renders decisions under the Railroad Retirement Act that are not benefits decisions. For example, it decides whether a company is an employer under the Railroad Retirement Act.

The Committee is not aware of any petitions for review under the Railroad Retirement Act that are not directed at the RRB. The Committee nevertheless decided to retain the phrase "Railroad Retirement Board" in the proposed amendment. Not only is clarity enhanced by including this phrase, but it is consonant with Rule 15(a)(2), which requires that a petition for review name the agency as a respondent.

IV. Information Items

The Committee had planned to present the Standing Committee with a proposal to publish modest amendments clarifying the relationship between Rule 35, dealing with rehearing en banc, and Rule 40, dealing with panel rehearing. But a majority of the Committee, by a vote of 5 to 2, reconsidered its prior determination not to make a more thorough revision of these two Rules. Instead of publishing minor changes, the Committee will consider revising these two Rules in order to eliminate much duplication and reduce confusion.

The joint Civil-Appellate subcommittee is exploring finality in consolidated cases, and whether a rule amendment in response to *Hall v. Hall*, 138 S. Ct. 1118 (2018), is appropriate. The subcommittee continues to review data being gathered by the FJC. *Hall* held that consolidated cases retain their separate identities for purposes of appeal, so that when one of the consolidated cases reaches judgment, that judgment is appealable without waiting for the disposition of other cases with which it was consolidated.

Emery Lee of the FJC has searched dockets in all 94 districts for filings in 2015 through 2017. Not including MDL cases, there are 20,730 cases with Civil Rule 42 consolidations in this data set—or 2.5% of federal civil filings. The next step will be to sample these cases in order to try to identify cases in which a *Hall* issue may have arisen.

The joint subcommittee exploring the possibility of an earlier-than-midnight deadline for electronic filing continues to gather information, including information from the FJC about actual filing patterns.

The Committee considered a suggestion for rulemaking to deal with decisions based on grounds that had not been briefed (19-AP-B). The American Academy of Appellate Lawyers suggested that before a decision is issued on grounds not briefed or argued by the parties, the court provide notice of the ground and an opportunity to submit supplemental briefing. The Committee decided that rulemaking would risk delaying decisions and inviting disputes about what was briefed, and observed that rehearing is available. While the suggestion raised a legitimate concern, the Committee concluded that it would be better for the Chair to send a letter to Chief Circuit Judges about the issue and include the letter submitted by the American Academy of Appellate Lawyers. The matter will remain on the agenda to be revisited in three years.

Subcommittees have been appointed to consider two recent suggestions:

1) Regularizing the standards and procedures governing IFP status (19-AP-C);

2) Amending Rule 4(a)(2) to more broadly allow the relation forward of notices of appeal (20-AP-A). Although the Committee considered this issue about a decade ago and decided against taking action, it is worth reexamining the question.

The second subcommittee will also consider the comment submitted regarding the proposed amendment to Rule 3, suggesting a provision that there is no need to file a new or amended notice of appeal after the denial of a Rule 4(a)(4)(A) motion.

A subcommittee has also been appointed to implement the Coronavirus Aid, Relief, and Economic Security (CARES) Act. In accordance with that Act, this subcommittee will consider whether amendments would be appropriate to deal with future emergencies.

The Committee is also considering a suggestion to amend Rule 43 to require the use of titles rather than names in cases seeking relief against officers in their official capacities (19-AP-G). It has tabled this suggestion pending inquiry into the practice of circuit clerks.

Finally, the Committee considered a suggestion that tight deadlines be established for cases involving Congressional subpoenas (19-AP-H) but agreed without dissent to remove that matter from its agenda.

APPENDIX A

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Appendix A

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ‘‘all plaintiffs,’’ ‘‘the defendants,’’ ‘‘the plaintiffs A, B, et al.,’’ or ‘‘all defendants except X’’;

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

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

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal

Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after

entry of the judgment and designates an order that merged into that judgment.

(~~5~~) (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate

only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a

separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties. . . ."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly

designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

The new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Changes Made After Publication and Comment

A provision was added that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. A paragraph was added to the Committee Note explaining this provision.

A paragraph was added to the Committee Note to clarify that the amendment does not change the principle that a decision on the merits is a final decision whether or not there remains for adjudication a request for attorney's fees attributable to the case.

A paragraph was added to the Committee Note explaining that while similar treatment of criminal cases may be appropriate, no inference should be drawn about criminal cases from the new provisions that are limited to civil cases.

Stylistic changes were made to both the text of the Rule and the Forms.

Summary of Public Comment

Michael Rosman (AP-2019-0001-0003) – Proposed Rule 3(c) is inconsistent with Civil Rule 54(b). Rule 54(b) requires entry of judgment that recites the disposition of all claims in the matter, not just the all remaining claims. Until entry of such a document, there is no appellate jurisdiction. The proposal should be revised to take account of the proper understanding of Rule 54(b). In addition, changes in phrasing should be made.

Thomas Mayes (AP-2019-0001-0004) – Filing a notice of appeal ought to be straightforward and ministerial. Proposed amendments should be adopted as written without delay to remove traps for the unwary that undermine confidence in the fairness and openness of the appellate.

Mapin Desai (AP-2019-0001-0005) – I have been following Adelphia Communications Corporation Chapter 11 Bankruptcy Case for over 17 years from 2002, and have suggestions for transparency, predictability, accountability and enforceability in bankruptcy proceedings.

Amicus Curiae (AP-2019-0001-0007) – The terms of a contract cannot be voided or retroactively changed by a Stay Order in Bankruptcy Court.

Professor Bryan Lammon (AP-2019-0001-0009) – The amendments are an important and necessary fix to the rule. But the proposed rule could be simplified by stating, "Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review" in place of proposed (c)(4) and (5). In addition, Rule 4(a)(4)(B)(ii) should also be amended to eliminate the requirement of

filing a second or amended notice to challenge a decision on a motion listed in Rule 4(a)(4)(A).

Association of the Bar of the City of New York (AP-2019-0001-0010) – We support the changes to Rule 3, but recommend a minor edit to the proposed text of Rule 3(c)(4) to clarify that the application of the merger principle set forth in that subpart is subject to the exception set forth in Rule 3(c)(6).

National Association of Criminal Defense Lawyers (AP-2019-0001-0011) – NACDL supports the proposed amendments to Rule 3, which are of particular importance in criminal cases. The attorney responsible for filing the notice of appeal may not be the attorney who will be handling the appeal, may not be the attorney who handled the plea or trial, and in many cases will not be in a position at that time to know what issue or issues would be available or fruitful to advance on appeal. Proposed Rule 3(c)(5) should be expanded to include criminal cases to avoid the possibility of courts using *expressio unius* to conclude that a notice of appeal in a criminal case must identify both the underlying appealable order and the denial of reconsideration. Forms 1A and 1B should be further restyled.

Council of Appellate Lawyers, American Bar Association (AP-2019-0001-0012) – We have no objection to the amendments proposed, except for the provision permitting an appellant to designate only part of a judgment or appealable order. This provision will create confusion and may facilitate efforts to limit appellate jurisdiction. It is unnecessary because an appellant may reach the same result of limiting the scope of its appeal through briefing.

Judge Steven Colloton (AP-2019-0001-0013) – The amendments to Rule 3 should not be adopted. The line of

cases cited in the report follows a longstanding mode of analysis, adopted in every circuit. Decisions enforcing the limits of a notice of appeal under Rule 3(c) do not "create a trap for the unwary." They properly apply the text of the rule and give effect to the intent manifested by the appellant when a notice of appeal was filed. Lawyers who are appellate specialists, retained after a notice of appeal is filed, understandably may prefer a different rule that permits an appellant to change its intent after the time for filing a notice of appeal has expired. Such a rule would allow latecoming appellate lawyers to search the record for potential claims of error that the appellant did not intend to raise when it filed the notice of appeal. But facilitating an appellant's ability to change its intent, outside the time for noticing an appeal, is not a sound reason to amend Rule 3(c). If an appellant wishes to designate every order in the case, then it is usually simple to do so. Rule 3(c) need not presume that lawyers are incapable of carrying out this task if it is consistent with their true intent.

If the Committee nonetheless elects to forge ahead with an amendment, consider striking references to "traps for the unwary" in the proposed Committee Note. This is a pejorative phrase, suggesting that the original rulemakers, and courts applying the current rule, have endeavored to take lawyers by surprise to gain an advantage.

Suppose, after a final decision in the case, the appellant designates only an interlocutory order from which an appeal is not authorized before final judgment. Would the proposed rule create a trap for the unwary, and require dismissal, because the appellant did not designate either "the judgment" or "an appealable order"?

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to ‘‘Forms 1A and 1B in the Appendix of Forms’’ must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as used in any applicable rule, means ‘‘appellate panel’’; and

(D) in Rule 12.1, ‘‘district court’’ includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

Committee Note

The amendment replaces ‘‘Form 1” with ‘‘Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Changes Made After Publication and Comment

No changes were made.

Summary of Public Comment

None.

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) **Stipulated Dismissal.** The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) **Appellant's Motion to Dismiss.** An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) **Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district

court or an administrative agency, or remanding the case to either of them.

(c) **Court Approval.** This Rule 42 does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

Changes Made After Publication and Comment

The phrase "for any relief beyond the mere dismissal of an appeal" was replaced by the phrase "for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal." The Committee Note was revised accordingly. In addition, a stylistic change was made.

Summary of Public Comment

Association of the Bar of the City of New York (AP-2019-0001-0010) – We propose that the language of Rule 42(b) be modified to conform with the authorizing statute and to avoid suggesting a substantive entitlement to remand that may or not be authorized by law. There is a substantive legal question regarding whether a court of appeals is authorized to "remand" a matter to an administrative agency.

National Association of Criminal Defense Lawyers (AP-2019-0001-0011) – The proposed amendments to Rule 42(b) are well taken, but should be strengthened to protect defendants from inappropriate "voluntary" dismissal of their appeals by counsel.

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Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ ___(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment~~)~~ ~~(from an order (describing it))~~ entered ~~in this action~~ on _____(state the date the judgment was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a~~ ~~Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order _____(describe~~ing~~ the order ~~it~~))~~ entered ~~in this action~~ on _____(state the date the order was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration* ~~*along*~~ *with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal*)~~___~~ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision ~~of this court~~ entered ~~in the above captioned proceeding~~ on _____(state the date the decision was entered)~~the _____ day of _____, 20__ (relating to _____)~~.

(s) _____
~~*Counsel*~~ *Attorney for* _____
Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

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APPENDIX B

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Appendix B

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

Rule 25. Filing and Service

(a) Filing

* * * * *

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

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

case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

TAB 3B

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Minutes of the Spring 2020 Meeting of the

Advisory Committee on the Appellate Rules

April 3, 2020

By telephone conference call

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 3, 2020, at 10:00 a.m.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Judge Paul Watford, Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Lisa B. Wright. Solicitor General Noel Francisco was represented by Thomas Byron, Assistant Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Bernice Donald, Member, Advisory Committee on the Bankruptcy Rules, and Liaison Member, Advisory Committee on the Appellate Rules; Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Alison Bruff, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Chagares opened the meeting and welcomed everyone. He expressed the hope that all are healthy. He noted that it is awkward to meet by phone, but that it was necessary under the circumstances.

II. Report on Status of Proposed Amendments and Legislation

Judge Chagares directed the committee's attention to the rules tracking chart in the agenda book (pages 25-28) and noted that amendments took effect in December of 2019 modernizing the rules to take account of electronic filing and to amend the disclosure requirements of Rule 26.1. In addition, amendments to Rules 35 and 40

are on track to take effect in December of 2020. Additional proposed amendments are out of public comment and will be discussed later in the meeting.

As for pending legislation, Judge Chagares stated that the proposed AMICUS Act does not appear at this time to be moving in Congress. The subcommittee does not believe that any action is necessary now but has asked for research to be done into ascertaining the number of parties that would be covered by the proposed Act. It will continue to monitor the status of the bill.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act has been enacted. As it pertains to the judiciary, the CARES Act authorizes teleconferences in certain criminal matters. While the bill was pending, Judge Chagares and Professor Hartnett were asked to review the Federal Rules of Appellate Procedure to see if any emergency amendments were needed to deal with COVID-19 pandemic. They found nothing that needed immediate attention. The CARES Act directs the judiciary to consider possible amendments through the Rules Enabling Act process in case of future emergencies. Accordingly, Judge Chagares formed a subcommittee to review the Federal Rules of Appellate Procedure for possible amendments. Professor Sachs, Tom Byron, and Judge Watford agreed to serve on this subcommittee. As usual, the Chair and the Reporter will serve as well.

Judge Campbell provided a bit of background on the CARES Act. An earlier version would have directly amended the Federal Rules of Criminal Procedure. The judiciary asked Congress to please not do so, but instead to simply authorize certain procedures during this emergency; and if Congress wanted something more permanent, to direct that the Rules Enabling Act process be used to address the matter. Congress chose to do what the judiciary requested. To implement that directive, subcommittees of each advisory committee should meet before the fall 2020 meeting to consider possible amendments. Any proposed amendments would be refined before the spring 2021 meeting, so that any proposed amendments would be published for public comment in the summer of 2021 and be on track to take effect in December 2023. The criminal rules committee is considering proposing some amendments; other committees may or may not.

Professor Coquillette noted that Judge Campbell had acted very quickly and had done a great job. Judge Chagares stated that we are all grateful for Judge Campbell's leadership.

III. Consent Agenda

Judge Chagares invited a motion to approve the consent agenda, consisting of approval of the minutes of the fall meeting on October 29, 2019, and the removal of

the suggestion regarding Congressional subpoenas (19-AP-H) from the agenda. The motion was made and approved with none opposed.

IV. Discussion of Matters Published for Public Comment (16-AP-D and 17-AP-G)

A. Rule 3

The Reporter presented the subcommittee report regarding Rule 3. Proposed amendments have been published for public comment. Two comments, if accepted, would derail the project. One was considered at the last meeting; a second was received since the last meeting.

At the last meeting, the committee considered the comments of Mr. Rosman, whose critique is based on his reading of Civil Rule 54. No committee member was persuaded last time, no member of the standing committee expressed concern, and the subcommittee did not see any need to revisit the issue. The Reporter emphasized that this was the last call for committee members to speak up on the issue. None did.

The Reporter then turned to the second comment that would, if accepted, derail the project. Judge Colloton has urged the committee to abandon the proposal. Judge Colloton points to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to hold appellants to their choices to limit the notices of appeal. He observes that it isn't hard for appellants to designate everything for appeal and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

The subcommittee concluded that if the rule leads to the decisions reflected in the Rules Clerk memo, we need to change the rule. In contrast to Judge Colloton, the comment submitted by the National Association of Criminal Defense Lawyers (NACDL) emphasizes the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed—as does the Supreme Court decision in *Garza*.

Finally, Judge Colloton urged that if the project goes forward, references to "trap for the unwary" should be deleted from the committee note as pejorative. The subcommittee does not view that phrase as pejorative. As reflected in Black's Law Dictionary, a trap can exist even if no one intended to set it.

In response to a question from Judge Chagares, the Reporter stated that he planned to address another concern raised by Judge Colloton—dealing with whether the proposal itself creates a trap for the unwary—later in the discussion.

No member of the committee suggested abandoning the project or eliminating the phrase "trap for the unwary" from the committee note.

The Reporter then turned to smaller issues, ones that might call for some adjustments but not abandonment of the project.

First, the Reporter stated that the Standing Committee had raised a concern whether the proposal might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. Discussion at the Standing Committee suggested that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The subcommittee recommended that neither change be made. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and." Keeping "rights and liabilities" preserves the intended connection between the proposal and Civil Rule 54(b). Instead, the subcommittee recommended adding to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*.

The subcommittee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney's fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The subcommittee concluded that this situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

The Reporter also discussed a comment from Professor Lammon proposing a way to simplify the proposal. The subcommittee did not recommend the proposed simplification, viewing it as both too broad and too narrow.

The committee accepted all of these recommendations by the subcommittee without further discussion.

The Reporter then turned to an issue that has been a significant recurring question: whether to allow the designation to limit the scope of the notice of appeal or to leave any such narrowing to the briefs. At the last meeting, members of the committee voiced differences about this issue but decided on allowing such limitation in the proposed amendment that was published for public comment.

The issue was raised at the Standing Committee and was the subject of public comment. The Council of Appellate Lawyers favored the opposite approach: not allowing the designation to limit the scope of the notice of appeal but leaving any such

narrowing to the briefs. The Association of the Bar of the City of New York (ABCNY) did not make such a recommendation, but did suggest adding an "except" clause to proposed subsection (c)(4) to make clear that the ability to limit the scope of the notice of appeal in subsection (6) operates as an exception to the general principle of subsection (4).

The subcommittee presented the committee with two alternatives. One alternative was the proposed amendment as published, with (c)(6) allowing limitation of the scope of the notice of appeal if done expressly. The other alternative would delete (c)(6) as published and add a sentence to (c)(4): "Specific designations do not limit the scope of the notice of appeal." Corresponding changes to the committee note would also be made.

Mr. Byron made a pitch for the "cleaner" alternative of deleting (c)(6) and adding the sentence to (c)(4). This approach would create less uncertainty and avoid inadvertent loss of appellate rights. He saw good arguments on both sides of this issue, yet thought that the concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not breaching the settlement agreement could be provided in other ways, separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal. In response to the argument that if proposed (c)(6) would lead to abuses, then we should see abuses now, Mr. Byron observed that the reason for this project as a whole is to respond to cases that have resulted in the inadvertent loss of appellate rights.

Judge Chagares noted that the existing rule permits parties to designate "a part thereof."

An academic member urged the committee to retain proposed (c)(6). He observed that current law allows limited notices of appeal, and that the point of the current project is to avoid miscommunication, not to change what a party can and can't do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, and there is utility in binding oneself in the notice of appeal rather than with some assurance on the side. If a matter has been appealed, the district court can only make an indicative ruling. Putting the question on the committee's calendar to review at some point in the future is better than taking away the ability to expressly limit the scope of the notice of appeal.

Mr. Byron moved to delete proposed (c)(6) and add the sentence to (c)(4). The motion failed by a vote of 3 to 5. (Byron, Wright, and Watford in favor; Bybee, Murphy, French, Sachs, and Spinelli opposed).

The Reporter then turned to another concern raised by Judge Colloton: whether the proposed amendment might create a new trap for the unwary if an appellant designates only a prior interlocutory order. To meet this concern, the material in the agenda book suggested an addition to (c)(7), providing that an appeal should not be dismissed for improperly designating the judgment if the intent is otherwise clear. But subsequent discussion with Judge Chagares led the Reporter to a different phrasing: that an appeal should not be dismissed "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment."

A judge member asked whether any change was necessary, given proposed (c)(4). The Reporter replied that he hoped that judges would read proposed (c)(4) the way the judge member did, but was concerned that not all judges would do so. Judge Chagares explained that some might read (c)(4) to require that the judgment be designated, and if this threshold requirement is not met, the appellant is going nowhere.

An academic member suggested that the proposed language would be better placed in (c)(5) as a rule of construction rather than in (c)(7) as a simple prohibition on dismissal of the appeal. Professor Struve agreed, and particularly noted that the phrasing now under discussion was an improvement over the one in the agenda book.

Mr. Byron thought the language would be better in (c)(7), because a court might conclude that appellate jurisdiction is lacking altogether, while (c)(5) addresses what sort of designations count as designating the final judgment. An academic member noted that this was a fair point.

Judge Chagares stated that there appeared to be a consensus to keep the language in (c)(7).

Discussion then turned to whether the new language should be limited to "the judgment" or should extend to "appealable orders." The Reporter stated that he had considered adding that phrase, but doing so would add complexity by inserting "appealable order" in three places—"for failure to properly designate the judgment *or appealable order* if the notice of appeal was filed after entry of the judgment *or appealable order* and designates an order that merged into that judgment *or appealable order*"—that did not appear worth it in light of the likelihood of the problem arising in the context of an appealable order. An academic member agreed

that the problem would not be likely to arise in that context, and that the provision is designed as a failsafe only to prevent complete loss of appellate rights.

Mr. Byron favored leaving out "appealable order." Like the Reporter, he did not envision a case in which the problem would arise in that context. With no problem identified, there is no need to go too far afield.

Judge Campbell suggested that the phrase "entry of" should be deleted. The Reporter stated that retaining the phrase "entry of" would connect the new provision to Rule 4(a) while deleting it could leave the relevant date uncertain. Mr. Byron agreed with Judge Campbell that the phrase "entry of" should not be included. An academic member suggested that the addition of a committee note stating that this provision should be read consistently with Rule 4(a)(2) and 4(b)(2). The committee decided, without dissent, to reject the phrasing in the agenda book and to adopt the phrasing discussed above, including the phrase "entry of."

The Reporter presented two ideas for expanding the project that had been suggested in public comments.

The first, suggested by Professor Lammon, was to provide that there was no need to file a new or amended notice of appeal, after the denial of a Rule 4(a)(4)(A) motion. The subcommittee thought that this suggestion would require further review and republication. It recommended rolling this suggestion into the new agenda item, to be discussed later, 20-AP-A. The committee agreed.

The second, suggested by the NACDL, was to expand proposed Rule 3(c)(5) to cover criminal cases. The subcommittee similarly thought that this proposed expansion would require further review and republication. The NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an expressio unius rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. The subcommittee suggested an addition to the committee note stating that similar issues may arise in a small number of criminal cases, but that no inference should be drawn from the new provision about how such issues should be handled in criminal cases.

A lawyer member expressed concern about this note, fearing that it could be read to suggest that the criminal rule should be stricter. Maybe it would be better to not add this to the committee note. Or maybe it could be added to the text in (c)(5).

Mr. Byron noted that, for appellate purposes, the nature of the order rather than the nature of the case determines whether it is treated as civil or criminal.

Professor Struve agreed that it is the nature of the act for which review is sought that determines treatment as civil or criminal.

The Reporter clarified that there are some orders that the NACDL is concerned about, such as a denial of a motion to dismiss on double jeopardy grounds, that are plainly criminal for purposes of appeal. Even though some appeals in criminal cases will be addressed by the existing proposal, not all will.

The Reporter suggested adding the clause, "and similar treatment may be appropriate" to the committee note. An academic member urged retention of the "no inference should be drawn" language, pointing out that it is less clear on the civil side when there is a final judgment, and that Rule 4(b) allows appeals from the denial of certain motions without an amended notice of appeal. Without further study, we shouldn't suggest that courts do anything other than what they are doing on the criminal side.

The lawyer member who raised this concern agreed, emphasizing that the concern was that the proposal in the agenda book suggests that similar treatment might not be appropriate.

Mr. Byron urged both keeping the "no inference" language and adding the "similar treatment may be appropriate" language.

The committee agreed without dissent, charging the subcommittee with finalizing the language.

The committee further agreed, without dissent, to send the proposed amendment, as modified by the discussions at this meeting, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Mr. Byron, Judge French, and Professor Sachs.

B. Rule 42

Judge Bybee presented the subcommittee report regarding the proposed amendment to Rule 42(b) that was published last summer for public comment. It would make dismissal of appeals mandatory in certain circumstances. Two comments were received, one from the ABCNY, the other from NACDL. Both comments proposed adding language.

ABCNY suggested additional language dealing with agency orders, particularly by the SEC. NACDL suggested additional language dealing with the

obligations of defense counsel. The subcommittee recommended neither addition. There is no need to add qualifications to the rule as published.

The subcommittee did, however, recommend eliminating the word "mere." The Reporter added that the subcommittee also recommended adding references to Rule 42(b)(1) and (b)(2) to clarify the scope of the amendment.

The committee agreed, without dissent, to send the proposed amendment, as presented in the agenda book, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Judge Bybee and Christopher Landau (now United States Ambassador to Mexico).

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rules 35 and 40 (18-AP–A)

Judge Chagares presented the subcommittee's report regarding Rules 35 and 40. He stated that the committee had previously rejected doing a thorough re-write of these rules, and so reported to the Standing Committee. Accordingly, the subcommittee presented more modest changes. But some members of the subcommittee favored a more thorough re-write, and he suggested that the committee address that question as a threshold matter. He noted that the committee could produce better rules, but there has been no real complaint or problem; if it ain't broke don't fix it.

Mr. Byron made a pitch for a more thorough re-write. The current rules have lots of duplication that arose inadvertently, traceable to the days when parties could not petition for rehearing en banc, but only suggest it. Once the two rules were aligned in that regard—so that a party could petition for rehearing en banc as well as petition for panel rehearing, frequently in a single document—it made sense to eliminate duplication. Lots of streamlining can be done.

A lawyer member agreed. The existing rules are confusing to someone who hasn't encountered them before. Two judge members favored taking a look at the rules.

The committee voted 5-2 to send the matter back to the subcommittee to consider the more thorough re-write. (French, Spinelli, Bybee, Wright, and Sachs in favor; Murphy and Watford opposed).

B. Proposed Amendment to Rule 25 in Railroad Retirement Act Cases (18-AP–E, 18-CV-EE)

Judge Chagares presented the subcommittee's report regarding privacy concerns in Railroad Retirement Act cases. A working draft was discussed at the last meeting and presented to the Standing Committee. One question that arose was whether it was redundant to refer to both the Railroad Retirement Board and the Railroad Retirement Act. But since the Railroad Retirement Board also issues decisions under the Railroad Unemployment Act, the subcommittee recommended no change to the working draft.

The committee, without dissent, agreed to send the proposed amendment to the Standing Committee for possible publication seeking public comment.

C. Unbriefed Grounds (19-AP-B)

Judge Chagares presented the subcommittee's report regarding decisions on unbriefed grounds. The subcommittee thought that there is a legitimate concern, but it was not a matter for rulemaking. Rulemaking could increase the time to decision and invite disputes about what was briefed. In addition, rehearing is available. Instead, the subcommittee recommended sending a letter to Chief Circuit Judges about the issue and including the letter from the American Academy of Appellate Lawyers, which expressed concern about courts deciding cases on grounds that had not been briefed.

Mr. Byron noted his support for the concern. The Department of Justice has encountered the same problem, and it is very frustrating. Perhaps a precatory rule encouraging supplemental briefing would be helpful while avoiding disputes about whether such briefing is required. A judge member agreed that it is a legitimate issue, but writing a rule would be ineffective and create further problems. A letter from the committee chair would be better.

Judge Chagares stated that the subcommittee's proposal, if adopted, would do that. He'd like to think that the Chief Judges would share the letter with their respective courts. Perhaps the committee could monitor the issue to see if it remains a continuing concern.

An academic member suggested sending a letter and calendaring the matter for the future. Mr. Byron agreed.

The committee, without dissent, adopted the proposal to send a letter and calendar the matter for the future. The matter will remain on the agenda to be revisited in three years.

VI. Discussion of Matters Before Joint Subcommittees

Judge Chagares stated that reports on matters before joint subcommittees are in the agenda book materials.

VII. Discussion of Recent Suggestions

The Reporter presented a discussion of recent suggestions.

A. IFP Standards (19-AP-C)

The Reporter noted that this committee has expressed the most interest in the suggestion regarding IFP standards and suggested that the next step would be the appointment of a subcommittee. Judge Chagares appointed a subcommittee consisting of Justice French, Judge Watford, and Ms. Wright.

B. Use of Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai suggested that the use of titles rather than names in official capacity suits be made mandatory. In particular, Sai suggested that the word "may" in Appellate Rule 43 and Civil Rule 17 be changed to "shall." The Reporter noted that this change could promote clarity, but that there is a possible worry about how it would interact with *Ex parte Young* and the Eleventh Amendment. He also noted that Sai had submitted a response to the memo in the agenda book and that this response had been circulated to the committee in advance of the meeting. The Reporter invited discussion, asking whether there is a real problem that needs to be addressed and whether the concerns about the Eleventh Amendment are overblown.

An academic member stated that he had no strong views. It could promote clarity, but at some downside risk. He shared the concern about sovereign immunity, but thought that it could be avoided. He slightly favored the formation of a subcommittee.

Mr. Byron noted that since the civil rules committee had kept it on its agenda, we should as well, but that he did not feel strongly. A judge member suggested that we wait for the civil rules committee; the Reporter said that it seemed like civil rules committee had a similar reaction, waiting for us.

The Reporter asked for comments on whether there was a problem that needed to be addressed. Ms. Dodszuweit responded that the Clerk's Office in the Court of Appeals for the Third Circuit currently uses titles rather than names. Judge Chagares suggested that the matter be tabled pending inquiry by Ms. Dodszuweit regarding the practice by other circuit clerks. The committee agreed without dissent.

C. Relation Forward of Notices of Appeal (20-AP-A)

Professor Lammon has suggested that premature notices of appeal relate forward. Current Rule 4(a)(2) allows relation forward when the notice of appeal is filed after the announcement of a decision but prior to entry. The committee considered this matter about a decade ago and decided against taking action; Professor Lammon contends that things have not gotten better since then.

The Reporter said that his sense from reading the prior minutes was that the committee was concerned about inviting premature notices of appeal, and added his concern about the disruption of district court proceedings. He suggested that there might be a way to avoid these problems by drafting a narrower provision that draws on the practice that allows a district court to certify that an appeal is frivolous.

Judge Chagares appointed a subcommittee to consider this suggestion, consisting of Judge Bybee, Judge Murphy, Ms. Spinelli, and Mr. Byron.

VII. Recent Rule Changes

Judge Chagares turned to a review of the impact and effectiveness of recent rule changes.

The 2019 amendment to Rule 25(d) eliminated the requirement of proof of service when service is made through a court's electronic-filing system. Some local rules have not yet been amended to conform to this new Rule, and continue to require proof of service, but the expectation is that this will change with a bit more time. Ms. Dodszuweit offered to follow-up with the Clerks of circuits that have not yet changed their rules or practices.

The 2018 amendment to Rule 29(a)(2) permits the rejection or striking of an amicus brief that would result in a judge's disqualification. This has happened in three circuits so far.

VIII. New Business and Updates on Other Matters

Judge Chagares invited any other suggestions that would result in the just, speedy, and inexpensive resolution of cases or any new business. None was immediately forthcoming.

Judge Campbell noted that other committees had covered a lot of ground and added that the Reporters will share information with each other.

IX. Adjournment

Judge Chagares thanked everyone for their contributions to the meeting and wished them good health in these uncertain times. He stated that the next meeting would be on October 20, 2020, and is scheduled to be held in Washington, DC.

The meeting adjourned at approximately 12:30 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

MEMORANDUM

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

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 18, 2020

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met virtually via WebEx on April 2, 2020. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to amendments to four rules that were published for comment last August. The amendments are to Rules 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination), 3007 (Objections to Claims), 7007.1 (Corporate Ownership Statement), and 9036 (Notice and Service Generally). The Advisory Committee also approved without publication amendments to five official forms in response to changes made to the Bankruptcy Code in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The Advisory Committee seeks the Standing Committee's retroactive approval of those conforming changes. Finally, the Advisory Committee voted to seek publication for comment of amendments to (1) Parts I and II of the Bankruptcy Rules that are

proposed as part of the rules restyling project; (2) thirteen rules and ten official forms that were previously issued on an interim basis in response to the Small Business Reorganization Act of 2019 ("SBRA"); and (3) amendments to three additional rules.

Part II of this report presents those action items along with one other rule amendment for publication that the Advisory Committee voted on at its fall 2019 meeting. At that earlier meeting, the Advisory Committee voted to seek publication of amendments to Rule 8023 (Voluntary Dismissal) to conform to amendments being proposed to the parallel appellate rule, FRAP 42.

The action items are organized as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2019—

- Rule 2005;
- Rule 3007;
- Rule 7007.1; and
- Rule 9036.

(A2) Form amendments approved under the Advisory Committee's delegated authority to make technical and conforming changes to official forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference—

- Official Forms 101, 201, 122A-1, 122B, and 122C-1.

B. Items for Publication

- Restyled Rules Parts I and II;
- Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, and 3019 (in response to SBRA);
- Rule 3002(c)(6);
- Rule 5005;
- Rule 7004;
- Rule 8023; and
- Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A (in response to SBRA).

Part III of this report presents two information items. The first concerns a revision to Interim Rule 1020 to implement the CARES Act. The second information item discusses the Advisory Committee's approval, in response to SBRA, of three new Director's Forms for chapter 11 discharge in subchapter V cases.

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2019.

The Advisory 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 2019 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of 18 U.S.C. § 3146(a) and (b)"—sections that have been repealed—with a reference to "the relevant provisions and policies of 18 U.S.C. § 3142"—the section that now deals with the topic of conditions of release. The only mention of the proposed change in the comments received in response to publication was a supportive statement from the National Conference of Bankruptcy Judges ("NCBJ"). Accordingly, the Advisory Committee unanimously approved the amendment as published.

Action Item 2. Rule 3007 (Objections to Claims). Rule 3007(a)(2)(A)(ii) requires service of an objection to a claim "on an insured depository institution[] in the manner provided by Rule 7004(h)." Some bankruptcy judges have questioned whether "insured depository institution" under Rule 7004(h) includes credit unions as well as banks, a question that the Advisory Committee previously decided in the negative, and whether the meaning of "insured depository institution" is the same under Rule 3007(a)(2)(A)(ii) as under Rule 7004(h)

Rule 7004 governs service of a summons and complaint in adversary proceedings, and Rule 9014(b) makes Rule 7004 applicable to service of a motion initiating a contested matter. Rule 7004(b) provides generally for service by first class mail, in addition to the methods of service specified by Civil Rule 4(e)-(j). Rule 7004(b), however, is made subject to an exception set out in subdivision (h). The latter provision states:

> (h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Section 114 of that law declared that "Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended" to add the text of new subdivision (h).

At the spring 2018 Advisory Committee meeting, the Committee concluded that Rule 7004(h) is not applicable to credit unions because, being insured by the National Credit Union Administration, credit unions do not fall within section 3 of the Federal Deposit Insurance Act.[1] The Committee also decided not to take further action on Suggestion 17-BK-E, which sought an expansion of Rule 7004(h) to include credit unions.

Because of the limited scope of Rule 7004(h), other rule provisions that require service in the manner provided "by Rule 7004" allow service by first class mail under Rule 7004(b) on credit unions. These rules include Rules 3012(b) (request for a determination of the amount of a secured claim in a chapter 12 or 13 plan), 4003(d) (avoidance of a lien on exempt property in a chapter 12 or 13 plan), 5009(d) (motion for an order declaring a lien satisfied and released), 9011(c)(1) (motion for sanctions), and 9014(b) (motion initiating a contested matter).

The 2017 amendments to Rule 3007 were intended to clarify that objections to claims are generally not required to be served in the manner provided by Rule 7004. Instead, those objections may be served on most claimants by mailing them to the person designated on the proof of claim. But that rule is subject to two exceptions. The one relevant here is set forth in subdivision (a)(2)(A)(ii). It provides that "insured depository institutions" must be served "in the manner provided by Rule 7004(h)." The Advisory Committee added that exception in an effort to comply with the legislative mandate in Rule 7004(h) that such institutions be served by certified mail in contested matters and adversary proceedings.

The Advisory Committee subsequently realized that the promulgation of Rule 3007(a)(2)(A)(ii) failed to take account of the Bankruptcy Code definition of "insured depository institution."[2] The Code definition, which includes credit unions in addition to banks insured by the FDIC, is made applicable to the Bankruptcy Rules by Rule 9001. However, the Committee concluded that the definition does not change the scope of Rule 7004(h), because in the latter provision Congress expressly included a specific and narrower definition of insured depository institution—one defined in section 3 of the Federal Deposit Insurance Act. That specific reference in Rule 7004(h) overrides the more general definition in § 101(35).

[1] Section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(c)(2), provides, "The term 'insured depository institution' means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter." The "Corporation" is the Federal Deposit Insurance Corporation. *Id.* at § 1811(a).

[2] Section 101(35) provides that the "term 'insured depository institution'—(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and (B) includes an insured credit union (except in the case of paragraphs (21B) and (33A) of this subsection)."

The existence of a Code definition of insured depository institution does, however, affect the scope of Rule 3007(a)(2)(A)(ii). That provision does not say that service according to Rule 7004 is required; instead, it specifically requires service according to Rule 7004(h). And it applies to an "insured depository institution" without providing any special definition of that term. Accordingly, the § 101(35) definition applies, and credit unions are brought within the requirement that Rule 7004(h) service be made. That means that only under this one rule are credit unions required to receive service by certified mail.

The Advisory Committee proposed the amendment to Rule 3007(a)(2)(A)(ii) to eliminate the inclusion of credit unions by limiting the term "insured depository institution" to the meaning set forth in section 3 of the Federal Deposit Insurance Act. The underlying intent of the Advisory Committee in previously proposing the amendments to Rule 3007 was to clarify that Rule 7004 service is generally not required for objections to claims. The exception in subdivision (a)(2)(A)(ii) was included based on the belief that it was required by the congressionally imposed requirement of Rule 7004(h); there was no intent, however, to expand the scope of that heightened service requirement.

In response to publication of the amendment to Rule 3007(a)(2)(A)(ii), the only comment submitted was the general statement by the NCBJ that it "supports the amendments." Accordingly, the Advisory Committee voted unanimously to recommend that the Standing Committee give final approval to the rule as published.

Action Item 3. Rule 7007.1 (Corporate Ownership Statement). Continuing the advisory committees' efforts to conform the various disclosure-statement rules to the amendments made to FRAP 26.1, which went into effect in December, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1. Similar amendments to Rule 8012—the bankruptcy appellate disclosure-statement rule—have been sent to Congress. Rule 7007.1 requires corporate-ownership disclosure in the bankruptcy court and is proposed for amendment to parallel the relevant amendments to Civil Rule 7.1 that were also published last August. Like that rule, amended Rule 7007.1 would be made applicable to nongovernmental corporations seeking to intervene and would no longer require the submission of two copies of the statement.

Two comments were submitted in response to publication. The first, submitted by Aderant, suggested that the word "shall" be changed to "must" to conform to the wording of the parallel rules. The Advisory Committee concluded that this change should be made when the Part VII rules are restyled. In the meantime, the Bankruptcy Rules (other than Part VIII) are continuing to use "shall" rather than "must" so that the change can be made at the same time throughout the rules and not on a piecemeal basis.

The other comment was submitted by the NCBJ. It suggested that, rather than conforming to Civil Rule 7.1's terminology "disclosure statement," Rule 7007.1 should retain the terminology "corporate ownership statement." It pointed out that "disclosure statement" is a bankruptcy term of art with a different meaning and that there are five other Bankruptcy Rule references to Rule 7007.1 that use the term "corporate ownership statement."

The Advisory Committee agreed with the NCBJ and voted unanimously to approve Rule 7007.1 with the current title retained and the word "disclosure" in subdivision (b) changed to "corporate ownership."

Action Item 4. Rule 9036 (Notice and Service Generally). For several years, the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic noticing and service in the bankruptcy courts. One set of amendments to Rule 9036 went into effect on December 1, 2019. Proposed amendments to Rule 2002(g) and Official Form 410 that were published along with the 2019 amendments to Rule 9036—authorizing creditors to designate an email address on their proofs of claim for receipt of notices and service—were held in abeyance by the Advisory Committee for further consideration. Additional amendments to Rule 9036 were published for public comment last August.

The recently published amendments to Rule 9036 would encourage the use of electronic noticing and service in several ways. The rule would recognize a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. In anticipation of the simultaneous amendments of Rule 2002(g) and Official Form 410, it would also allow courts and parties to serve or provide notice to a creditor at an email address designated on its proof of claim. And it would provide a set of priorities for electronic noticing and service for situations in which a recipient had provided more than one electronic address to the courts.

Seven sets of comments were submitted regarding the proposed amendments to Rule 9036. Most of them were from clerks of court or their staff, and they expressed several concerns about the proposed amendments to Rule 9036, as well as to the earlier published amendments to Rule 2002(g) and Official Form 410.

There was enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. No comments expressed opposition to it or concerns about it.

Many clerks, however, expressed opposition to several other aspects of the proposed Rule 9036 amendments. In addition to individual commenters, commenters included the Bankruptcy Clerks Advisory Group, the Bankruptcy Noticing Working Group, and an ad hoc group of 34 clerks of court. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

Clerk monitoring of email bounce-backs. Proposed Rule 9036(d) provides that "[e]lectronic notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served." One clerk expressed concern that this provision imposes an administrative burden on the clerk's office by requiring it to monitor undeliverable emails. He advocated for the addition of a sentence to subdivision (d) that would relieve clerks of that burden. No other comments raised this concern.

The Advisory Committee noted that the provision to which objection was raised is also included in the version of Rule 9036 that went into effect in December. The same provision is

also in Rule 8011(c)(3), which became effective in 2018. In considering the provision in Rule 8011, the Advisory Committee spent considerable time discussing this provision, and it determined that all users of electronic noticing and service—clerks as well as parties—should be required to make effective service or noticing, which means continuing their efforts if they become aware that their prior attempt failed. The Advisory Committee voted not to change the language in question.

It did, however, decide that the other part of the comment's suggestion—that an additional sentence be added that would make the electronic notice recipient responsible for maintaining and updating its electronic address with the bankruptcy clerk—would be helpful. That directive could reduce the number of bounce-backs. The Advisory Committee therefore voted to add the following sentence to the end of subdivision (d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

Administrative burden of allowing a creditor to opt-in to email noticing and service on its proof of claim. This was the chief concern of the clerks and the Bankruptcy Noticing Working Group and was a concern that was expressed when the amendments to Rules 2002(g), 9036, and Form 410 were published in 2017. Without an automated process to retrieve email addresses in proofs of claim, clerks say that they will have to manually review every proof of claim to determine if the email box was checked and an email address was listed. According to one clerk, even automation will not solve all the problems because paper proofs of claim will still be filed, and they will contain errors and illegible entries that will require staff time to resolve. Several of the comments noted that the high-volume paper-notice program will produce significant savings for the courts, and that any savings resulting from low-volume users opting into email notice will be outweighed by administrative costs.

The proposal for email opt-in on proofs of claim would not be just for the benefit of the judiciary, which already has the Electronic Bankruptcy Noticing program. Instead, it was also intended to benefit parties, who could save mailing costs in serving creditors who opt into email notice. Because parties cannot be forced to accept electronic service and notice, an opt-in procedure seemed to be the best approach. And providing that opportunity in the proof of claim seemed the best mechanism to pursue since Rule 2002(g)(1)(A) already provides that "a proof of claim filed by a creditor . . . that designates a mailing address constitutes a filed request to mail notices to that address." Under subdivision (g)(1) of that rule, notices required to be mailed to a creditor "shall be addressed as such entity . . . has directed in its last request filed in the particular case." The amendment to Rule 2002(g) published in 2017 would expand that rule to include email addresses, and Rule 9036 would recognize transmission to that email address as a proper means of service or noticing.

In deciding not to go forward in 2018 with the amendments to Rule 2002(g) and Form 410 that would provide for opting into email service, the Advisory Committee accepted the concerns that were raised then by clerks about the lack of an automated means of retrieving the designated email addresses. The Advisory Committee was told then that such automation would not be feasible until 2021. The decision in 2019 to propose the new amendments to 9036, with the anticipation that approval would also be sought for the Rule 2002(g) and Form 410 amendments, was made with the expectation that automation would be feasible by the amendments' December 1, 2021 effective date.

One clerk said, however, that even with automation, the burden on the clerk's office will still be too great because of the number of paper proofs of claim that will be filed. While the comment from the Bankruptcy Noticing Working Group suggested some ways that burden might be reduced, the Advisory Committee decided that the proof-of-claim check-box option should not be pursued. Deciding not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, and deleting references to that option in Rule 9036, would allow the courts to receive the benefits of the high-volume paper-notice program, which is anticipated to result in significant savings to the judiciary, without imposing what many clerks perceive as an undue burden on them of having to review proofs of claim for email addresses. This approach does not provide any benefit to parties, however, because they will not have access to electronic addresses registered with the BNC, but it is anticipated that future improvements to CM/ECF will allow the entry of email addresses in a way that will be accessible to parties as well as to those within the court system. Language proposed by the Subcommittee in Rule 9036(b)(2) would allow for that future possibility. Accordingly, the Advisory Committee voted unanimously to approve the revised version of the published amendments to Rule 9036 that is set forth in the appendix.

Interplay of the proposed amendments to Rules 2002(g) and 9036. Given the Advisory Committee's recommendation not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, this concern raised by the comments is no longer an issue.

(A2) Conforming form amendments for which retroactive approval is sought.

Action Item 5. The Advisory Committee recommends that the Standing Committee retroactively approve and provide notice to the Judicial Conference of the amendments to Official Forms 101 (Voluntary Petition for Individual Filing for Bankruptcy), 201 (Voluntary Petition for Non-Individual Filing for Bankruptcy), 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period), which are discussed below. The forms as amended are in Bankruptcy Appendix A.

On March 27, 2020, President Trump signed the CARES Act, which made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the coronavirus crisis. These changes affect the bankruptcy forms as described below.

New Definition of Debtor in § 1182(1). The CARES Act modifies the definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Previously, § 1182(1) defined "debtor" under subchapter V as "a small business debtor." A "small business debtor" is defined in § 101(51D) and includes the limitation that the prospective debtor have "aggregate noncontingent liquidated secured and unsecured debts . . . in an amount not more than $2,725,625" (a figure subject to adjustment every three years under § 104). Under the CARES Act, § 1182(1) was amended to include a separate definition of "debtor" for subchapter V purposes that is identical to the definition for "small business debtor" in all respects except that the debt limitation is $7,500,000. The CARES Act also amended § 103(*i*) to provide that subchapter V of chapter 11 applies to a "debtor (as defined in section 1182(1))" who elects such treatment, rather

than a "small business debtor" who so elects. The definition of "debtor" in § 1182(1) will revert to its prior version one year after the effective date of the CARES Act.

Form 101. Previously Form 101, line 13, asked the debtor whether he or she intended to file under chapter 11, whether he or she was a small business debtor, and if so whether he or she intended to elect treatment under subchapter V of chapter 11. Because of the new definition of "debtor" in § 1182(1), line 13 was modified to ask not only whether the individual debtor is a small business debtor, but also whether he or she is a debtor as defined in § 1182(1) and whether he or she wishes to proceed under subchapter V.

Form 201. Form 201, line 8, previously asked a debtor filing under chapter 11 to check a box if its aggregate debts were less than $2,725,625. The debtor was also asked to check a box if the debtor was a small business debtor, and an additional box if the debtor was a small business debtor that elected subchapter V treatment. Because of the amended definition of "debtor" in § 1182(1), line 8 was modified to add a box for the debtor to check if its aggregate debts are less than $7,500,000 (the figure in the definition of "debtor" in § 1182(1)) and it elects subchapter V treatment. The language permitting such an election with respect to "small business debtors" was deleted. A small business debtor will always fall within definition of debtor for subchapter V, so it can check the box electing subchapter V treatment. But the court will need to know if it is a small business debtor that does not elect to proceed under subchapter V because special provisions of chapter 11 will apply.

Amendments to Definitions of Current Monthly Income and Disposable Income. The CARES Act amends the definition of "current monthly income" in § 101(10A)(B)(ii) to add a new exclusion from the computation of "current monthly income" for "[p]ayments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).'' An identical exclusion was inserted in § 1325(b)(2) for computing disposable income. As a result, the new exclusion was inserted in Forms 122A-1, 122B, and 122C-1. The exclusion appears in line 10 of each of the amended forms. These amendments have a duration of one year after the effective date of the CARES Act, at which time we will revert to the former version of these forms.

B. Items for Publication

The Advisory Committee recommends that the following rule amendments be published for public comment in August 2020. The rules in this group appear in Bankruptcy Appendix B.

Action Item 6. Restyled Parts I and II. The restyled rules are the product of intensive and collaborative work between the style consultants, who produced the initial drafts, and the Reporters and Restyling Subcommittee of the Advisory Committee, who provided comments to the style consultants on those drafts. Each set of rules was the subject of several reviews by all parties, including many telephonic and Skype meetings by the Subcommittee to look at drafts while revisions were made and drafting issues discussed.

The Advisory Committee has endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the Reporters and Subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rules changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer."

On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, we have recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matter of Pure Style*. Although the Subcommittee made many suggestions of ways to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee has committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. When Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, it included the following provision:

> SEC. 321. Rule 2002 of the Bankruptcy Rules is amended by adding at the end thereof the following new subdivision:
>
> "(n) In a voluntary case commenced under the Code by an individual debtor whose debts are primarily consumer debts, the clerk, or some other person as the court may direct, shall give the trustee and all creditors notice by mail of the order for relief not more than 20 days after the entry of such order."

Other Bankruptcy Rules that were enacted by Congress in whole or in part are Rules 2002(f), 3001(g), and 7004(h). The Advisory Committee concluded that, even if it has the authority to

restyle statutory rules under the Rules Enabling Act, 28 U.S.C. § 2075, it would not be advisable to challenge Congressional authority in connection with this project.

Although the Advisory Committee requests that the restyled rules be published for public comment in August 2020, none of the restyled rules will submitted to the Judicial Conference until all of the rules have been restyled and published for comment and given final approval by the Advisory Committee and the Standing Committee.

Action Item 7. SBRA Rules. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act of 2019 took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. Now the Advisory Committee has begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment this summer, along with the SBRA form amendments.

The SBRA rules consist of the following:

- **Rule 1007** (Lists, Schedules, Statements, and Other Documents; Time Limits),
- **Rule 1020** (Small Business Chapter 11 Reorganization Case),
- **Rule 2009** (Trustees for Estates When Joint Administration Ordered),
- **Rule 2012** (Substitution of Trustee or Successor Trustee; Accounting),
- **Rule 2015** (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- **Rule 3010** (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- **Rule 3011** (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- **Rule 3014** (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- **Rule 3016** (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- **Rule 3017.1** (Court Consideration of Disclosure Statement in a Small Business Case),
- **new Rule 3017.2** (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- **Rule 3018** (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- **Rule 3019** (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

Because the interim rules had just recently gone into effect when the Advisory Committee met, there had been little experience with them. As a result, the only suggested changes of which the Advisory Committee was aware were a few stylistic changes to Rules 3017.2 and 3019 suggested by the style consultants.

The only concern the Advisory Committee had about the stylistic suggestions was that the proposed change to Rule 3019(c)—changing "MODIFICATION OF" to "MODIFYING"—would make that title inconsistent with the titles of subdivision (a) (MODIFICATION OF PLAN BEFORE CONFIRMATION) and subdivision (b) (MODIFICATION OF PLAN AFTER CONFIRMATION IN INDIVIDUAL DEBTOR CASE). The Committee concluded that the title of (c) should be kept as it is for now and that the style consultants' change should be made to all of the subdivisions in the restyling process. With that exception, the Advisory Committee approved the SBRA rules for publication with the changes recommended by the style consultants.

Action Item 8. Rule 3002(c)(6) (Time for Filing Proof of Claim). Rule 3002 requires creditors to file proofs of claim for their claims to be allowed, and it specifies in subdivision (c) the deadline for filing those proofs of claim in cases filed under chapter 7, 12 and 13. Rule 3002(c) then provides certain exceptions, including for domestic creditors, in paragraph (6)(A), when "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)." Because failure to timely file the list of creditors' names and addresses required by Rule 1007(a) is grounds for dismissal of a bankruptcy case, the situation described in that exception is unlikely to exist. The Advisory Committee therefore proposes amending Rule 3002(c)(6) to allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." That is the standard now applicable to foreign creditors under Rule 3002(c)(6)(B).

Action Item 9. Rule 5005 (Filing and Transmittal of Papers). Amendments to Rule 9036 that went into effect in December 2019 would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. The rule also allows service or noticing on any entity by any electronic means consented to in writing by that person.

Transmittal of papers to the U.S. trustee is governed by Rule 5005(b), which requires that such papers be "mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee" and that the entity transmitting the paper file as proof of transmittal a verified statement. The proposed amendments to Rule 5005(b) conform this U.S. trustee-specific rule to both amended Rule 9036 and current bankruptcy practice under Rule 5005(b). The proposed changes, which are supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means, and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Action Item 10. Rule 7004 (Process; Service of Summons, Complaint). The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title. The proposed amendments are consistent with an Advisory Committee Note to its predecessor, Rule 704, that explicitly stated:

> In serving a corporation or partnership or other unincorporated association by mail pursuant to paragraph (3) of subdivision (c), **it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title**.

(Emphasis supplied).

When the Bankruptcy Rules were revised following the enactment of the Bankruptcy Reform Act of 1978, and Rule 704 became 7004, the original Advisory Committee Note to Rule 704 was no longer included in the published version. The absence of the original Advisory Committee Note has created confusion, and because Advisory Committee Notes cannot be amended without an amendment to the Rule itself, the proposed amendments insert the substance of the former Advisory Committee Note into proposed Rule 7004(*i*).

Action Item 11. Rule 8023 (Voluntary Dismissal). At the meeting of the Standing Committee on June 25, 2019, the Advisory Committee on Appellate Rules presented proposed amendments to Rule 42(b) dealing with voluntary dismissals. The amended version is intended to make dismissal mandatory upon agreement by the parties, as the rule stated prior to its restyling. It also intends to clarify that a court order is required for any action other than a simple dismissal. The rule does not change applicable law requiring court approval of settlements, payments, or other consideration. The revised Rule 42(b) was published for comment last August.

Bankruptcy Rule 8023 was modeled on Rule 42(b), and the proposed amendments are intended to make conforming changes to Rule 8023.

Action Item 12. SBRA Forms. The new and amended forms that the Advisory Committee promulgated in response to the enactment of SBRA took effect on February 19, 2020, the effective date of the Act. Unlike the interim SBRA rules, the forms were officially issued—under the Advisory Committee's delegated authority to make conforming and technical amendments to Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. Nevertheless, the Advisory Committee committed to publishing them for comment this summer, along with the SBRA rule amendments, in order to ensure that the public has a thorough opportunity to review them.

The current SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),

- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

The Advisory Committee was aware of only one suggestion for a needed change, and that change is to an additional form. A staff member at the Administrative Office of the Courts pointed out the need to add an exception to the instructions set out at the beginning of Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). It currently begins, "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11." That statement is incorrect for individuals filing under subchapter V of chapter 11. Section 1191(a) and (b) of the Code make § 1129(a)(15) inapplicable in subchapter V cases. The latter provision makes an individual debtor's current monthly income generally relevant in chapter 11 cases because it bases projected disposable income on that amount. In subchapter V cases, however, § 1191(d) defines disposable income without reference to current monthly income. Therefore, the instructions to Official Form 122B need to express an exception for subchapter V cases.

The Advisory Committee approved amending the first sentence of those instructions as follows: "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 (other than under subchapter V)."[3]

The Advisory Committee unanimously voted to seek publication of the amendment to Official Form 122B and the SBRA forms listed above.

III. Information Items

Information Item 1. Amendment to Interim Rule 1020 in Response to the CARES Act. The enactment of the CARES Act required amendment of one bankruptcy rule—Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V). Bankruptcy Rule 1020 provides procedural rules for "small business chapter 11 reorganization cases." In response to the enactment of SBRA, which took effect in February 2020, all districts adopted an interim Rule 1020 that reflects the new option for a small business debtor to proceed under subchapter V of chapter 11. Subsequently, in response to the CARES Act, that interim rule had to be modified for one year to include references to "a debtor as defined in § 1182(1) of the Code." Although a small business debtor (debts not more than $2,725,625) will always satisfy the definition of debtor in § 1182(1) (debts not more than $7,500,000), a debtor's status as a small business debtor must still be designated because special provisions of the Code apply to such debtors who do not elect to proceed under subchapter V of chapter 11.

[3] A similar change was needed for the instruction booklet—Bankruptcy Forms for Individuals. Because those instructions are issued by the Administrative Office of the Courts outside the rulemaking process, Rules Counsel Scott Myers made that correction.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the following recommendations of the Advisory Committee:

> **The Advisory Committee recommends that amendments to the existing interim Rule 1020 be approved as set out in the attachment to this [April 6, 2020] report and that the Standing Committee request approval from the Executive Committee of the Judicial Conference to distribute the new interim rule to the district and bankruptcy courts for adoption.**

Following the Standing Committee's approval, the chairs of the Standing and Advisory Committees requested the Executive Committee of the Judicial Conference to "act on an expedited basis on behalf of the Judicial Conference to authorize distribution of Interim Rule of Bankruptcy Procedure 1020 to the courts so it can be adopted locally." Memorandum of April 13, 2020, from the Chairs of the Standing Committee and the Advisory Committee to the Executive Committee of the Judicial Conference. On April 14, we were informed that the Executive Committee had unanimously approved the request of the Committees as submitted.

A memorandum from the chairs of the Standing Committee and the Advisory Committee was sent to all chief judges of the district and bankruptcy courts on April 20. The memorandum included a copy of the amended interim rule and requested that it be adopted locally to implement the CARES Act. A copy of the Advisory Committee's April 6 Report to the Standing Committee and the amended interim rule are attached as Bankruptcy Appendix C. The amended interim rule has also been posted on the federal courts' website.

Information Item 2. Director's Forms for Subchapter V Discharge. The Bankruptcy Clerks' Advisory Group suggested that it would be helpful to have one or more form orders of discharge for subchapter V cases. Previously the only chapter 11 discharge form was for individual debtors (Director's Form 3180RI). That form was not appropriate in its entirety for subchapter V cases because the scope of discharge differs.

The Advisory Committee decided that, as with the other discharge-order forms, forms adopted for subchapter V cases should be Director's Forms in order to allow individual courts flexibility in using them. It approved three forms. One is for an individual case in which confirmation is consensual under § 1191(a). In those cases, discharge is governed by § 1141(d)(1)-(4). If, however, the plan is confirmed nonconsensually under § 1191(b), § 1192 governs the discharge. Two different forms are proposed for that situation, one for individuals and another for corporations and partnerships.

The Advisory Committee decided that a form order should be created for individual cases in which confirmation is consensual under § 1191(a), even though there is no statutory mandate for the court to enter a discharge order. (Section 1141(d)(1) says that "confirmation of a plan . . . discharges the debtor.") Members concluded that it would be useful for individual debtors to have a document that demonstrates that they have received a discharge.

With respect to cases in which the plan is confirmed under § 1191(b), § 1192 requires that "the court shall grant the debtor a discharge" after the requisite payments have been made. The Advisory Committee approved two forms for this situation. There are differences in the scope of the discharge for individuals and for corporations and partnerships, and so different explanations are required.

APPENDIX A

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Appendix A-1

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

Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination.

* * * * *

(c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the relevant provisions and policies of title 18~~,~~ U.S.C.~~,~~ § ~~3146(a) and (b)~~ 3142.

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

Committee Note

The rule is amended to replace the reference to 18 U.S.C. § 3146(a) and (b) with a reference to 18 U.S.C. § 3142. Sections 3141 through 3151 of Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is in 18 U.S.C. § 3142. Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the "relevant" provisions and policies of § 3142.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- **National Conference of Bankruptcy Judges (BK-2019-0012)** – Expressed general support for the amendment.

Rule 3007. Objections to Claims

(a) TIME AND MANNER OF SERVICE

* * * * *

(2) *Manner of Service.*

(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; and

* * * * *

(ii) if the objection is to a claim of an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act, in the manner provided in Rule 7004(h).

* * * * *

Committee Note

Subdivision (a)(2)(A)(ii) is amended to clarify that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994. It applies only to insured depository institutions that are insured by the Federal Deposit Insurance Corporation and does not include credit unions, which are instead insured by the National Credit Union Administration. A credit union, therefore, may be served with an objection to a claim according to Rule 3007(a)(2)(A)—by first-class mail sent to the person designated for receipt of notice on the credit union's proof of claim.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- **National Conference of Bankruptcy Judges (BK-2019-0012)** – Expressed general support for the amendment.

Rule 7007.1. Corporate Ownership Statement

(a) REQUIRED DISCLOSURE. Any nongovernmental corporation that is a party to an adversary proceeding, other than the debtor, ~~or a governmental unit,~~ shall file ~~two copies of~~ a statement that identifies any parent corporation and any publicly held corporation~~, other than a governmental unit, that directly or indirectly~~ that owns 10% or more of ~~any class of the corporation's equity interests,~~ its stock or states that there ~~are no entities to report under this subdivision~~ is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. ~~A party shall file the~~ The corporate ownership statement shall: ~~required under Rule 7007.1(a)~~

(1) be filed with ~~its~~ the corporation's first appearance, pleading, motion, response, or other request addressed to the court~~.~~; and

(2) be supplemented whenever the information required by this rule changes ~~A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose~~.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. Bankr. P. 8012, Fed. R. App. P. 26.1., and Fed. R. Civ. P. 7.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene. Stylistic changes are made to subdivision (b) to reflect that some statements will be filed by nonparties seeking to intervene.

Changes Made After Publication and Comment

- The existing title of the rule was retained.
- In line 15 the word "disclosure" was changed to "corporate ownership."

Summary of Public Comment

National Conference of Bankruptcy Judges (BK-2019-0002-0012) – Rather than conforming to Civil Rule 7.1's terminology "disclosure statement," Rule 7007.1 should

retain the terminology "corporate ownership statement." "Disclosure statement" is a bankruptcy term of art with a different meaning. There are 5 other Bankruptcy Rule references to Rule 7007.1 that use the term "corporate ownership statement."

Cheryl Siler (Aderant) (BK-2019-0002-0013) – In order to ensure consistency among all the Federal Rules relating to disclosure statements, we suggest that the word "shall" be revised to "must." This change would align FRBP 7007.1(a) with the language used in Federal Rule of Civil Procedure 7.1(a)(1), Federal Rule of Bankruptcy Procedure 8012(a), and Federal Rule of Appellate Procedure 26.1(a).

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Rule 9036. Notice and Service ~~Generally~~ by Electronic Transmission

(a) IN GENERAL. This rule applies ~~W~~whenever these rules require or permit sending a notice or serving a paper by mail or other means.~~, the clerk, or some other person as the court or these rules may direct, may send the notice to or serve the paper on~~

(b) NOTICES FROM AND SERVICE BY THE COURT.

(1) *Registered Users.* The clerk may send notice to or serve a registered user by filing the notice or paper ~~it~~ with the court's electronic-filing system.

(2) *All Recipients.* For any recipient, the clerk may send notice or serve a paper ~~Or it may be sent to any person~~ by ~~other~~ electronic means that the ~~person~~ recipient consented to in writing, including by designating an electronic address for receipt of notices. But these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk shall send the notice to or serve the paper at that address; and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the paper electronically at an address designated by the Director, unless the entity has designated an address under § 342(e) or (f) of the Code.

(c) NOTICES FROM AND SERVICE BY AN ENTITY. An entity may send notice or serve a paper in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).

(d) COMPLETING NOTICE OR SERVICE. ~~In either of these events,~~ Electronic ~~service or~~ notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. It is the recipient's responsibility to keep its electronic address current with the clerk.

(e) INAPPLICABILITY. This rule does not apply to any ~~pleading or other~~ paper required to be served in accordance with Rule 7004.

Committee Note

The rule is amended to take account of the Administrative Office of the United States Courts' program for providing notice to high-volume paper-notice recipients. Under this program, when the Bankruptcy Noticing Center ("BNC") has sent by mail more than a designated number of notices in a calendar month (initially set at 100) from bankruptcy courts to an entity, the Director of the Administrative Office will notify the entity that it is a high-volume paper-notice recipient. As such, this "threshold notice" will inform the entity that it must register an electronic address with the BNC. If, within a time specified in the threshold notice, a notified entity enrolls in Electronic Bankruptcy Noticing with the BNC, it will be sent notices electronically at the address maintained by the BNC upon a start date determined by the Director. If a notified entity does not timely enroll in Electronic Bankruptcy Noticing, it

will be informed that court-generated notices will be sent to an electronic address designated by the Director. Any designation by the Director, however, is subject to the entity's right under § 342(e) and (f) of the Code to designate an address at which it wishes to receive notices in chapter 7 and chapter 13 cases, including at its own electronic address that it registers with the BNC.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. Only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program, and any such address will supersede for court-generated notices an electronic address specified on a proof of claim.

The title of the rule is revised to more accurately reflect the rule's applicability to methods of electronic noticing and service. Rule 9036 does not preclude noticing and service by physical means otherwise authorized by the court or these rules.

Changes Made After Publication and Comment

- In line 18 a reference to Rule 2002(g)(1) was deleted.

- The last sentence in subdivision (d) was added.

- Conforming amendments were made to the Committee Note.

Summary of Public Comment

Rob Lawson (Clerk's Office, Bankr. W.D. Tex.) (BK-2019-0002-0003) – Rule 9036(b)(2) should be revised to require an electronic-notice recipient to maintain and update its electronic address with the bankruptcy clerk. Furthermore, subdivision (c) should state, "The clerk is not required to monitor and act on undelivered notices sent through the court's electronic-filing system." Requiring the clerk's office to monitor bounced-back email notices imposes an administrative burden on it.

Dana McWay (Clerk, Bankr. E.D.Mo.) (BK-2019-0002-0008) – Submitted on behalf of herself and 33 other clerks of court. We support the proposed revision to Rule 9036 that mandates electronic noticing for high-volume paper-notice recipients. But the proposed changes to this rule, Rule 2002(g), and Form 410 that would allow a creditor to designate an email address on its proof of claim for service or notice are "unneeded, problematic, and not supportable." The mandate of electronic noticing for high-volume paper-notice recipients contained in the proposed revised Rule 9036 will serve to accomplish moving the largest volume of notice recipients from paper to electronic in a manner that is efficient, automated, and does not require human intervention. By contrast, adding a check box and area for an email address on the proof of claim form is neither efficient nor automated and will do little, if anything, to increase the use of EBN. Both the check box and area for an email address introduce the opportunity for a multitude of mistakes by the person completing the proof of claim form, ranging from illegible and unreadable handwriting to

transposed lettering and formatting errors. Costly and inefficient human intervention will be required to resolve the errors. Even if CM/ECF and other software programs are modified to accommodate the proposed changes, a large volume of proofs of claim will still be received in clerk's offices in paper format, requiring the need for human intervention.

Wesley Scott (attorney) (BK-2019-0002-0009) and (**BK-2019-0002-0011)** – Initially opposed the amendments but upon reconsideration supports. Questions how debtor's attorney will know who is registered to get electronic notice through BNC.

David Zimmerman on behalf of the Bankruptcy Noticing Working Group (BK-2019-0002-0010) – BNWG enthusiastically supports Rule 9036(b)'s provisions for electronic service on high-volume paper-notice recipients. However, increasing electronic noticing among low-volume paper-notice recipients benefits the judiciary only if it is automated. Amended Rules 9036(b) and 2002(g)(1) would introduce unnecessary, relatively expensive administrative costs that would reduce or outweigh cost savings of converting to electronic noticing. The increased labor costs of reviewing every claim would promptly roll back the hard-won cost savings that courts have enjoyed from the highly successful EBN program. Before the proposed rule changes take effect, the following changes should be implemented: (1) CM/ECF must be updated to allow for an email address to be entered for each creditor and party in each case. (2) Claimants who designate an email address for noticing on a proof of claim form should also be required to provide a mailing address, and all entities (including courts) should have the flexibility to serve notices to that creditor either electronically at the designated email address or in paper form at the designated mailing address. (3) Creditors who

want to use a claim form to register for electronic notice should be required to electronically file the proof of claim and enter their email address in CM/ECF at the time they file it. (4) Official Form 410 should be further amended to include language that encourages filers to register for EBN and to file the claim electronically rather than filing it in paper. Finally, proposed amendments to Rule 2002(g)(1) should only be implemented if Rule 9036(b) is amended.

NCBJ (BK-2019-0002-0012) – Includes this rule within its general statement of support for the published amendments.

Ryan Johnson (Clerk, Bankr. N.D. W. Va.) (BK-2019-0002-0014) – To the extent that Rules 2002(g)(1), 9036(b)(2) and Official Form 410 are permissive and not mandatory. To the extent that the proposed amendments are intended to impose a mandatory requirement for a clerk to effect electronic service and notice by using an email address submitted on a proof of claim form, this clerk's office, at this time, lacks the means and resources to make such a program successful. But even if our clerk's office cannot immediately avail itself of Rule 9036(b)(2)'s electronic notice and service initiative, we would like to see this option made available to parties in interest through Rule 9036(c). Finally, the proposed amendments to Official Form 410 may inadvertently permit a creditor to only designate an email address for the receipt of notices such as by leaving the physical address lines blank, thus making email the only possible method of service of notice.

Ken Gardner on behalf of the Bankruptcy Clerks Advisory Group (BK-2019-0002-0015) – BCAG supports the comments made by David Zimmerman on behalf of the Bankruptcy Noticing Working Group.

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Appendix A-2

The following form amendments were approved under the Advisory Committee's delegated authority to make technical and conforming changes to official forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. These amendments were necessitated by changes made to the Bankruptcy Code in the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter you are filing under:

❑ Check if this is an amended filing

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 04/20

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name

3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____
	About Debtor 1:	**About Debtor 2 (Spouse Only in a Joint Case):**
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code

6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

8. How you will pay the fee

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

❑ No
❑ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY
  Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a *small business debtor* or a debtor as defined by 11 U.S. C. § 1182(1)?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor or a debtor choosing to proceed under Subchapter V so that it can set appropriate deadlines. If you indicate that you are a small business debtor or you are choosing to proceed under Subchapter V, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- ❑ Yes. I am filing under Chapter 11, I am a debtor according to the definition in § 1182(1) of the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Committee Note

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law provides a new definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Line 13 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check one box only as directed in this form and in Form 122A-1Supp:

- ❑ 1. There is no presumption of abuse.
- ❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 122A–2).
- ❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 122A–1

Chapter 7 Statement of Your Current Monthly Income

04/20

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

				Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5.	**Net income from operating a business, profession, or farm**	**Debtor 1**	**Debtor 2**		
	Gross receipts (before all deductions)	$_____	$_____		
	Ordinary and necessary operating expenses	– $_____	– $_____		
	Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** ➔ $_____	$_____
6.	**Net income from rental and other real property**	**Debtor 1**	**Debtor 2**		
	Gross receipts (before all deductions)	$_____	$_____		
	Ordinary and necessary operating expenses	– $_____	– $_____		
	Net monthly income from rental or other real property	$_____	$_____	**Copy here** ➔ $_____	$_____
7.	**Interest, dividends, and royalties**			$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ➔		
For you	$_____	
For your spouse	$_____	
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11. **Copy line 11 here** ➔ $_____

Multiply by 12 (the number of months in a year). **x** 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. 13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3. Do NOT fill out or file Official Form 122A-2.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 122A-2.* Go to Part 3 and fill out Form 122A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A–2.

If you checked line 14b, fill out Form 122A–2 and file it with this form.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

04/20

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** ➔	$_____	$_____

6. **Net income from rental and other real property**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here** ➔	$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ + $_____ = $_____ **Total current monthly income**	

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 122C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

04/20

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**

	Debtor 1	Debtor 2			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** ➔	$_____	$_____

6. **Net income from rental and other real property**

	Debtor 1	Debtor 2			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here** ➔	$_____	$_____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔

For you ..... $_____

For your spouse ..... $_____

9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title. $_____ $_____

10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.

_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____

11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

$_____ + $_____ = $_____

Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 below.
- ❑ You are married and your spouse is filing with you. Fill in 0 below.
- ❑ You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

_____	$_____
_____	$_____
_____	+ $_____
Total	$_____ Copy here ➔ −_____

14. **Your current monthly income.** Subtract the total in line 13 from line 12. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. ..... $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Your Disposable Income* (Official Form 122C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13.

19a. If the marital adjustment does not apply, fill in 0 on line 19a. ..... – $_____

19b. **Subtract line 19a from line 18.** $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. ..... $_____

Multiply by 12 (the number of months in a year). **x** 12

20b. The result is your current monthly income for the year for this part of the form. $_____

20c. Copy the median family income for your state and size of household from line 16c..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

☐ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C–2.

If you checked 17b, fill out Form 122C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

Committee Note

Official Forms 122A-1, 122B, and 122C-1 are amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law modifies the definition of "current monthly income" in §101(10A) and the definition of "disposable income" in §1325(b)(2) to exclude "payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19)." Each form is modified to expressly exclude these amounts from line 10. These amendments will terminate one year after the date of enactment of the CARES Act.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

☐ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 04/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. **Debtor's name** _____

2. **All other names debtor used in the last 8 years**
   Include any assumed names, trade names, and *doing business as* names
   _____
   _____
   _____
   _____
   _____

3. **Debtor's federal Employer Identification Number** (EIN) __ __ – __ __ __ __ __ __ __

4. **Debtor's address**

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. **Debtor's website** (URL) _____

6. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes .

___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check **all** that apply*:
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____
  District _____ When _____
  MM / DD / YYYY
  Case number, if known _____

11. Why is the case filed in *this district*?

Check all that apply:

- ❑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- ❑ No
- ❑ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

- ❑ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
  What is the hazard? _____
- ❑ It needs to be physically secured or protected from the weather.
- ❑ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- ❑ Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

- ❑ No
- ❑ Yes. Insurance agency _____
  Contact name _____
  Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- ❑ Funds will be available for distribution to unsecured creditors.
- ❑ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

15. Estimated assets

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

16. Estimated liabilities

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition 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 _____
MM / DD / YYYY

✘ _____ _____
Signature of authorized representative of debtor Printed name

Title _____

18. Signature of attorney

✘ _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

Committee Note

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law provides a new definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Line 8 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

APPENDIX B

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Appendix B

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

For Publication for Public Comment

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

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Appendix B-1

Bankruptcy Rules Restyling

1000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

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ORIGINAL	REVISION
Rule 1001. Scope of Rules and Forms; Short Title	**Rule 1001. Scope; Title; Citations; References to a Specific Form**
The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.	**(a) In General.** These rules, together with the bankruptcy forms, govern the procedure in cases under the Bankruptcy Code, Title 11 of the United States Code. They must be construed, administered, and employed by both the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding. **(b) Title.** These rules should be referred to as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. **(c) Citations.** In these rules, the Bankruptcy Code is cited with a section sign and number (§ 101). A rule is cited with "Rule" followed by the rule number (Rule 1001(a)). **(d) References to a Specific Form.** A reference to a "Form" followed by a number is a reference to an Official Bankruptcy Form.
PART I—COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF	**PART I. COMMENCING A BANKRUPTCY CASE; THE PETITION AND ORDER FOR RELIEF**

ORIGINAL	REVISION
Rule 1002. Commencement of Case	**Rule 1002. Commencing a Bankruptcy Case**
(a) PETITION. A petition commencing a case under the Code shall be filed with the clerk.	**(a) In General.** A bankruptcy case is commenced by filing a petition with the clerk.
(b) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the petition filed pursuant to subdivision (a) of this rule.	**(b) Copy to the United States Trustee.** The clerk must promptly send a copy of the petition to the United States trustee.

ORIGINAL	REVISION
Rule 1003. Involuntary Petition	**Rule 1003. Involuntary Petition: Transferred Claims; Joining Other Creditors; Additional Time to Join**
(a) TRANSFEROR OR TRANSFEREE OF CLAIM. A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.	**(a) Transferred Claims.** An entity that has transferred or acquired a claim for the purpose of commencing an involuntary case under Chapter 7 or Chapter 11 is not a qualified petitioner. A petitioner that has transferred or acquired a claim must attach to the petition and to any copy: (1) all documents evidencing the transfer, whether it was unconditional, for security, or otherwise; and (2) a signed statement that: (A) affirms that the claim was not transferred for the purpose of commencing the case; and (B) sets forth the consideration for the transfer and its terms.
(b) JOINDER OF PETITIONERS AFTER FILING. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.	**(b) Joining Other Creditors After Filing.** If an involuntary petition is filed by fewer than 3 creditors and the debtor's answer alleges the existence of 12 or more creditors as provided in § 303(b), the debtor must attach to the answer: (1) the names and addresses of all creditors; and (2) a brief statement of the nature and amount of each creditor's claim. **(c) Additional Time to Join.** If there appear to be 12 or more creditors, the court must allow a reasonable time for other creditors to join the petition before holding a hearing on it.

ORIGINAL	REVISION
Rule 1004. Involuntary Petition Against a Partnership	**Rule 1004. Involuntary Petition Against a Partnership**
After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall promptly send to or serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.	A petitioner who files an involuntary petition against a partnership under § 303(b)(3) must promptly send the petition to—or serve a copy on—each general partner who is not a petitioner. The clerk must promptly issue a summons for service on any general partner who is not a petitioner. Rule 1010 governs the form and service of the summons.

ORIGINAL	REVISION
Rule 1004.1. Petition for an Infant or Incompetent Person	**Rule 1004.1. Voluntary Petition on Behalf of an Infant or Incompetent Person**
If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.	**(a) Represented Infant or Incompetent Person.** If an infant or an incompetent person has a representative—such as a general guardian, committee, conservator, or similar fiduciary—the representative may file a voluntary petition on behalf of the infant or incompetent person. **(b) Unrepresented Infant or Incompetent Person.** If an infant or an incompetent person does not have a representative: (1) a next friend or guardian ad litem may file the petition; and (2) the court must appoint a guardian ad litem or issue any other order needed to protect the interests of the infant debtor or incompetent debtor.

ORIGINAL	REVISION
Rule 1004.2. Petition in Chapter 15 Cases	**Rule 1004.2. Petition in a Chapter 15 Case**
(a) DESIGNATING CENTER OF MAIN INTERESTS. A petition for recognition of a foreign proceeding under chapter 15 of the Code shall state the country where the debtor has its center of main interests. The petition shall also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending.	**(a) Designating the Center of Main Interests.** A petition under Chapter 15 for recognition of a foreign proceeding must: (1) designate the country where the debtor has its center of main interests; and (2) identify each country in which a foreign proceeding is pending against, by, or regarding the debtor.
(b) CHALLENGING DESIGNATION. The United States trustee or a party in interest may file a motion for a determination that the debtor's center of main interests is other than as stated in the petition for recognition commencing the chapter 15 case. Unless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition. The motion shall be transmitted to the United States trustee and served on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor was a party as of the time the petition was filed, and such other entities as the court may direct.	**(b) Challenging the Designation.** The United States trustee or a party in interest may, by motion, challenge the designation. If the motion is filed by a party in interest, a copy must be sent to the United States trustee. Unless the court orders otherwise, the motion must be filed at least 7 days before the date set for the hearing on the petition. The motion must be served on: • the debtor; • all persons or bodies authorized to administer the debtor's foreign proceedings; • all entities against whom provisional relief is sought under § 1519; • all parties to pending United States litigation in which the debtor is a party when the petition is filed; and • any other entity as the court orders.

ORIGINAL	REVISION
Rule 1005. Caption of Petition	**Rule 1005. Caption of a Petition; Title of the Case**
The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the following information about the debtor: name, employer identification number, last four digits of the social-security number or individual debtor's taxpayer-identification number, any other federal taxpayer-identification number, and all other names used within eight years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.	**(a) Caption and Title; Required Information.** A petition's caption must contain the name of the court, the title of the case, and the docket number. The title must include the following information about the debtor: (1) name; (2) employer-identification number; (3) the last 4 digits of the social-security number or individual taxpayer-identification number; (4) any other federal taxpayer-identification number; and (5) all other names the debtor has used within 8 years before the petition was filed. **(b) Petition Not Filed by Debtor.** A petition not filed by the debtor must include all names that the petitioner knows have been used by the debtor.

ORIGINAL	REVISION
Rule 1006. Filing Fee	**Rule 1006. Filing Fee**
(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)–(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.	**(a) In General.** Unless (b) or (c) applies, every petition must be accompanied by: (1) the filing fee required by 28 U.S.C. § 1930(a)(1)–(5); and (2) any other fee that the Judicial Conference of the United States requires under 28 U.S.C. § 1930(b) to be paid upon filing.
(b) PAYMENT OF FILING FEE IN INSTALLMENTS. (1) Application to Pay Filing Fee in Installments. A voluntary petition by an individual shall be accepted for filing, regardless of whether any portion of the filing fee is paid, if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments. (2) Action on Application. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. (3) Postponement of Attorney's Fees. All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney or any other	**(b) Paying by Installment.** **(1)** *Application to Pay by Installment.* The clerk must accept for filing an individual's voluntary petition, regardless of whether any part of the filing fee is paid, if it is accompanied by a completed and signed application to pay in installments (Form 103A). **(2)** *Court Decision on Installments.* Before the meeting of creditors, the court may order payment of the entire filing fee or may order the debtor to pay it in installments, designating the number, amount, and payment dates. The number of payments must not exceed 4, and all payments must be made within 120 days after the petition is filed. The court may, for cause, extend the time to pay an installment, but the last one must be paid within 180 days after the petition is filed. **(3)** *Postponing Other Payments.* Until the filing fee has been paid in full, the debtor or Chapter 13 trustee must not make any further payment to an attorney or any other person who provides services to the debtor in connection with the case.

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person who renders services to the debtor in connection with the case.	
(c) WAIVER OF FILING FEE. A voluntary chapter 7 petition filed by an individual shall be accepted for filing if accompanied by the debtor's application requesting a waiver under 28 U.S.C. § 1930(f), prepared as prescribed by the appropriate Official Form.	**(c) Waiving the Filing Fee.** The clerk must accept for filing an individual's voluntary Chapter 7 petition if it is accompanied by a completed and signed application to waive the filing fee (Form 103B).[1]

ORIGINAL	REVISION
Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits	**Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File**
(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS. (1) Voluntary Case. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate. (2) Involuntary Case. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. (3) Equity Security Holders. In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 14 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder. (4) Chapter 15 Case. In addition to the documents required under § 1515	**(a) Lists of Names and Addresses.** **(1)** *Voluntary Case.* In a voluntary case, the debtor must file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H of the Official Bankruptcy Forms. Unless it is a governmental unit, a corporate debtor must: (A) include a corporate-ownership statement containing the information described in Rule 7007.1; and (B) promptly file a supplemental statement if changed circumstances make the original statement inaccurate. **(2)** *Involuntary Case.* Within 7 days after the order for relief has been entered in an involuntary case, the debtor must file a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H of the Official Bankruptcy Forms. **(3)** *Chapter 11—List of Equity Security Holders.* Unless the court orders otherwise, a Chapter 11 debtor must, within 14 days after the order for relief is entered, file a list of the debtor's equity security holders by class. The list must show the number and type of interests registered in each holder's name, along with the holder's last known address or place of business. **(4)** *Chapter 15—Information Required from a Foreign Representative.* If a foreign representative files a petition under Chapter 15 for recognition of a foreign proceeding, the representative

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of the Code, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition: (A) a corporate ownership statement containing the information described in Rule 7007.1; and (B) unless the court orders otherwise, a list containing the names and addresses of all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code. (5) Extension of Time. Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under § 705 or appointed under § 1102 of the Code, or other party as the court may direct.	must—in addition to the documents required by § 1515—include with the petition: (A) a corporate-ownership statement containing the information described in Rule 7007.1; and (B) unless the court orders otherwise, a list containing the names and addresses of: (i) all persons or bodies authorized to administer the debtor's foreign proceedings; (ii) all parties to pending United States litigation in which the debtor was a party when the petition was filed; and (iii) all entities against whom provisional relief is sought under § 1519. **(5)** *Extending the Time to File.* On motion and for cause, the court may extend the time to file any list required by this Rule 1007(a). Notice of the motion must be given to: • the United States trustee; • any trustee; • any committee elected under § 705 or appointed under § 1102; and • any other party as the court orders.
(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED. (1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed	**(b) Schedules, Statements, and Other Documents.** **(1)** *In General.* Except in a Chapter 9 case or when the court orders otherwise, the debtor must file—prepared as prescribed by the appropriate Official Form, if any— (A) a schedule of assets and liabilities;

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by the appropriate Official Forms, if any: (A) schedules of assets and liabilities; (B) a schedule of current income and expenditures; (C) a schedule of executory contracts and unexpired leases; (D) a statement of financial affairs; (E) copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social security number or individual taxpayer-identification number; and (F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code. (2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement. (3) Unless the United States trustee has determined that the credit counseling requirement of § 109(h) does not apply in the district, an individual debtor must file a statement of compliance with the credit counseling requirement, prepared as prescribed by the appropriate Official Form which must include one of the following:	(B) a schedule of current income and expenditures; (C) a schedule of executory contracts and unexpired leases; (D) a statement of financial affairs; (E) copies of all payment advices or other evidence of payment that the debtor received from any employer within 60 days before the petition was filed—with all but the last 4 digits of the debtor's social-security number or individual taxpayer-identification number deleted; and (F) a record of the debtor's interest, if any, in an account or program of the type specified in § 521(c). **(2)** ***Statement of Intention.*** In a Chapter 7 case, an individual debtor must: (A) file the statement of intention required by § 521(a) (Form 108); and (B) before or upon filing, serve a copy on the trustee and the creditors named in the statement. **(3)** ***Credit-Counseling Statement.*** Unless the United States trustee has determined that the requirement to file a credit-counseling statement under § 109(h) does not apply in the district, an individual debtor must file a statement of compliance (included in Form 101). The debtor must include one of the following: (A) a certificate and any debt-repayment plan required by § 521(b); (B) a statement that the debtor has received the credit-counseling

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(A) an attached certificate and debt repayment plan, if any, required by § 521(b); (B) a statement that the debtor has received the credit counseling briefing required by § 109(h)(1) but does not have the certificate required by § 521(b); (C) a certification under § 109(h)(3); or (D) a request for a determination by the court under § 109(h)(4). (4) Unless § 707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form. (5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form. (6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with § 1325(b)(3), prepared as prescribed by the appropriate Official Form.	briefing required by § 109(h)(1), but does not have a § 521(b) certificate; (C) a certification under § 109(h)(3); or (D) a request for a court determination under § 109(h)(4). **(4)** ***Current Monthly Income—Chapter 7.*** Unless § 707(b)(2)(D) applies, an individual debtor in a Chapter 7 case must: (A) file a statement of current monthly income (Form 122A-1); and (B) if that income exceeds the median family income for the debtor's state and household size, file the Chapter 7 means-test calculation (Form 122A-2). **(5)** ***Current Monthly Income—Chapter 11.*** An individual debtor in a Chapter 11 case must file a statement of current monthly income (Form 122B). **(6)** ***Current Monthly Income—Chapter 13.*** A debtor in a Chapter 13 case must: (A) file a statement of current monthly income (Form 122C-1); and (B) if that income exceeds the median family income for the debtor's state and household size, file the Chapter 13 calculation of disposable income (Form 122C-2). **(7)** ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3)

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(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition: (A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and (B) An individual debtor in a chapter 11 case shall file the statement if § 1141(d)(3) applies. (8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1), the debtor shall file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B).	applies—must file a statement that such a course has been completed (Form 423). **(8)** *Limitation on Homestead Exemption.* This Rule 1007(b)(8) applies if an individual debtor in a Chapter 11, 12, or 13 case claims an exemption under § 522(b)(3)(A) in property of the type described in § 522(p)(1) and the property value exceeds the amount specified in § 522(q)(1). The debtor must file a statement about any pending proceeding in which the debtor may be found: (A) guilty of the type of felony described in § 522(q)(1)(A); or (B) liable for the type of debt described in § 522(q)(1)(B).
(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days after the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who	**(c) Time to File.** **(1)** *Voluntary Case—Various Documents.* Unless (d), (e), (f), or (h) provides otherwise, the debtor in a voluntary case must file the documents required by (b)(1), (b)(4), (b)(5), and (b)(6) with the petition or within 14 days after it is filed. **(2)** *Involuntary Case—Various Documents.* In an involuntary case, the debtor must file the documents required by (b)(1) within 14 days after the order for relief is entered. **(3)** *Credit-Counseling Documents.* In a voluntary case, the documents required by (b)(3)(A), (C), or (D) must be filed

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has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.	with the petition. Unless the court orders otherwise, a debtor who has filed a statement under (b)(3)(B) must file the documents required by (b)(3)(A) within 14 days after the order for relief is entered. **(4)** *Financial-Management Course.* Unless the court extends the time to file, an individual debtor must file the statement required by (b)(7) as follows: (A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and (B) in a Chapter 11 or Chapter 13 case, before the last payment is made under the plan or before a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b). **(5)** *Limitation on Homestead Exemption.* The debtor must file the statement required by (b)(8) no earlier than the date of the last payment made under the plan, or the date a motion for a discharge is filed under § 1141(d)(5)(B), 1228(b), or 1328(b). **(6)** *Documents in a Converted Case.* Unless the court orders otherwise, a document filed before a case is converted to another chapter is considered filed in the converted case. **(7)** *Extending the Time to File.* Except as § 1116(3) provides otherwise, the court, on motion and for cause, may extend the time to file a document under this rule. The movant must give notice of the motion to: • the United States trustee; • any committee elected under § 705 or appointed under § 1102; and

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	• any trustee, examiner, and other party as the court directs. If the motion is granted, notice must be given to the United States trustee and to any committee, trustee, and other party as the court orders.
(d) LIST OF 20 LARGEST CREDITORS IN CHAPTER 9 MUNICIPALITY CASE OR CHAPTER 11 REORGANIZATION CASE. In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code.	**(d) List of the 20 Largest Unsecured Creditors in a Chapter 9 or Chapter 11 Case.** In addition to the lists required by (a), a debtor in a Chapter 9 case or in a voluntary Chapter 11 case must file with the petition a list containing the names, addresses, and claims of the creditors that hold the 20 largest unsecured claims, excluding insiders as prescribed by the appropriate Official Form (Form 104 or 204). In an involuntary Chapter 11 case, the debtor must file the list within 2 days after the order for relief is entered under § 303(h).
(e) LIST IN CHAPTER 9 MUNICIPALITY CASES. The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.	**(e) Chapter 9 Lists.** In a Chapter 9 case, the court must set the time for the debtor to file a list required by (a). If a proposed plan requires the assessments on real estate to be revised so that the proportion of special assessments or special taxes for some property will be different from the proportion in effect when the petition is filed, the debtor must also file a list that shows—for each adversely affected property—the name and address of each known holder of title, both legal and equitable. On motion and for cause, the court may modify the requirements of this Rule 1007(e) and those of (a).

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(f) STATEMENT OF SOCIAL SECURITY NUMBER. An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.	**(f) Social-Security Number.** In a voluntary case, an individual debtor must submit with the petition a statement that gives the debtor's social-security number or states that the debtor does not have one (Form 121). In an involuntary case, the debtor must submit the statement within 14 days after the order for relief is entered.
(g) PARTNERSHIP AND PARTNERS. The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.	**(g) Partnership Case.** The general partners of a debtor partnership must file for the partnership the list required by (a) and the documents required by (b)(1)(A)–(D). The court may order any general partner to file a statement of personal assets and liabilities and may set the deadline for doing so.
(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance	**(h) Interests in Property Acquired or Arising After a Petition Is Filed.** After the petition is filed, in a Chapter 7, 11, 12, or 13 case, if the debtor acquires—or becomes entitled to acquire—an interest in property described in § 541(a)(5), the debtor must file a supplemental schedule and include any claimed exemption. Unless the court allows additional time, the debtor must file the schedule within 14 days after learning about the property interest. This duty continues even after the case is closed, except for property acquired after a plan is confirmed in a Chapter 11 case or a discharge is granted in a Chapter 12 or 13 case.

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with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.	
(i) DISCLOSURE OF LIST OF SECURITY HOLDERS. After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.	**(i) Security Holders Known to Others.** After notice and a hearing and for cause, the court may direct an entity other than the debtor or trustee to: (1) disclose any list of the debtor's security holders in its possession or under its control by: (A) producing the list or a copy of it; (B) allowing inspection or copying; or (C) making any other disclosure; and (2) indicate the name, address, and security held by each of them.
(j) IMPOUNDING OF LISTS. On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.	**(j) Impounding Lists.** On motion of a party in interest and for cause, the court may impound any list filed under this rule and may refuse inspection. But the court may permit a party in interest to inspect or use an impounded list on terms prescribed by the court.
(k) PREPARATION OF LIST, SCHEDULES, OR STATEMENTS ON DEFAULT OF DEBTOR. If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these	**(k) Debtor's Failure to File a Required Document.** If a debtor fails to properly prepare and file a list, schedule, or statement (other than a statement of intention) as required by this rule, the court may order:

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papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.	(1) that the trustee, a petitioning creditor, a committee, or other party to do so within the time set by the court; and (2) that the cost incurred be reimbursed as an administrative expense.
(l) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule.	**(l) Copies to the United States Trustee.** The clerk must promptly send to the United States trustee a copy of every list, schedule, or statement filed under (a)(1), (a)(2), (b), (d), or (h).
(m) INFANTS AND INCOMPETENT PERSONS. If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).	**(m) Infant or Incompetent Person.** If a debtor knows that a person named in a list of creditors or in a schedule is an infant or is incompetent, the debtor must include the name, address, and legal relationship of any person on whom process would be served in an adversary proceeding against that person under Rule 7004(b)(2).

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Rule 1008. Verification of Petitions and Accompanying Papers	**Rule 1008. Requirement to Verify Petitions and Accompanying Documents**
All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.	A petition, list, schedule, statement, and any amendment must be verified or must contain an unsworn declaration under 28 U.S.C. § 1746.

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Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements	**Rule 1009. Amending a Voluntary Petition, List, Schedule, or Statement**
(a) GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.	**(a) In General.** **(1)** ***By a Debtor.*** A debtor may amend a voluntary petition, list, schedule, or statement at any time before the case is closed. The debtor must give notice of the amendment to the trustee and any affected entity. **(2)** ***By a Party in Interest.*** On motion of a party in interest and after notice and a hearing, the court may order a voluntary petition, list, schedule, or statement to be amended. The clerk must give notice of the amendment to entities that the court designates.
(b) STATEMENT OF INTENTION. The statement of intention may be amended by the debtor at any time before the expiration of the period provided in § 521(a) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected there-by.	**(b) Amending a Statement of Intention.** A debtor may amend a statement of intention at any time before the time provided in § 521(a)(2) expires. The debtor must give notice of the amendment to the trustee and any affected entity.
(c) STATEMENT OF SOCIAL SECURITY NUMBER. If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).	**(c) Incorrect Social-Security Number.** If a debtor learns that a social-security number shown on the statement submitted under Rule 1007(f) is incorrect, the debtor must: (1) promptly submit an amended statement with the correct number (Form 121); and (2) give notice of the amendment to all entities required to be listed under Rule 1007(a)(1) or (a)(2).
(d) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall promptly transmit to the United States trustee a copy of every amendment filed	**(d) Copy to the United States Trustee.** The clerk must promptly send a copy of every amendment filed under this rule to the United States trustee.

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or submitted under subdivision (a), (b), or (c) of this rule.	

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Rule 1010. Service of Involuntary Petition and Summons	**Rule 1010. Serving an Involuntary Petition and Summons**
(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS. On the filing of an involuntary petition, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) F.R.Civ.P. apply when service is made or attempted under this rule.	**(a) In General.** After an involuntary petition has been filed, the clerk must promptly issue a summons for service on the debtor. The summons must be served with a copy of the petition in the manner that Rule 7004(a) and (b) provide for service of a summons and complaint. If service cannot be so made, the court may order service by mail to the debtor's last known address, and by at least one publication as the court orders. Service may be made anywhere. Rule 7004(e) and Fed. R. Civ. P. 4(*l*) govern service.
(b) CORPORATE OWNERSHIP STATEMENT. Each petitioner that is a corporation shall file with the involuntary petition a corporate ownership statement containing the information described in Rule 7007.1.	**(b) Corporate-Ownership Statement.** A corporation that files an involuntary petition must file and serve with the petition a corporate-ownership statement containing the information described in Rule 7007.1.

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Rule 1011. Responsive Pleading or Motion in Involuntary Cases	**Rule 1011. Responsive Pleading in an Involuntary Case; Effect of a Motion**
(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.	**(a) Who May Contest a Petition.** A debtor may contest an involuntary petition filed against it. In a partnership case under Rule 1004, a nonpetitioning general partner—or a person who is alleged to be a general partner but denies the allegation—may contest the petition.
(b) DEFENSES AND OBJECTIONS; WHEN PRESENTED. Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 21 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.	**(b) Defenses and Objections; Time to File.** A defense or objection to the petition must be presented as prescribed by Fed. R. Civ. P. 12. It must be filed and served within 21 days after the summons is served. But if service is made by publication on a party or partner who does not reside in—or cannot be found in—the state where the court sits, the court must set the time to file and serve the answer.
(c) EFFECT OF MOTION. Service of a motion under Rule 12(b) F.R.Civ.P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F.R.Civ.P.	**(c) Effect of a Motion.** Serving a motion under Fed. R. Civ. P. 12(b) extends the time to file and serve an answer as Fed. R. Civ. P. 12(a) permits.
(d) CLAIMS AGAINST PETITIONERS. A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.	**(d) Debtor's Claim Against a Petitioning Creditor.** A debtor's answer must not assert a claim against a petitioning creditor except to defeat the petition.
(e) OTHER PLEADINGS. No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service.	**(e) Limit on Pleadings.** No pleading other than an answer to the petition is allowed, but the court may order a reply to an answer and set the time for filing and service.
(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition is a	**(f) Corporate-Ownership Statement.** A corporation that responds to the petition must file a corporate-ownership statement

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corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.	containing the information described in Rule 7007.1. The corporation must do so with its first appearance, pleading, motion, response, or other first request to the court.

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Rule 1012. Responsive Pleading in Cross-Border Cases	**Rule 1012. Contesting a Petition in a Chapter 15 Case**
(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.	**(a) Who May Contest the Petition.** A debtor or a party in interest may contest a Chapter 15 petition for recognition of a foreign proceeding.
(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.	**(b) Time to File a Response.** Unless the court sets a different time, a response to the petition must be filed at least 7 days before the date set for a hearing on the petition.
(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.	**(c) Corporate-Ownership Statement.** A corporation that responds to the petition must file a corporate-ownership statement containing the information described in Rule 7007.1. The corporation must do so with its first appearance, pleading, motion, response, or other first request to the court.

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Rule 1013. Hearing and Disposition of a Petition in an Involuntary Case	**Rule 1013. Contested Petition in an Involuntary Case; Default**
(a) CONTESTED PETITION. The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order.	**(a) Hearing and Disposition.** When a petition in an involuntary case is contested, the court must: (1) rule on the issues presented at the earliest practicable time; and (2) promptly issue an order for relief, dismiss the petition, or issue any other appropriate order.
(b) DEFAULT. If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief requested in the petition.	**(b) Default.** If the petition is not contested within the time allowed by Rule 1011, the court must issue the order for relief on the next day or as soon as practicable.
[(c) ORDER FOR RELIEF]	

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Rule 1014. Dismissal and Change of Venue	**Rule 1014. Transferring a Case to Another District; Dismissing a Case Improperly Filed**
(a) DISMISSAL AND TRANSFER OF CASES. (1) Cases Filed in Proper District. If a petition is filed in the proper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties. (2) Cases Filed in Improper District. If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.	**(a) Dismissal or Transfer.** **(1)** ***Petitions Filed in the Proper District.*** If a petition is filed in the proper district, the court may transfer the case to another district in the interest of justice or for the parties' convenience. The court may do so: (A) on its own or on timely motion of a party in interest; and (B) only after a hearing on notice to the petitioner, United States trustee, and other entities as the court orders. **(2)** ***Petitions Filed in an Improper District.*** If a petition is filed in an improper district, the court may dismiss the case or may transfer it to another district on the same grounds and under the same procedures as stated in (1).
(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS. If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, the court in the district in which the first-filed petition is pending may determine, in the interest of justice or	**(b) Petitions Involving the Same or Related Debtors Filed in Different Districts.** **(1)** ***Scope.*** This Rule 1014(b) applies if petitions commencing cases or seeking recognition under Chapter 15 are filed in different districts by, regarding, or against: (A) the same debtor; (B) a partnership and one or more of its general partners; (C) two or more general partners; or (D) a debtor and an affiliate.

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for the convenience of the parties, the district or districts in which any of the cases should proceed. The court may so determine on motion and after a hearing, with notice to the following entities in the affected cases: the United States trustee, entities entitled to notice under Rule 2002(a), and other entities as the court directs. The court may order the parties to the later-filed cases not to proceed further until it makes the determination.	**(2)** *Court Action.* The court in the district in which the first petition is filed may determine the district or districts in which the cases should proceed in the interest of justice or for the parties' convenience. The court may do so on timely motion and after a hearing on notice to: • the United States trustee; • entities entitled to notice under Rule 2002(a); and • other entities as the court orders. **(3)** *Later-Filed Petitions.* The court may order the parties in a case commenced by a later-filed petition not to proceed further until the motion is decided.

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Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court	**Rule 1015. Consolidating or Jointly Administering Cases Pending in the Same District**
(a) CASES INVOLVING SAME DEBTOR. If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.	**(a) Consolidating Cases Involving the Same Debtor.** The court may consolidate two or more cases regarding or brought by or against the same debtor that are pending in its district.
(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).	**(b) Jointly Administering Cases Involving Related Debtors; Exemptions of Spouses; Protective Orders to Avoid Conflicts of Interest.** **(1)** *In General.* The court may order joint administration of the estates in a joint case or in two or more cases pending in the court if they are brought by or against: (A) spouses; (B) a partnership and one or more of its general partners; (C) two or more general partners; or (D) a debtor and an affiliate. **(2)** *Potential Conflicts of Interest.* Before issuing a joint-administration order, the court must consider how to protect the creditors of different estates against potential conflicts of interest. **(3)** *Exemptions in Cases Involving Spouses.* If spouses have filed separate petitions, with one electing exemptions under § 522(b)(2) and the other under § 522(b)(3), and the court orders joint administration, that order must: (A) set a reasonable time for the debtors to elect the same exemptions; and

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	(B) advise the debtors that if they fail to do so, they will be considered to have elected exemptions under § 522(b)(2).
(c) EXPEDITING AND PROTECTIVE ORDERS. When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.	**(c) Protective Orders to Avoid Unnecessary Costs and Delay.** When cases are consolidated or jointly administered, the court may issue orders to avoid unnecessary costs and delay while still protecting the parties' rights under the Code.

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Rule 1016. Death or Incompetency of Debtor	**Rule 1016. Death or Incompetency of a Debtor**
Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.	**(a) Chapter 7 Case.** In a Chapter 7 case, the debtor's death or incompetency does not abate the case. The case continues, as far as possible, as though the death or incompetency had not occurred. **(b) Chapter 11, 12, or 13 Case.** Upon the debtor's death or incompetency in a Chapter 11, 12, or 13 case, the court may dismiss the case or may continue it if further administration is possible and is in the parties' best interests. If the court chooses to continue, it must do so, as far as possible, as though the death or incompetency had not occurred.

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Rule 1017. Dismissal or Conversion of Case; Suspension	**Rule 1017. Dismissing a Case; Suspending Proceedings; Converting a Case to Another Chapter**
(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002. For the purpose of the notice, the debtor shall file a list of creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it.	**(a) Dismissing a Case.** Except as provided in § 707(a)(3), 707(b), 1208(b), or 1307(b), or in Rule 1017(b), (c), or (e), the court must conduct a hearing on notice under Rule 2002 before dismissing a case for any reason. For the purpose of the notice, a debtor who has not already done so must, before the court's deadline, file a list of creditors and their addresses. If the debtor fails to timely file the list, the court may order the debtor or another entity to do so.
(b) DISMISSAL FOR FAILURE TO PAY FILING FEE. (1) If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case. (2) If the case is dismissed or closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.	**(b) Dismissing a Case for Failure to Pay an Installment Toward the Filing Fee.** If the debtor fails to pay any installment toward the filing fee, the court may dismiss the case after a hearing on notice to the debtor and trustee. If the court dismisses or closes the case without full payment of the filing fee, previous installment payments must be distributed as if full payment had been made.
(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United	**(c) Dismissing a Voluntary Chapter 7 or Chapter 13 Case for Failure to File a Document on Time.** On motion of the United States trustee, the court may dismiss a voluntary Chapter 7 case under § 707(a)(3), or a Chapter 13 case under § 1307(c)(9), for a failure to timely file the information required by § 521(a)(1). But the court may do so only after a hearing on

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States trustee on the debtor, the trustee, and any other entities as the court directs.	notice served by the United States trustee on the debtor, trustee, and any other entity as the court orders.
(d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before a hearing on notice as provided in Rule 2002(a).	**(d) Dismissing a Case or Suspending Proceedings Under § 305.** The court may dismiss a case or suspend proceedings under § 305 only after a hearing on notice under Rule 2002(a).
(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE, OR CONVERSION TO A CASE UNDER CHAPTER 11 OR 13, FOR ABUSE. The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs. (1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. The party filing the motion shall set forth in the motion all matters to be considered at the hearing. In addition, a motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse. (2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing.	**(e) Dismissing an Individual Debtor's Chapter 7 Case for Abuse; Converting the Case to Chapter 11 or 13.** (1) *In General.* On motion under § 707(b), the court may dismiss an individual debtor's Chapter 7 case for abuse or, with the debtor's consent, convert it to Chapter 11 or 13. The court may do so only after a hearing on notice to: • the debtor, • the trustee, • the United States trustee, and • any other entity as the court orders. (2) *Time to File.* Except as § 704(b)(2) provides otherwise, a motion to dismiss a case for abuse under § 707(b) or (c) must be filed within 60 days after the first date set for the meeting of creditors under § 341(a). On request made within the 60-day period, the court may, for cause, extend the time to file. The motion must: (A) set forth all matters to be considered at the hearing; and (B) if made under § 707(b)(1) and (3), state with particularity the circumstances alleged to constitute abuse.

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	(3) *Hearing on the Court's Own Motion.* If the hearing is set on the court's own motion, the clerk must serve notice on the debtor within 60 days after the first date set for the meeting of creditors under § 341(a). The notice must set forth all matters to be considered at the hearing.
(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION. (1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b). (2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. (3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.	**(f) Procedures for Dismissing, Suspending, or Converting a Case.** (1) *In General.* Rule 9014 governs a proceeding to dismiss or suspend a case or to convert it to another chapter—except under § 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b). (2) *Cases Requiring a Motion.* Dismissing or converting a case under § 706(a), 1112(a), 1208(b), or 1307(b) requires a motion filed and served as required by Rule 9013. (3) *Conversion Date in a Chapter 12 or 13 Case.* If the debtor files a conversion notice under § 1208(a) or § 1307(a), the case will be converted without court order, and the filing date of the notice becomes the conversion date in applying § 348(c) or Rule 1019. The clerk must promptly send a copy of the notice to the United States trustee.

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Rule 1018. Contested Involuntary Petitions; Contested Petitions Commencing Chapter 15 Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings	**Rule 1018. Contesting a Petition in an Involuntary or Chapter 15 Case; Vacating an Order for Relief; Applying Part VII Rules**
Unless the court otherwise directs and except as otherwise prescribed in Part I of these rules, the following rules in Part VII apply to all proceedings contesting an involuntary petition or a chapter 15 petition for recognition, and to all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings contesting an involuntary petition or a chapter 15 petition for recognition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.	**(a) Applying Part VII Rules.** Unless the court orders or a Part I rule provides otherwise, Rules 7005, 7008–10, 7015–16, 7024–26, 7028–37, 7052, 7054, 7056, and 7062—together with any other Part VII rules as the court may direct—apply to the following: (1) a proceeding contesting either an involuntary petition or a Chapter 15 petition for recognition; and (2) a proceeding to vacate an order for relief. **(b) References to "Adversary Proceedings."** Any reference to "adversary proceedings" in the rules listed in (a) is a reference to the proceedings listed in (a)(1)–(2). **(c) "Complaint" Means "Petition."** For the proceedings described in (a), a reference to the "complaint" in the Federal Rules of Civil Procedure must be read as a reference to the petition.

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Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case	**Rule 1019. Converting or Reconverting a Chapter 11, 12, or 13 Case to Chapter 7**
When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case: (1) Filing of Lists, Inventories, Schedules, Statements. (A) Lists, inventories, schedules, and statements of financial affairs theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall com-ply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7. (B) If a statement of intention is required, it shall be filed within 30 days after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an extension of time for cause only on written motion filed, or oral request made during a hearing, before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.	**(a) Papers Previously Filed; New Filing Dates; Statement of Intention.** **(1)** *Papers Previously Filed.* Unless the court orders otherwise, when a Chapter 11, 12, or 13 case is converted or reconverted to Chapter 7, the lists, inventories, schedules, and statements of financial affairs previously filed are considered filed in the Chapter 7 case. If they have not been previously filed, the debtor must comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the same date as the order directing that the case continue under Chapter 7. **(2)** *Statement of Intention.* A statement of intention, if required, must be filed within 30 days after the conversion order is entered or before the first date set for the meeting of creditors, whichever is earlier. The court may, for cause, extend the time to file only on motion filed —or on oral request made during a hearing—before the time has expired. Notice of an extension must be given to the United States trustee and to any committee, trustee, or other party as the court orders.
(2) New Filing Periods. (A) A new time period for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002,	**(b) New Period to File a § 707(b) or (c) Motion, a Proof of Claim, an Objection to a Discharge, or a Complaint to Determine Dischargeability.** **(1)** *When a New Period Begins.* When a case is converted to Chapter 7, a new

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4004, or 4007, but a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case. (B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless: (i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or (ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.	period begins under Rule 1017, 3002, 4004, or 4007 for filing: (A) a motion under § 707(b) or (c); (B) a proof of claim; (C) a complaint objecting to a discharge; or (D) a complaint to determine whether a specific debt may be discharged. **(2)** ***When a New Period Does Not Begin.*** No new period to file begins when a case is reconverted to Chapter 7 after a previous conversion to Chapter 11, 12, or 13 if the time to file in the original Chapter 7 case has expired. **(3)** ***New Period to Object to a Claimed Exemption.*** When a case is converted to Chapter 7, a new period begins under Rule 4003(b) to object to a claimed exemption unless: (A) more than 1 year has elapsed since the court issued the first order confirming a plan under Chapter 11, 12, or 13, or (B) the case was previously pending in Chapter 7 and time has expired to object to a claimed exemption in the original Chapter 7 case.
(3) Claims Filed Before Conversion. All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case.	**(c) Proof of Claim Filed Before Conversion.** A proof of claim filed by a creditor before conversion is considered filed in the Chapter 7 case.
(4) Turnover of Records and Property. After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and	**(d) Turning Over Records and Property.** Unless the court orders otherwise, after a trustee in the Chapter 7 case qualifies or assumes duties, the debtor in possession—or the previously acting trustee in the Chapter 11, 12, or 13 case—must promptly turn over to the Chapter 7 trustee all

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property of the estate in the possession or control of the debtor in possession or trustee.	records and property of the estate that are in its possession or control.
(5) Filing Final Report and Schedule of Postpetition Debts. (A) Conversion of Chapter 11 or Chapter 12 Case. Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall: (i) not later than 14 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and (ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account; (B) Conversion of Chapter 13 Case. Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7, (i) the debtor, not later than 14 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and (ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account; (C) Conversion After Confirmation of a Plan. Unless the court	**(e) Final Report and Account; Schedule of Unpaid Postpetition Debts.** **(1)** *In a Chapter 11 or Chapter 12 Case.* Unless the court orders otherwise, when a Chapter 11 or 12 case is converted to Chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion must: (A) within 14 days after conversion, file a schedule of unpaid debts incurred after the petition was filed but before conversion and include the name and address of each claim holder; and (B) within 30 days after conversion, file and send to the United States trustee a final report and account. **(2)** *In a Chapter 13 Case.* Unless the court orders otherwise, when a Chapter 13 case is converted to Chapter 7: (A) within 14 days after conversion, the debtor must file a schedule of unpaid debts incurred after the petition was filed but before conversion and include the name and address of each claim holder; and (B) within 30 days after conversion, the trustee must file and send to the United States trustee a final report and account. **(3)** *Converting a Case to Chapter 7 After a Plan Has Been Confirmed.* Unless the court orders otherwise, if a case under Chapter 11, 12, or 13 is converted to a case under Chapter 7

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orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file: (i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply; (ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and (iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion. (D) Transmission to United States Trustee. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).	after a plan is confirmed, the debtor must file: (A) a schedule of property that was acquired after the petition was filed but before conversion and was not listed in the final report and account, except when a Chapter 13 case is converted to Chapter 7 and § 348(f)(2) does not apply; (B) a schedule of unpaid debts that were incurred after confirmation but before conversion and were not listed in the final report and account; and (C) a schedule of executory contracts and unexpired leases that were entered into or assumed after the petition was filed but before conversion. **(4)** *Copy to the United States Trustee.* The clerk must promptly send to the United States trustee a copy of any schedule filed under this Rule 1019(e).
(6) Postpetition Claims; Preconversion Administrative Expenses; Notice. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)–(d) and 3002. Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the	**(f) Postpetition Claims; Preconversion Administrative Expenses.** **(1)** *Request to Pay an Administrative Expense; Time to File.* A request to pay an administrative expense incurred before conversion is timely filed under § 503(a) if it is filed before conversion or within a time set by the court. A request by a governmental unit is timely if it is filed: (A) before conversion; or (B) within 180 days after conversion or within a time set by the court, whichever is later. **(2)** *Proof of Claim Against the Debtor or the Estate.* A proof of claim under § 348(d) against either the debtor or

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time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d).	the estate may be filed as specified in Rules 3001(a)–(d) and 3002. **(3)** *Giving Notice of Certain Time Limits.* After the filing of a schedule of debts incurred after the case was commenced but before conversion, the clerk, or the court's designee, must notify the entities listed on the schedule of: (A) the time to request payment of an administrative expense; and (B) the time to file a proof of claim under § 348(d), unless a notice of insufficient assets to pay a dividend has been mailed under Rule 2002(e).

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Rule 1020. Small Business Chapter 11 Reorganization Case	**Rule 1020. Designating a Chapter 11 Case as a Small Business Case**
(a) SMALL BUSINESS DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.	**(a) In General.** In a voluntary Chapter 11 case, the debtor must state in the petition whether the debtor is a small business debtor. In an involuntary case, the debtor must do so in a statement filed within 14 days after the order for relief is entered. Unless (c) applies, the case must proceed in accordance with the debtor's statement, unless and until the court issues an order finding that the debtor's statement is incorrect.
(b) OBJECTING TO DESIGNATION. Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.	**(b) Objecting to the Designation.** Unless (c) applies, the United States trustee or a party in interest may object to the debtor's designation. The objection must be filed within 30 days after the conclusion of the meeting of creditors held under § 341(a) or within 30 days after an amendment to the designation is filed, whichever is later.
(c) APPOINTMENT OF COMMITTEE OF UNSECURED CREDITORS. If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this	**(c) When a Committee of Unsecured Creditors Has Been Appointed.** **(1)** ***Determining Whether the Committee Is Active and Representative.*** If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case may proceed as a small business case only if, and from the time when, the court determines that: (A) the committee is not sufficiently active and representative in

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subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.	providing effective oversight of the debtor; and (B) the debtor satisfies all other requirements for a small business debtor. **(2)** ***Motion for a Court Determination.*** Within a reasonable time after the committee has become insufficiently active or representative, the United States trustee or a party in interest may move for a determination by the court. The debtor may do so at any time.
(d) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.	**(d) Procedure; Service.** An objection or request under this rule is governed by Rule 9014 and must be served on: • the debtor; • the debtor's attorney; • the United States trustee; • the trustee; • any committee appointed under § 1102 or its authorized agent, or, if no unsecured creditors' committee has been appointed, the creditors on the list filed under Rule 1007(d); and • any other entity as the court orders.

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Rule 1021. Health Care Business Case	**Rule 1021. Designating a Chapter 7, 9, or 11 Case as a Health Care Business Case**
(a) HEALTH CARE BUSINESS DESIGNATION. Unless the court orders otherwise, if a petition in a case under chapter 7, chapter 9, or chapter 11 states that the debtor is a health care business, the case shall proceed as a case in which the debtor is a health care business.	**(a) In General.** If a petition in a Chapter 7, 9, or 11 case designates the debtor as a health care business, the case must proceed in accordance with the designation unless the court orders otherwise.
(b) MOTION. The United States trustee or a party in interest may file a motion to determine whether the debtor is a health care business. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs. The motion shall be governed by Rule 9014.	**(b) Seeking a Court Determination.** The United States trustee or a party in interest may move the court to determine whether the debtor is a health care business. Proceedings on the motion are governed by Rule 9014. If the motion is filed by a party in interest, a copy must be sent to the United States trustee. The motion must be served on: • the debtor; • the trustee; • any committee elected under § 705 or appointed under § 1102, or its authorized agent; • in a Chapter 9 or Chapter 11 case in which an unsecured creditors' committee has not been appointed under § 1102, the creditors on the list filed under Rule 1007(d); and • any other entity as the court orders.

Bankruptcy Rules Restyling

2000 Series

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PART II— OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS	**PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS AND APPOINTMENTS; FINAL REPORT; COMPENSATION**
Rule 2001. Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case	**Rule 2001. Appointing an Interim Trustee Before the Order for Relief in an Involuntary Chapter 7 Case**
(a) APPOINTMENT. At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may order the appointment of an interim trustee under § 303(g) of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.	**(a) Appointing an Interim Trustee.** After an involuntary Chapter 7 case commences but before an order for relief, the court may, on a party in interest's motion, order the United States trustee to appoint an interim trustee under § 303(g). The motion must set forth the need for the appointment and may be granted only after a hearing on notice to: • the debtor; • the petitioning creditors; • the United States trustee; and • other parties in interest as the court orders.
(b) BOND OF MOVANT. An interim trustee may not be appointed under this rule unless the movant furnishes a bond in an amount approved by the court, conditioned to indemnify the debtor for costs, attorney's fee, expenses, and damages allowable under § 303(i) of the Code.	**(b) Bond Required.** An interim trustee may be appointed only if the movant furnishes a bond, in an amount that the court approves, to indemnify the debtor for any costs, attorney's fees, expenses, and damages allowable under § 303(i).
(c) ORDER OF APPOINTMENT. The order directing the appointment of an interim trustee shall state the reason the	**(c) The Order's Content.** The court's order must state the reason the appointment is needed and specify the trustee's duties.

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appointment is necessary and shall specify the trustee's duties.	
(d) TURNOVER AND REPORT. Following qualification of the trustee selected under § 702 of the Code, the interim trustee, unless otherwise ordered, shall (1) forthwith deliver to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account.	**(d) The Interim Trustee's Final Report.** Unless the court orders otherwise, after qualification of a trustee selected under § 702, the interim trustee must: (1) promptly deliver to the trustee all the records and property of the estate that are in the interim trustee's possession or under its control; and (2) within 30 days after the trustee qualifies, file a final report and account.

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Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee	**Rule 2002. Notices**
(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (l), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of: (1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number; (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent; (4) in a chapter 7 liquidation, a chapter 11 reorganization case, or a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) or is on dismissal of the case for	**(a) 21-Day Notices to the Debtor, Trustee, Creditors, and Indenture Trustees.** Except as (h), (i), (*l*), (p), and (q) provide otherwise, the clerk or the court's designee must give the debtor, the trustee, all creditors, and all indenture trustees at least 21 days' notice by mail of: (1) the meeting of creditors under § 341 or § 1104(b), which notice—unless the court orders otherwise—must include the debtor's: (A) employer-identification number; (B) social-security number; and (C) any other federal taxpayer-identification number; (2) a proposal to use, sell, or lease property of the estate other than in the ordinary course of business—unless the court, for cause, shortens the time or orders another method of giving notice; (3) a hearing to approve a compromise or settlement other than an agreement under Rule 4001(d)—unless the court, for cause, orders that notice not be sent; (4) a hearing on a motion to dismiss a Chapter 7, 11, or 12 case or convert it to another chapter—unless the hearing is under § 707(a)(3) or § 707(b) or is on a motion to dismiss the case for failure to pay the filing fee;

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failure to pay the filing fee; (5) the time fixed to accept or reject a proposed modification of a plan; (6) a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000; (7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and (9) the time fixed for filing objections to confirmation of a chapter 13 plan.	(5) the time to accept or reject a proposal to modify a plan; (6) a hearing on a request for compensation or for reimbursement of expenses, if the request exceeds $1,000; (7) the time to file proofs of claims under Rule 3003(c); (8) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 12 plan; and (9) the time to object to confirming a Chapter 13 plan.
(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement or, under § 1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; (2) for filing objections and the hearing to consider confirmation of a chapter 9 or chapter 11 plan; and (3) for the hearing to consider confirmation of a chapter 13 plan.	**(b) 28-Day Notices to the Debtor, Trustee, Creditors, and Indenture Trustees.** Except as (*l*) provides otherwise, the clerk or the court's designee must give the debtor, trustee, all creditors, and all indenture trustees at least 28 days' notice by mail of: (1) the time to file objections and the time of a hearing to: (A) consider approving a disclosure statement; or (B) determine under § 1125(f) whether a plan includes adequate information to make a separate disclosure statement unnecessary; (2) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 9 or 11 plan; and (3) the time of a hearing to consider whether to confirm a Chapter 13 plan.

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(c) CONTENT OF NOTICE. (1) *Proposed Use, Sale, or Lease of Property.* Subject to Rule 6004, the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property. The notice of a proposed sale or lease of personally identifiable information under § 363(b)(1) of the Code shall state whether the sale is consistent with any policy prohibiting the transfer of the information. (2) *Notice of Hearing on Compensation.* The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(6) of this rule shall identify the applicant and the amounts requested. (3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall: (A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction; (B) describe briefly the nature of the injunction; and (C) identify the entities that would be subject to the injunction.	**(c) Content of Notice.** **(1)** ***Proposed Use, Sale, or Lease of Property.*** Subject to Rule 6004, a notice of a proposed use, sale, or lease of property under (a)(2) must include: (A) the time and place of any public sale; (B) the terms and conditions of any private sale; and (C) the time to file objections. The notice suffices if it generally describes the property. In a notice of a proposed sale or lease of personally identifiable information under § 363(b)(1), the notice must state whether the sale is consistent with any policy that prohibits transferring the information. **(2)** ***Hearing on an Application for Compensation or Reimbursement.*** A notice under (a)(6) of a hearing on a request for compensation or for reimbursement of expenses must identify the applicant and the amounts requested. **(3)** ***Hearing on Confirming a Plan That Proposes an Injunction.*** If a plan proposes an injunction against conduct not otherwise enjoined under the Code, the notice under (b)(2) must: (A) state in conspicuous language (bold, italic, or underlined text) that the plan proposes an injunction; (B) describe briefly the nature of the injunction; and (C) identify the entities that would be subject to it.
(d) NOTICE TO EQUITY SECURITY HOLDERS. In a chapter 11	**(d) Notice to Equity Security Holders in a Chapter 11 Case.** Unless the court orders

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reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in the manner and form directed by the court give notice to all equity security holders of (1) the order for relief; (2) any meeting of equity security holders held pursuant to § 341 of the Code; (3) the hearing on the proposed sale of all or substantially all of the debtor's assets; (4) the hearing on the dismissal or conversion of a case to another chapter; (5) the time fixed for filing objections to and the hearing to consider approval of a disclosure statement; (6) the time fixed for filing objections to and the hearing to consider confirmation of a plan; and (7) the time fixed to accept or reject a proposed modification of a plan.	otherwise, in a Chapter 11 case, the clerk or the court's designee must give notice as the court orders to the equity security holders of: (1) the order for relief; (2) a meeting of equity security holders under § 341; (3) a hearing on a proposed sale of all, or substantially all, the debtor's assets; (4) a hearing on a motion to dismiss a case or convert it to another chapter; (5) the time to file objections to—and the time of the hearing to consider whether to approve—a disclosure statement; (6) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 11 plan; and (7) the time to accept or reject a proposal to modify a plan.
(e) NOTICE OF NO DIVIDEND. In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.	**(e) Notice of No Dividend in a Chapter 7 Case.** In a Chapter 7 case, if it appears from the schedules that there are no assets from which to pay a dividend, the notice of the meeting of creditors may state: (1) that fact; (2) that filing proofs of claim is unnecessary; and (3) that further notice of the time to file proofs of claim will be given if enough assets become available to pay a dividend.
(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees	**(f) Other Notices.** **(1)** ***Various Notices to the Debtor, Creditors, and Indenture Trustees.*** Except as (*l*) provides otherwise, the clerk, or some other person as the

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notice by mail of: (1) the order for relief; (2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305; (3) the time allowed for filing claims pursuant to Rule 3002; (4) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004; (5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007; (6) the waiver, denial, or revocation of a discharge as provided in Rule 4006; (7) entry of an order confirming a chapter 9, 11, or 12 plan; (8) a summary of the trustee's final report in a chapter 7 case if the net proceeds realized exceed $1,500; (9) a notice under Rule 5008 regarding the presumption of abuse; (10) a statement under § 704(b)(1) as to whether the debtor's case would be presumed to be an abuse under § 707(b); and (11) the time to request a delay in the entry of the discharge under §§ 1141(d)(5)(C), 1228(f), and 1328(h). Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).	court may direct, must give the debtor, creditors, and indenture trustees notice by mail of: (A) the order for relief; (B) a case's dismissal or conversion to another chapter; (C) a suspension of proceedings under § 305; (D) the time to file a proof of claim under Rule 3002; (E) the time to file a complaint to object to the debtor's discharge under § 727, as Rule 4004 provides; (F) the time to file a complaint to determine whether a debt is dischargeable under § 523, as Rule 4007 provides; (G) a waiver, denial, or revocation of a discharge, as Rule 4006 provides; (H) entry of an order confirming a plan in a Chapter 9, 11, or 12 case; (I) a summary of the trustee's final report in a Chapter 7 case if the net proceeds realized exceed $1,500; (J) a notice under Rule 5008 regarding the presumption of abuse; (K) a statement under § 704(b)(1) about whether the debtor's case would be presumed to be an abuse under § 707(b); and (L) the time to request a delay in granting the discharge under §§ 1141(d)(5)(C), 1228(f), or 1328(h). **(2)** ***Notice of the Time to Accept or Reject a Plan.*** Notice of the time to accept or reject a plan under

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	Rule 3017(c) must be given in accordance with Rule 3017(d).
(g) ADDRESSING NOTICES. (1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision— (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and (B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address. (2) Except as provided in § 342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of equity security holders. (3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative	**(g) Addressing Notices.** **(1)** *In General.* A notice mailed to a creditor, indenture trustee, or equity security holder must be addressed as the entity or its authorized agent provided in its last request filed in the case. The request may be: (A) a proof of claim filed by a creditor or an indenture trustee designating a mailing address (unless a notice of no dividend has been given under (e) and a later notice of a possible dividend under Rule 3002(c)(5) has not been given); or (B) a proof of interest filed by an equity security holder designating a mailing address. **(2)** *When No Request Has Been Filed.* Except as § 342(f) provides otherwise, if a creditor or indenture trustee has not filed a request under (1) or Rule 5003(e), the notice must be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request, the notice must be mailed to the address shown on the list of equity security holders. **(3)** *Notices to Representatives of an Infant or Incompetent Person.* If a list or schedule filed under Rule 1007 includes a name and address of an infant's or an incompetent person's representative, and a person other than that representative files a request or proof of claim designating a different name and mailing address, then unless the court orders otherwise, the notice

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files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim. (4) Notwithstanding Rule 2002(g)(1)–(3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider's failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law. (5) A creditor may treat a notice as not having been brought to the creditor's attention under § 342(g)(1) only if, prior to issuance of the notice, the creditor has filed a statement that designates the name and address of the person or organizational subdivision of the creditor responsible for receiving notices under the Code, and that describes the procedures established by the creditor to cause such notices to be delivered to the designated person or subdivision.	must be mailed to both persons at their designated addresses. **(4)** ***Using an Address Agreed to Between an Entity and a Notice Provider.*** Notwithstanding (g)(1)-(3), when the court orders that a notice provider give a notice, the provider may do so in the manner agreed to between the provider and an entity, and at the address or addresses the entity supplies. An address supplied by the entity is conclusively presumed to be a proper address for the notice. But a failure to use a supplied address does not invalidate a notice that is otherwise effective under applicable law. **(5)** ***When a Notice Is Not Brought to a Creditor's Attention.*** A creditor may treat a notice as not having been brought to the creditor's attention under § 342(g)(1) only if, before the notice was issued, the creditor has filed a statement: (A) designating the name and address of the person or organizational subdivision responsible for receiving notices; and (B) describing the creditor's procedures for delivering notices to the designated person or organizational subdivision.
(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed	**(h) Notice to Creditors That Have Filed Proofs of Claim in a Chapter 7 Case.** **(1)** ***In General.*** In a Chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341,

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only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.	the court may order that all notices required by (a) be mailed only to: • the debtor; • the trustee; • indenture trustees; • creditors with claims for which proofs of claim have been filed; and • creditors that have received an extension of time under Rule 3002(c)(1) or (2) to file proofs of claim. **(2)** ***When a Notice of Insufficient Assets Has Been Given.*** If notice of insufficient assets to pay a dividend has been given to creditors under (e), after 90 days following the mailing of a notice of the time to file proofs of claim under Rule 3002(c)(5), the court may order that notices be mailed only to those entities listed in (1).
(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed pursuant to this rule shall be mailed to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed under § 1114 shall receive copies of all notices required by	**(i) Notice to a Committee.** **(1)** ***In General.*** Any notice required to be mailed under this Rule 2002 must also be mailed to a committee elected under § 705 or appointed under § 1102, or to its authorized agent. **(2)** ***Limiting Notices.*** The court may order that a notice required by (a)(2), (3), or (6) be: (A) sent to the United States trustee; and (B) mailed only to: (i) the committees elected under § 705 or appointed under § 1102, or to their authorized agents; and

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subdivisions (a)(1), (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.	(ii) those creditors and equity security holders who file—and serve on the trustee or debtor in possession—a request that all notices be mailed to them. **(3)** *Copy to a Committee.* A notice required under (a)(1), (a)(5), (b), (f)(1)(B)–(C), or (f)(1)(H)—and any other notice as the court orders—must be sent to a committee appointed under § 1114.
(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case, to the Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.	**(j) Notice to the United States.** A notice required to be mailed to all creditors under this Rule 2002 must also be mailed: (1) in a Chapter 11 case in which the Securities and Exchange Commission has filed either a notice of appearance or a request to receive notices, to the SEC at any place it designates; (2) in a commodity-broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a Chapter 11 case, to the Internal Revenue Service at the address in the register maintained under Rule 5003(e) for the district where the case is pending; (4) in a case for which the papers indicate that a debt (other than for taxes) is owed to the United States, to the United States attorney for the district where the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) in a case for which the papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

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(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et. seq.	**(k) Notice to the United States Trustee.** **(1)** *In General.* Except in a Chapter 9 case or unless the United States trustee requests otherwise, the clerk or the court's designee must send to the United States trustee notice of: (A) all matters described in (a)(2)–(4), (a)(8), (b), (f)(1)(A)–(C), (f)(1)(E), (f)(1)(G)–(I), and (q); (B) all hearings on applications for compensation or for reimbursement of expenses; and (C) any other matter if the United States trustee requests it or the court orders it. **(2)** *Time to Send.* The notice must be sent within the time (a) or (b) prescribes. **(3)** *Exception Under the Securities Investor Protection Act.* In a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq., these rules do not require any document to be sent to the United States trustee.
(*l*) NOTICE BY PUBLICATION. The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice.	**(*l*) Notice by Publication.** The court may order notice by publication if notice by mail is impracticable or if it is desirable to supplement the notice.
(m) ORDERS DESIGNATING MATTER OF NOTICES. The court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.	**(m) Orders Concerning Notices.** Except as these rules provide otherwise, the court may designate the matters about which, the entity to whom, and the form and manner in which a notice must be sent.
(n) CAPTION. The caption of every notice given under this rule shall comply	**(n) Notice of an Order for Relief in a Consumer Case.** In a voluntary case

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with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.	commenced under the Code by an individual debtor whose debts are primarily consumer debts, the clerk, or some other person as the court may direct, shall give the trustee and all creditors notice by mail of the order for relief not more than 20 days after the entry of such order.
(o) NOTICE OF ORDER FOR RELIEF IN CONSUMER CASE. In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by mail of the order for relief within 21 days from the date thereof.	**(o) Caption.** The caption of a notice given under this Rule 2002 must conform to Rule 1005. The caption of a debtor's notice to a creditor must also include the information that § 342(c) requires.
(p) NOTICE TO A CREDITOR WITH A FOREIGN ADDRESS. (1) If, at the request of the United States trustee or a party in interest, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged. (2) Unless the court for cause orders otherwise, a creditor with a foreign address to which notices under this rule are mailed shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c). (3) Unless the court for cause orders otherwise, the mailing address of a creditor with a foreign address shall be	**(p) Notice to a Creditor with Foreign Address.** **(1)** *When Notice by Mail Does Not Suffice.* At the request of the United States trustee or a party in interest, or on its own, the court may find that a notice mailed to a creditor with a foreign address within the time these rules prescribe would not give the creditor reasonable notice. The court may then order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be extended. **(2)** *Notice of the Time to File a Proof of Claim.* Unless the court, for cause, orders otherwise, a creditor with a foreign address must be given at least 30 days' notice of the time to file a proof of claim under Rule 3002(c) or Rule 3003(c). **(3)** *Determining a Foreign Address.* Unless the court, for cause, orders otherwise, the mailing address of a

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determined under Rule 2002(g).	creditor with a foreign address must be determined under (g).
(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES. (1) *Notice of Petition for Recognition.* After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision. (2) *Notice of Court's Intention to Communicate with Foreign Courts and Foreign Representatives.* The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being	**(q) Notice of a Petition for Recognition of a Foreign Proceeding; Notice of Intent to Communicate with a Foreign Court or Foreign Representative.** **(1)** ***Timing of the Notice; Who Must Receive It.*** After a petition for recognition of a foreign proceeding is filed, the court must promptly hold a hearing on it. The clerk or the court's designee must promptly give at least 21 days' notice by mail of the hearing to: • the debtor; • all persons or bodies authorized to administer the debtor's foreign proceedings; • all entities against whom provisional relief is being sought under § 1519; • all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and • any other entities as the court orders. If the court consolidates the hearing on the petition with a hearing on a request for provisional relief, the court may set a shorter notice period. **(2)** ***Contents of the Notice.*** The notice must: (A) state whether the petition seeks recognition as a foreign main proceeding or a foreign nonmain proceeding; and

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sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative.	(B) include a copy of the petition and any other document the court specifies. **(3)** *Communicating with a Foreign Court or Foreign Representative.* If the court intends to communicate with a foreign court or foreign representative, the clerk or the court's designee must give notice by mail of the court's intention to all those listed in (q)(1).

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Rule 2003. Meeting of Creditors or Equity Security Holders	**Rule 2003. Meeting of Creditors or Equity Security Holders**
(a) DATE AND PLACE. Except as otherwise provided in § 341(e) of the Code, in a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.	**(a) Date and Place of the Meeting.** **(1)** *Date.* Unless § 341(e) applies, the United States trustee must call a meeting of creditors to be held: (A) in a Chapter 7 or 11 case, no fewer than 21 days and no more than 40 days after the order for relief; (B) in a Chapter 12 case, no fewer than 21 days and no more than 35 days after the order for relief; or (C) in a Chapter 13 case, no fewer than 21 days and no more than 50 days after the order for relief. **(2)** *Effect of a Motion or an Appeal.* The United States trustee may set a later date for the meeting if there is a motion to vacate the order for relief, an appeal from such an order, or a motion to dismiss the case. **(3)** *Place; Possible Change in the Meeting Date.* The meeting may be held at a regular place for holding court. Or the United States trustee may designate any other place in the district that is convenient for the parties in interest. If the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief.
(b) ORDER OF MEETING. (1) Meeting of Creditors. The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may	**(b) Conducting the Meeting; Agenda; Who May Vote.** **(1)** *At a Meeting of Creditors.* (A) *Generally.* The United States trustee must preside at the meeting of creditors. The meeting must include an examination of the

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include the election of a creditors' committee and, if the case is not under subchapter V of chapter 7, the election of a trustee. The presiding officer shall have the authority to administer oaths. (2) Meeting of Equity Security Holders. If the United States trustee convenes a meeting of equity security holders pursuant to § 341(b) of the Code, the United States trustee shall fix a date for the meeting and shall preside. (3) Right To Vote. In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. A creditor of a partnership may file a proof of claim or writing evidencing a right to vote for the trustee for the estate of the general partner notwithstanding that a trustee for the estate of the partnership has previously qualified. In the event of an objection to the amount or allowability of a claim for the purpose of voting, unless the court orders otherwise, the United States trustee shall tabulate the votes for each alternative presented by the dispute and, if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court.	debtor under oath. The presiding officer has the authority to administer oaths. (B) *Chapter 7 Cases.* In a Chapter 7 case, the meeting may include the election of a creditors' committee; and if the case is not under Subchapter V, the meeting may include electing a trustee. **(2)** ***At a Meeting of Equity Security Holders.*** If the United States trustee convenes a meeting of equity security holders under § 341(b), the United States trustee must set a date for the meeting and preside over it. **(3)** ***Who Has a Right to Vote; Objecting to the Right to Vote.*** (A) *In a Chapter 7 Case.* A creditor in a Chapter 7 case may vote if, at or before the meeting: (i) the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote under § 702(a); (ii) the proof of claim is not insufficient on its face; and (iii) no objection is made to the claim. (B) *In a Partnership Case.* A creditor in a partnership case may file a proof of claim or a writing evidencing a right to vote for a trustee for the general partner's estate even if a trustee for the partnership's estate has previously qualified. (C) *Objecting to the Amount or Allowability of a Claim for Voting Purposes.* Unless the court orders otherwise, if there is an objection to the amount or allowability of a claim for voting purposes, the United States trustee

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	must tabulate the votes for each alternative presented by the dispute. If resolving the dispute is necessary to determine the election's result, the United States trustee must report to the court the tabulations for each alternative.
(c) RECORD OF MEETING. Any examination under oath at the meeting of creditors held pursuant to § 341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and provide a copy or transcript of such recording at the entity's expense.	**(c) Recording the Proceedings.** At the meeting of creditors under § 341(a), the United States trustee must: (1) record verbatim—using electronic sound-recording equipment or other means of recording—all examinations under oath; (2) preserve the recording and make it available for public access for 2 years after the meeting concludes; and (3) upon request, certify and provide a copy or transcript of the recording to any entity at that entity's expense.
(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE. (1) Report of Undisputed Election. In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed. (2) Disputed Election. If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the	**(d) Reporting Election Results in a Chapter 7 Case.** **(1)** *Undisputed Election.* In a Chapter 7 case, if the election of a trustee or a member of a creditors' committee is undisputed, the United States trustee must promptly file a report of the election. The report must include the name and address of the person or entity elected and a statement that the election was undisputed. **(2)** *Disputed Election.* (A) *United States Trustee's Report.* If the election is disputed, the United States trustee must: (i) promptly file a report informing the court of the nature of the dispute and listing the name and address of any candidate elected

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report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. Unless a motion for the resolution of the dispute is filed no later than 14 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.	under any alternative presented by the dispute; and (ii) no later than the date on which the report is filed, mail a copy to any party in interest that has requested one. (B) *Interim Trustee.* Until the court resolves the dispute, the interim trustee must continue in office. Unless a motion to resolve the dispute is filed within 14 days after the report is filed, the interim trustee must serve as trustee in the case.
(e) ADJOURNMENT. The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.	**(e) Adjournment.** The presiding official may adjourn the meeting from time to time by announcing at the meeting the date and time to reconvene. The presiding official must promptly file a statement showing the adjournment and the date and time to reconvene.
(f) SPECIAL MEETINGS. The United States trustee may call a special meeting of creditors on request of a party in interest or on the United States trustee's own initiative.	**(f) Special Meetings of Creditors.** The United States trustee may call a special meeting of creditors or may do so on request of a party in interest.
(g) FINAL MEETING. If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $1,500, the clerk shall mail a summary of the trustee's final account to the creditors with a notice of the meeting, together with a statement of the amount of the claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.	**(g) Final Meeting of Creditors.** If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $1,500, the clerk must give notice of the meeting to the creditors. The notice must include a summary of the trustee's final account and a statement of the amount of the claims allowed. The trustee must attend the meeting and, if requested, report on the administration of the estate.

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Rule 2004. Examination	**Rule 2004. Examinations**
(a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.	**(a) In General.** On motion of a party in interest, the court may order the examination of any entity.
(b) SCOPE OF EXAMINATION. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.	**(b) Scope of the Examination.** **(1)** *In General.* The examination of an entity under this Rule 2004, or of a debtor under § 343, may relate only to: (A) the debtor's acts, conduct, or property; (B) the debtor's liabilities and financial condition; (C) any matter that may affect the administration of the debtor's estate; or (D) the debtor's right to a discharge. **(2)** *Other Topics in Certain Cases.* In a Chapter 12 or 13 case, or in a Chapter 11 case that is not a railroad reorganization, the examination may also relate to: (A) the operation of any business and the desirability of its continuing; (B) the source of any money or property the debtor acquired or will acquire for the purpose of consummating a plan and the consideration given or offered; and (C) any other matter relevant to the case or to formulating a plan.
(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as	**(c) Compelling Attendance and the Production of Documents.** Regardless of the district where the examination will be conducted, an entity may be compelled under Rule 9016 to attend and produce documents. An attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be

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provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.	held if the attorney is admitted to practice in that court or in the court where the case is pending.
(d) TIME AND PLACE OF EXAMINATION OF DEBTOR. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.	**(d) Time and Place to Examine the Debtor.** The court may, for cause and on terms it may impose, order the debtor to be examined under this Rule 2004 at any designated time and place, in or outside the district.
(e) MILEAGE. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.	**(e) Witness Fees and Mileage.** **(1)** ***For a Nondebtor Witness.*** An entity, except the debtor, may be required to attend as a witness only if the lawful mileage and witness fee for 1 day's attendance are first tendered. **(2)** ***For a Debtor Witness.*** A debtor witness must be tendered a mileage fee if required to appear for examination more than 100 miles from the debtor's residence. The fee need cover only the distance exceeding 100 miles from the debtor's residence at the time of the examination or when the first petition was filed, whichever residence is nearer.

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Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination	**Rule 2005. Apprehending and Removing a Debtor for Examination**
(a) ORDER TO COMPEL ATTENDANCE FOR EXAMINATION. On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.	**(a) Compelling the Debtor's Attendance.** **(1)** *Order to Apprehend the Debtor.* On motion of a party in interest, supported by an affidavit, the court may order a marshal or other official authorized by law to bring the debtor before the court without unnecessary delay. The affidavit must allege that: (A) an examination is necessary to properly administer the estate, and there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid the examination; (B) the debtor has evaded service of a subpoena or an order to attend the examination; or (C) the debtor has willfully disobeyed a duly served subpoena or order to attend the examination. **(2)** *Ordering an Immediate Examination.* If, after hearing, the court finds the allegations to be true, it must: (A) order the immediate examination of the debtor; and (B) if necessary, set conditions for further examination and for the debtor's obedience to any further order regarding it.
(b) REMOVAL. Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the	**(b) Removing a Debtor to Another District for Examination.** **(1)** *In General.* When an order is issued under (a)(1) and the debtor is found in another district, the debtor may be

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following rules: (1) If the debtor is taken into custody under the order at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order. (2) If the debtor is taken into custody under the order at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall order removal, and the person in custody shall be released on conditions ensuring prompt appearance before the court that issued the order to compel the attendance.	taken into custody and removed as provided in (2) and (3). **(2)** ***Within 100 Miles.*** A debtor who is taken into custody less than 100 miles from where the order was issued must be brought promptly before the court that issued the order. **(3)** ***At 100 Miles or More.*** A debtor who is taken into custody 100 miles or more from where the order was issued must be brought without unnecessary delay for a hearing before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the judge finds that the person in custody is the debtor and is subject to an order under (a)(1), or if the person waives a hearing, the judge must order removal, and must release the person in custody on conditions ensuring prompt appearance before the court that issued the order compelling attendance.
(c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U.S.C., § 3146(a) and (b).	**(4)** ***Conditions of Release.*** 18 U.S.C. § 3146(a) and (b) govern the court's determination of what conditions will reasonably assure attendance and obedience under this Rule 2005.

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Rule 2006. Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases	**Rule 2006. Soliciting and Voting Proxies in a Chapter 7 Case**
(a) APPLICABILITY. This rule applies only in a liquidation case pending under chapter 7 of the Code.	**(a) Applicability.** This Rule 2006 applies only in a Chapter 7 case.
(b) DEFINITIONS. (1) Proxy. A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of the estate. (2) Solicitation of Proxy. The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.	**(b) Definitions.** **(1)** ***Proxy.*** A "proxy" is a written power of attorney that authorizes an entity to vote the claim or otherwise act as the holder's attorney-in-fact in connection with the administration of the estate. **(2)** ***Soliciting a Proxy.*** "Soliciting a proxy" means any communication by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of a Chapter 7 petition filed by or against the debtor. But such a communication is not considered soliciting a proxy if it comes from an attorney to a claim owner who is a regular client or who has requested the attorney's representation.
(c) AUTHORIZED SOLICITATION. (1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least seven days' notice in writing and of which meeting written minutes were kept and are available	**(c) Who May Solicit a Proxy.** A proxy may be solicited only in writing and only by: (1) a creditor that, on the date the petition was filed, held an allowable unsecured claim against the estate; (2) a committee elected under § 705; (3) a committee elected by creditors that hold a majority of claims in number and in total amount and that: (A) have claims that are not contingent or unliquidated; (B) are not disqualified from voting under § 702(a); and (C) were present or represented at a creditors' meeting of which:

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reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. (2) A proxy may be solicited only in writing.	(i) all creditors with claims over $500 or the 100 creditors with the largest claims had at least 7 days' written notice; and (ii) written minutes are available that report the voting creditors' names and the amounts of their claims; or (4) a bona fide trade or credit association, which may solicit only creditors who, on the petition date: (A) were its members or subscribers in good standing; and (B) held allowable unsecured claims.
(d) SOLICITATION NOT AUTHORIZED. This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.	**(d) When Soliciting a Proxy Is Not Permitted.** This Rule 2006 does not permit soliciting a proxy: (1) for any interest except that of a general creditor; (2) by the interim trustee; or (3) by or on behalf of: (A) a custodian; (B) any entity not qualified to vote under § 702(a); (C) an attorney-at-law; or (D) a transferee holding a claim for collection purposes only.
(e) DATA REQUIRED FROM HOLDERS OF MULTIPLE PROXIES. At any time before the voting commences at any meeting of creditors pursuant to § 341(a) of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and transmit to the United States trustee a verified list of the proxies to be voted and a verified	**(e) Duties of Holders of Multiple Proxies.** Before voting begins at any meeting of creditors under § 341(a)—or at any other time the court orders—a holder of 2 or more proxies must file and send to the United States trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances regarding each proxy's execution and delivery. The statement must include:

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statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including: (1) a copy of the solicitation; (2) identification of the solicitor, the forwarder, if the forwarder is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority; (3) a statement that no consideration has been paid or promised by the proxyholder for the proxy; (4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other entity for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxyholder's law firm,	(1) a copy of the solicitation; (2) an identification of the solicitor, the forwarder (if the forwarder is neither the solicitor nor the claim owner), and the proxyholder—including their connections with the debtor and with each other—together with: (A) if the solicitor, forwarder, or proxyholder is an association, a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were, on the petition date, members or subscribers in good standing with allowable unsecured claims; and (B) if the solicitor, forwarder, or proxyholder is a committee of creditors, a list stating: (i) the date and place the committee was organized; (ii) that the committee was organized under (c)(1)(B) or (C); (iii) the committee's members; (iv) the amounts of their claims; (v) when the claims were acquired; (vi) the amounts paid for the claims; and (vii) the extent to which the committee members' claims are secured or entitled to priority; (3) a statement that the proxyholder has neither paid nor promised any consideration for the proxy; (4) a statement addressing whether there is any agreement—and, if so, giving its

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which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate; (5) if the proxy was solicited by an entity other than the proxyholder, or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other entity for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any entity other than a member or regular associate of the solicitor's or forwarder's law firm which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate; (6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on the member's claim.	particulars—between the proxyholder and any other entity to pay any consideration related to voting the proxy or to share with any entity (except a member or regular associate of the proxyholder's law firm) compensation that may be allowed to: (A) the trustee or any entity for services rendered in the case; or (B) any person employed by the estate; (5) if the proxy was solicited by an entity other than the proxyholder—or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the claim owner—a statement signed and verified by the solicitor or forwarder: (A) confirming that no consideration has been paid or promised for the proxy; (B) addressing whether there is any agreement—and, if so, giving its particulars—between the solicitor or forwarder and any other entity to pay any consideration related to voting the proxy or to share with any entity (except a member or regular associate of the solicitor's or forwarder's law firm) compensation that may be allowed to: (i) the trustee or any entity for services rendered in the case; or (ii) any person employed by the estate; and (6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member disclosing the amount and source of any consideration paid or to

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	be paid to the member in connection with the case, except a dividend on the member's claim.
(f) ENFORCEMENT OF RESTRICTIONS ON SOLICITATION. On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other appropriate action.	**(f) Enforcing Restrictions on Soliciting Proxies.** On motion of a party in interest or on its own, the court may determine whether there has been a failure to comply with this Rule 2006 or any other impropriety related to soliciting or voting a proxy. After notice and a hearing, the court may: (1) reject a proxy for cause; (2) vacate an order entered because a proxy was voted that should have been rejected; or (3) take other appropriate action.

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Rule 2007. Review of Appointment of Creditors' Committee Organized Before Commencement of the Case	**Rule 2007. Reviewing the Appointment of a Creditors' Committee Organized Before a Chapter 9 or 11 Case Is Commenced**
(a) MOTION TO REVIEW APPOINTMENT. If a committee appointed by the United States trustee pursuant to § 1102(a) of the Code consists of the members of a committee organized by creditors before the commencement of a chapter 9 or chapter 11 case, on motion of a party in interest and after a hearing on notice to the United States trustee and other entities as the court may direct, the court may determine whether the appointment of the committee satisfies the requirements of § 1102(b)(1) of the Code.	**(a) Motion to Review the Appointment.** If, in a Chapter 9 or 11 case, a committee appointed by the United States trustee under § 1102(a) consists of the members of a committee organized by creditors before the case commenced, the court may determine whether the committee's appointment satisfies the requirements of § 1102(b)(1). The court may do so on a party in interest's motion and after a hearing on notice to the United States trustee and other entities as the court orders.
(b) SELECTION OF MEMBERS OF COMMITTEE. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if: (1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least seven days' notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection; (2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the	**(b) Determining Whether the Committee Was Fairly Chosen.** The court may find that the committee was fairly chosen if: (1) it was selected by a majority in number and amount of claims of unsecured creditors who are entitled to vote under § 702(a) and who were present or represented at a meeting of which: (A) all creditors with unsecured claims of over $1,000 or the 100 unsecured creditors with the largest claims had at least 7 days' written notice; and (B) written minutes are available for inspection reporting the voting creditors' names and the amounts of their claims; (2) all proxies voted at the meeting were solicited under Rule 2006; (3) the lists and statements required by Rule 2006(e) have been sent to the United States trustee; and

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lists and statements required by subdivision (e) thereof have been transmitted to the United States trustee; and (3) the organization of the committee was in all other respects fair and proper.	(4) the committee's organization was in all other respects fair and proper.
(c) FAILURE TO COMPLY WITH REQUIREMENTS FOR APPOINTMENT. After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.	**(c) Failure to Comply with Appointment Requirements.** If, after a hearing on notice under (a), the court finds that a committee appointment fails to satisfy the requirements of § 1102(b)(1), it: (1) must order the United States trustee to vacate the appointment; and (2) may order other appropriate action.

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Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case	**Rule 2007.1. Appointing a Trustee or Examiner in a Chapter 11 Case**
(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner under § 1104(a) or § 1104(c) of the Code shall be made in accordance with Rule 9014.	**(a) In General.** In a Chapter 11 case, a motion to appoint a trustee or examiner under § 1104(a) or (c) must be made in accordance with Rule 9014.
(b) ELECTION OF TRUSTEE. (1) *Request for an Election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee. (2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006. (3) *Report of Election and Resolution of Disputes.* (A) *Report of Undisputed Election.* If no dispute arises out of the	**(b) Requesting the United States Trustee to Convene a Meeting of Creditors to Elect a Trustee.** **(1)** ***In General.*** A request to the United States trustee to convene a meeting of creditors to elect a trustee must be filed and sent to the United States trustee in accordance with Rule 5005 and within the time prescribed by § 1104(b). Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved under (c) below must serve as trustee. **(2)** ***Notice and Manner of Conducting the Election.*** A trustee's election under § 1104(b) must be conducted as Rules 2003(b)(3) and 2006 provide, and notice of the meeting of creditors must be given as Rule 2002 provides. The United States trustee must preside at the meeting. A proxy to vote in the election may be solicited only by a creditors' committee appointed under § 1102 or by another party entitled to solicit a proxy under Rule 2006. **(3)** ***Reporting Election Results; Resolving Disputes.*** (A) *Undisputed Election.* If the election is undisputed, the United States trustee must promptly file a report certifying the election, including

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election, the United States trustee shall promptly file a report certifying the election, including the name and address of the person elected and a statement that the election is undisputed. The report shall be accompanied by a verified statement of the person elected setting forth that person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. (B) *Dispute Arising Out of an Election*. If a dispute arises out of an election, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code.	the name and address of the person elected and a statement that the election is undisputed. The report must be accompanied by a verified statement of the person elected setting forth that person's connections with: (i) the debtor; (ii) creditors; (iii) any other party in interest; (iv) their respective attorneys and accountants; (v) the United States trustee; or (vi) any person employed in the United States trustee's office. (B) *Disputed Election.* If the election is disputed, the United States trustee must promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report must be accompanied by a verified statement by each such candidate, setting forth the candidate's connections with any entity listed in (A). No later than the date on which the report of the disputed election is filed, the United States trustee must mail a copy of the report and each verified statement to: (i) any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report; and

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	(ii) any committee appointed under § 1102.
(c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, or persons employed in the office of the United States trustee. The application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.	**(c) Approving an Appointment.** On application of the United States trustee, the court may approve a trustee's or examiner's appointment under § 1104(d). The application must: (1) name the person appointed and state, to the best of the applicant's knowledge, all that person's connections with any entity listed in (b)(3)(A); (2) state the names of the parties in interest with whom the United States trustee consulted about the appointment; and (3) be accompanied by a verified statement of the person appointed setting forth that person's connections with any entity listed in (b)(3)(A).

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Rule 2007.2. Appointment of Patient Care Ombudsman in a Health Care Business Case	**Rule 2007.2. Appointing a Patient-Care Ombudsman in a Health Care Business Case**
(a) ORDER TO APPOINT PATIENT CARE OMBUDSMAN. In a chapter 7, chapter 9, or chapter 11 case in which the debtor is a health care business, the court shall order the appointment of a patient care ombudsman under § 333 of the Code, unless the court, on motion of the United States trustee or a party in interest filed no later than 21 days after the commencement of the case or within another time fixed by the court, finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients.	**(a) In General.** In a Chapter 7, 9, or 11 case in which the debtor is a health care business, the court must order the appointment of a patient-care ombudsman under § 333—unless the court, on motion of the United States trustee or a party in interest, finds that appointing a patient-care ombudsman in that case is not necessary to protect patients. The motion must be filed within 21 days after the case was commenced or at another time set by the court.
(b) MOTION FOR ORDER TO APPOINT OMBUDSMAN. If the court has found that the appointment of an ombudsman is not necessary, or has terminated the appointment, the court, on motion of the United States trustee or a party in interest, may order the appointment at a later time if it finds that the appointment has become necessary to protect patients.	**(b) Deferred Appointment.** If the court has found that appointing an ombudsman is unnecessary, or has terminated the appointment, the court may, on motion of the United States trustee or a party in interest, order an appointment later if it finds that an appointment has become necessary to protect patients.
(c) NOTICE OF APPOINTMENT. If a patient care ombudsman is appointed under § 333, the United States trustee shall promptly file a notice of the appointment, including the name and address of the person appointed. Unless the person appointed is a State Long-Term Care Ombudsman, the notice shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, patients, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office	**(c) Giving Notice.** When a patient-care ombudsman is appointed under § 333, the United States trustee must promptly file a notice of the appointment, including the name and address of the person appointed. Unless that person is a State Long-Term-Care Ombudsman, the notice must be accompanied by a verified statement of the person appointed setting forth that person's connections with: (1) the debtor; (2) creditors; (3) patients;

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of the United States trustee.	(4) any other party in interest; (5) their respective attorneys and accountants; (6) the United States trustee; or (7) any person employed in the United States trustee's office.
(d) TERMINATION OF APPOINTMENT. On motion of the United States trustee or a party in interest, the court may terminate the appointment of a patient care ombudsman if the court finds that the appointment is not necessary to protect patients.	**(d) Terminating an Appointment.** On motion of the United States trustee or a party in interest, the court may terminate a patient-care ombudsman's appointment that it finds to be unnecessary to protect patients.
(e) MOTION. A motion under this rule shall be governed by Rule 9014. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct.	**(e) Procedure.** Rule 9014 governs any motion under this Rule 2007.2. The motion must be sent to the United States trustee and served on: • the debtor; • the trustee; • any committee elected under § 705 or appointed under § 1102, or its authorized agent; and • any other entity as the court orders. In a Chapter 9 or 11 case, if no committee of unsecured creditors has been appointed under § 1102, the motion must also be served on the creditors included on the list filed under Rule 1007(d).

ORIGINAL	REVISION
Rule 2008. Notice to Trustee of Selection	**Rule 2008. Notice to the Person Selected as Trustee**
The United States trustee shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in writing of rejection of the office within seven days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in writing of acceptance of the office within seven days after receipt of notice of selection or shall be deemed to have rejected the office.	**(a) Giving Notice.** The United States trustee must immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. **(b) Accepting the Position of Trustee.** **(1)** ***Trustee Who Has Filed a Blanket Bond.*** A trustee selected in a Chapter 7, 12, or 13 case who has filed a blanket bond under Rule 2010 may reject the office by notifying the court and the United States trustee in writing within 7 days after receiving notice of selection. Otherwise, the trustee will be deemed to have accepted the office. **(2)** ***Other Trustees.*** Any other person selected as trustee may accept the office by notifying the court and the United States trustee in writing within 7 days after receiving notice of selection. Otherwise, the person will be deemed to have rejected the office.

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Rule 2009. Trustees for Estates When Joint Administration Ordered	**Rule 2009. Trustees for Jointly Administered Estates**
(a) ELECTION OF SINGLE TRUSTEE FOR ESTATES BEING JOINTLY ADMINISTERED. If the court orders a joint administration of two or more estates under Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered, unless the case is under subchapter V of chapter 7 of the Code.	**(a) Creditors' Right to Elect a Single Trustee.** Except in a case under Subchapter V of Chapter 7, if the court orders that 2 or more estates be jointly administered under Rule 1015(b), the creditors may elect a single trustee for those estates.
(b) RIGHT OF CREDITORS TO ELECT SEPARATE TRUSTEE. Notwithstanding entry of an order for joint administration under Rule 1015(b), the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code, unless the case is under subchapter V of chapter 7.	**(b) Creditors' Right to Elect a Separate Trustee.** Except in a case under Subchapter V of Chapter 7, any debtor's creditors may elect a separate trustee for the debtor's estate under § 702—even if the court orders joint administration under Rule 1015(b).
(c) APPOINTMENT OF TRUSTEES FOR ESTATES BEING JOINTLY ADMINISTERED. (1) *Chapter 7 Liquidation Cases.* Except in a case governed by subchapter V of chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases. (2) *Chapter 11 Reorganization Cases.* If the appointment of a trustee is ordered, the United States trustee may appoint one or more trustees for estates being jointly administered in chapter 11 cases. (3) *Chapter 12 Family Farmer's Debt Adjustment Cases.* The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 12 cases. (4) *Chapter 13 Individual's Debt*	**(c) United States Trustee's Right to Appoint Interim Trustees in Cases with Jointly Administered Estates.** **(1)** ***Chapter 7.*** Except in a case under Subchapter V of Chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in Chapter 7. **(2)** ***Chapter 11.*** If the court orders the appointment of a trustee, the United States trustee may appoint one or more trustees for estates being jointly administered in Chapter 11. **(3)** ***Chapter 12 or 13.*** The United States trustee may appoint one or more trustees for estates being jointly administered in Chapter 12 or 13.

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Adjustment Cases. The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 13 cases.	
(d) POTENTIAL CONFLICTS OF INTEREST. On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee who has been elected or appointed, the court shall order the selection of separate trustees for estates being jointly administered.	**(d) Conflicts of Interest.** On a showing that a common trustee's conflicts of interest will prejudice creditors or equity security holders of jointly administered estates, the court must order the selection of separate trustees for the estates.
(e) SEPARATE ACCOUNTS. The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.	**(e) Keeping Separate Accounts.** A trustee of jointly administered estates must keep separate accounts of each estate's property and distribution.

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Rule 2010. Qualification by Trustee; Proceeding on Bond	**Rule 2010. Blanket Bond; Proceedings on the Bond**
(a) BLANKET BOND. The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.	**(a) Authorizing a Blanket Bond.** The United States trustee may authorize a blanket bond in the United States' favor, conditioned on the faithful performance of a trustee's official duties to cover: (1) a person who qualifies as trustee in a number of cases; or (2) multiple trustees who each qualifies in a different case.
(b) PROCEEDING ON BOND. A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.	**(b) Proceedings on the Bond.** A party in interest may bring a proceeding in the name of the United States on a trustee's bond for the use of the entity injured by the trustee's breach of the condition.

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Rule 2011. Evidence of Debtor in Possession or Qualification of Trustee	**Rule 2011. Evidence That a Debtor Is a Debtor in Possession or That a Trustee Has Qualified**
(a) Whenever evidence is required that a debtor is a debtor in possession or that a trustee has qualified, the clerk may so certify and the certificate shall constitute conclusive evidence of that fact.	**(a) The Clerk's Certification.** Whenever evidence is required that a debtor is a debtor in possession or that a trustee has qualified, the clerk may issue a certificate to that effect. The certification constitutes conclusive evidence of that fact.
(b) If a person elected or appointed as trustee does not qualify within the time prescribed by § 322(a) of the Code, the clerk shall so notify the court and the United States trustee.	**(b) Trustee's Failure to Qualify.** If a person elected or appointed as trustee does not qualify within the time prescribed by § 322(a), the clerk must so notify the court and the United States trustee.

ORIGINAL	REVISION
Rule 2012. Substitution of Trustee or Successor Trustee; Accounting	**Rule 2012. Substituting a Trustee in a Chapter 11 or 12 Case; Successor Trustee in a Pending Proceeding**
(a) TRUSTEE. If a trustee is appointed in a chapter 11 case or the debtor is removed as debtor in possession in a chapter 12 case, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.	**(a) Substituting a Trustee.** If a trustee is appointed in a Chapter 11 case or the debtor is removed as debtor in possession in a Chapter 12 case, the trustee is automatically substituted for the debtor in possession as a party in any pending action, proceeding, or matter.
(b) SUCCESSOR TRUSTEE. When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code (1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and (2) the successor trustee shall prepare, file, and transmit to the United States trustee an accounting of the prior administration of the estate.	**(b) Successor Trustee.** When a trustee dies, resigns, is removed, or otherwise ceases to hold office while a bankruptcy case is pending, the successor trustee is automatically substituted as a party in any pending action, proceeding, or matter. The successor trustee must prepare, file, and send to the United States trustee an accounting of the estate's prior administration.

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Rule 2013. Public Record of Compensation Awarded to Trustees, Examiners, and Professionals	**Rule 2013. Keeping a Public Record of Compensation Awarded by the Court to Examiners, Trustees, and Professionals**
(a) RECORD TO BE KEPT. The clerk shall maintain a public record listing fees awarded by the court (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professionals employed by trustees, and (2) to examiners. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee awarded. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge. "Trustees," as used in this rule, does not include debtors in possession.	**(a) In General.** The clerk must keep a public record of fees the court awards to examiners and trustees, and to attorneys, accountants, appraisers, auctioneers, and other professionals that trustees employ. The record must include the case name and docket number, the name of the individual or firm receiving the fee, and the amount awarded. The record must be maintained chronologically and be kept current and open for public examination without charge. "Trustee," as used in this Rule 2013, does not include a debtor in possession.
(b) SUMMARY OF RECORD. At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees awarded during the preceding year. The summary shall be open to examination by the public without charge. The clerk shall transmit a copy of the summary to the United States trustee.	**(b) Annual Summary of the Record.** At the end of each year, the clerk must prepare a summary of the public record, by individual or firm name, showing the total fees awarded during the year. The summary must be open for public examination without charge. The clerk must send a copy of the summary to the United States trustee.

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Rule 2014. Employment of Professional Persons	**Rule 2014. Employing Professionals**
(a) APPLICATION FOR AND ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.	**(a) Order Approving Employment; Application for Employment.** **(1)** *Order Approving Employment.* The court may approve the employment of an attorney, accountant, appraiser, auctioneer, agent, or other professional under § 327, § 1103, or § 1114 only on the trustee's or committee's application. **(2)** *Application for Employment.* The applicant must file the application and, except in a Chapter 9 case, must send a copy to the United States trustee. The application must state specific facts showing: (A) the necessity for the employment; (B) the name of the person to be employed; (C) the reasons for the selection; (D) the professional services to be rendered; (E) any proposed arrangement for compensation; and (F) to the best of the applicant's knowledge, all the person's connections with: • the debtor; • creditors; • any other party in interest; • their respective attorneys and accountants; • the United States trustee; and • any person employed in the United States trustee's office.

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	(3) *Verified Statement.* The application must be accompanied by a verified statement of the person to be employed, setting forth that person's connections with any entity listed in (2)(F).
(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as attorney or accountant so employed, without further order of the court.	**(b) Services Rendered by a Member or Associate of a Law or Accounting Firm.** If a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant—or if a named attorney or accountant is employed—then any partner, member, or regular associate may act as so employed, without further court order.

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Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status	**Rule 2015. Duty to Keep Records, Make Reports, and Give Notices**
(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall: (1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; (5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter	**(a) Duties of a Trustee or Debtor in Possession.** A trustee or debtor in possession must: (1) in a Chapter 7 case and, if the court so orders, in a Chapter 11 case, file and send to the United States trustee a complete inventory of the debtor's property within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file: (A) the reports and summaries required by § 704(a)(8); and (B) if payments are made to employees, a statement of the amounts of deductions for all taxes required to be withheld or paid on the employees' behalf and the place where these funds are deposited; (4) give notice of the case, as soon as possible after it commences, to the following entities, except those who know or have previously been notified of the case: (A) every entity known to be holding money or property subject to the debtor's withdrawal or order, including every bank, savings- or building-and-loan association, public utility company, and

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during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6), file and transmit to the United States trustee a statement of any disbursements made during that quarter and of any fees payable under 28 U.S.C. § 1930(a)(6) for that quarter; and (6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and transmit to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by § 308. If the order for relief is within the first 15 days of a calendar month, a report shall be filed for the portion of the month that follows the order for relief. If the order for relief is after the 15th day of a calendar month, the period for the remainder of the month shall be included in the report for the next calendar month. Each report shall be filed no later than 21 days after the last day of the calendar month following the month covered by the report. The obligation to file reports under this subparagraph terminates on the effective date of the plan, or conversion or dismissal of the case.	landlord with whom the debtor has a deposit; and (B) every insurance company that has issued a policy with a cash-surrender value payable to the debtor; (5) in a Chapter 11 case, on or before the last day of the month after each calendar quarter during which fees must be paid under 28 U.S.C. § 1930(a)(6), file and send to the United States trustee a statement of those fees and any disbursements made during that quarter; and (6) in a Chapter 11 small business case, unless the court, for cause, sets a different schedule, file and send to the United States trustee a report under § 308, using Form 425C, for each calendar month after the order for relief on the following schedule: • If the order for relief is within the first 15 days of a calendar month, the report must be filed for the rest of that month. • If the order for relief is after the 15th, the information for the rest of that month must be included in the report for the next calendar month. Each report must be filed within 21 days after the last day of the month following the month that the report covers. The obligation to file reports ends on the date that the plan becomes effective or the case is converted or dismissed.
(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in	**(b) Duties of a Chapter 12 Trustee or Debtor in Possession.** In a Chapter 12 case, the debtor in possession must perform the duties prescribed in (a)(2)–(4)

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possession shall perform the duties prescribed in clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.	and, if the court orders, file and send to the United States trustee a complete inventory of the debtor's property within the time the court sets. If the debtor is removed as debtor in possession, the trustee must perform these duties.
(c) CHAPTER 13 TRUSTEE AND DEBTOR. (1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.(2) Nonbusiness Cases. In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.	**(c) Duties of a Chapter 13 Trustee and Debtor.** **(1)** ***Chapter 13 Business Case.*** In a Chapter 13 case, a debtor engaged in business must: (A) perform the duties prescribed by (a)(2)–(4); and (B) if the court so orders, file and send to the United States trustee a complete inventory of the debtor's property within the time the court sets. **(2)** ***Other Chapter 13 Case.*** In a Chapter 13 case in which the debtor is not engaged in business, the trustee must perform the duties prescribed by (a)(2).
(d) FOREIGN REPRESENTATIVE. In a case in which the court has granted recognition of a foreign proceeding under chapter 15, the foreign representative shall file any notice required under § 1518 of the Code within 14 days after the date when the representative becomes aware of the subsequent information.	**(d) Duties of a Chapter 15 Foreign Representative.** In a Chapter 15 case in which the court has granted recognition of a foreign proceeding, the foreign representative must file any notice required under § 1518 within 14 days after becoming aware of the subsequent information.
(e) TRANSMISSION OF REPORTS. In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of	**(e) Making Reports Available in a Chapter 11 Case.** In a Chapter 11 case, the court may order that copies or summaries of annual reports and other reports be

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other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports. A copy of every report or summary mailed or published pursuant to this subdivision shall be transmitted to the United States trustee.	mailed to creditors, equity security holders, and indenture trustees. The court may also order that summaries of these reports be published. A copy of every such report or summary, whether mailed or published, must be sent to the United States trustee.

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Rule 2015.1. Patient Care Ombudsman	**Rule 2015.1. Patient-Care Ombudsman**
(a) REPORTS. A patient care ombudsman, at least 14 days before making a report under § 333(b)(2) of the Code, shall give notice that the report will be made to the court, unless the court orders otherwise. The notice shall be transmitted to the United States trustee, posted conspicuously at the health care facility that is the subject of the report, and served on: the debtor; the trustee; all patients; and any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct. The notice shall state the date and time when the report will be made, the manner in which the report will be made, and, if the report is in writing, the name, address, telephone number, email address, and website, if any, of the person from whom a copy of the report may be obtained at the debtor's expense.	**(a) Notice of the Report.** Unless the court orders otherwise, a patient-care ombudsman must give at least 14 days' notice before making a report under § 333(b)(2). **(1)** ***Recipients of the Notice.*** The notice must be sent to the United States trustee, posted conspicuously at the healthcare facility that is the report's subject, and served on: • the debtor; • the trustee; • all patients; • any committee elected under § 705 or appointed under § 1102 or its authorized agent; • in a Chapter 9 or 11 case, the creditors on the list filed under Rule 1007(d) if no committee of unsecured creditors has been appointed under § 1102; and • any other entity as the court orders. **(2)** ***Contents of the Notice.*** The notice must state: (A) the date and time when the report will be made; (B) the manner in which it will be made; and (C) if it will be written, the name, address, telephone number, email address, and any website of the person from whom a copy may be obtained at the debtor's expense.

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(b) AUTHORIZATION TO REVIEW CONFIDENTIAL PATIENT RECORDS. A motion by a patient care ombudsman under § 333(c) to review confidential patient records shall be governed by Rule 9014, served on the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, and transmitted to the United States trustee subject to applicable nonbankruptcy law relating to patient privacy. Unless the court orders otherwise, a hearing on the motion may not be commenced earlier than 14 days after service of the motion.	**(b) Authorization to Review Confidential Patient Records.** **(1)** *Motion to Review; Service.* A patient-care ombudsman's motion under § 333(c) to review confidential patient records is governed by Rule 9014. The motion must: (A) be served on the patient; (B) be served on any family member or other contact person whose name and address have been given to the trustee or the debtor to provide information about the patient's healthcare; and (C) be sent to the United States trustee, subject to applicable nonbankruptcy law relating to patient privacy. **(2)** *Time for a Hearing*. Unless the court orders otherwise, a hearing on the motion may not commence earlier than 14 days after the motion is served.

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Rule 2015.2. Transfer of Patient in Health Care Business Case	**Rule 2015.2. Transferring a Patient in a Health Care Business Case**
Unless the court orders otherwise, if the debtor is a health care business, the trustee may not transfer a patient to another health care business under § 704(a)(12) of the Code unless the trustee gives at least 14 days' notice of the transfer to the patient care ombudsman, if any, the patient, and any family member or other contact person whose name and address has been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care. The notice is subject to applicable nonbankruptcy law relating to patient privacy.	Unless the court orders otherwise, if the debtor is a health care business, the trustee may transfer a patient to another health care business under § 704(a)(12) only if the trustee gives at least 14 days' notice of the transfer to: • any patient-care ombudsman; • the patient; and • any family member or other contact person whose name and address have been given to the trustee or the debtor to provide information about the patient's healthcare. The notice is subject to applicable nonbankruptcy law concerning patient privacy.

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Rule 2015.3. Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest	**Rule 2015.3. Reporting Financial Information About Entities in Which a Chapter 11 Estate Holds a Substantial or Controlling Interest**
(a) REPORTING REQUIREMENT. In a chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.	**(a) Reporting Requirement; Contents of the Report.** In a Chapter 11 case, the trustee or debtor in possession must file periodic financial reports of the value, operations, and profitability of each entity in which the estate holds a substantial or controlling interest—unless the entity is a publicly traded corporation or a debtor in a bankruptcy case. The reports must be prepared as prescribed by Form 426 and be based on the most recent information reasonably available to the filer.
(b) TIME FOR FILING; SERVICE. The first report required by this rule shall be filed no later than seven days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted. Copies of the report shall be served on the United States trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.	**(b) Time to File; Service.** The first report must be filed at least 7 days before the first date set for the meeting of creditors under § 341. Later reports must be filed at least every 6 months, until the date the plan becomes effective or the case is converted or dismissed. A copy of each report must be served on the United States trustee, any committee appointed under § 1102, and any other party in interest that has filed a request for it.
(c) PRESUMPTION OF SUBSTANTIAL OR CONTROLLING INTEREST; JUDICIAL DETERMINATION. For purposes of this rule, an entity of which the estate controls or owns at least a 20 percent interest, shall be presumed to be an entity in which the estate has a substantial or controlling interest. An entity in which the estate controls or owns less than a 20 percent interest shall	**(c) Presumption of a Substantial or Controlling Interest.** **(1)** ***When a Presumption Applies.*** Under this Rule 2015.3, the estate is presumed to have a substantial or controlling interest in an entity of which it controls or owns at least a 20% interest. Otherwise, the estate is presumed not to have a substantial or controlling interest.

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be presumed not to be an entity in which the estate has a substantial or controlling interest. Upon motion, the entity, any holder of an interest therein, the United States trustee, or any other party in interest may seek to rebut either presumption, and the court shall, after notice and a hearing, determine whether the estate's interest in the entity is substantial or controlling.	**(2)** ***Rebutting the Presumption.*** The entity, any holder of an interest in it, the United States trustee, or any other party in interest may move to rebut either presumption. After notice and a hearing, the court must determine whether the estate's interest in the entity is substantial or controlling.
(d) MODIFICATION OF REPORTING REQUIREMENT. The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.	**(d) Modifying the Reporting Requirement.** After notice and a hearing, the court may vary the reporting requirements of (a) for cause, including that: (1) the trustee or debtor in possession is not able, after a good-faith effort, to comply with them; or (2) the required information is publicly available.
(e) NOTICE AND PROTECTIVE ORDERS. No later than 14 days before filing the first report required by this rule, the trustee or debtor in possession shall send notice to the entity in which the estate has a substantial or controlling interest, and to all holders—known to the trustee or debtor in possession—of an interest in that entity, that the trustee or debtor in possession expects to file and serve financial information relating to the entity in accordance with this rule. The entity in which the estate has a substantial or controlling interest, or a person holding an interest in that entity, may request protection of the information under § 107 of the Code.	**(e) Notice to Entities in Which the Estate has a Substantial or Controlling Interest; Protective Order.** At least 14 days before filing the first report under (a), the trustee or debtor in possession must send notice to every entity in which the estate has a substantial or controlling interest—and all known holders of an interest in the entity—that the trustee or debtor in possession expects to file and serve financial information about the entity in accordance with this Rule 2015.3. Any such entity, or person holding an interest in it, may request that the information be protected under § 107.
(f) EFFECT OF REQUEST. Unless the court orders otherwise, the pendency of a request under subdivisions (c), (d), or (e) of this rule shall not alter or stay the	**(f) Effect of a Request.** Unless the court orders otherwise, a pending request under (c), (d), or (e) does not alter or stay the requirements of (a).

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requirements of subdivision (a).	

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Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses	**Rule 2016. Compensation for Services Rendered; Reimbursing Expenses**
(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.	**(a) In General.** (1) *Application.* An entity seeking from the estate interim or final compensation for services or reimbursement of necessary expenses must file an application showing: (A) in detail the amounts requested and the services rendered, time expended, and expenses incurred; (B) all payments previously made or promised for services rendered or to be rendered in connection with the case; (C) the source of the paid or promised compensation; (D) whether any previous compensation has been shared and whether an agreement or understanding exists between the applicant and any other entity for sharing compensation for services rendered or to be rendered in connection with the case; and (E) the particulars of any compensation sharing or agreement or understanding to share, except by the applicant as a member or regular associate of a law or accounting firm. (2) *Application for Services Rendered or to be Rendered by Attorney or Accountant.* The requirements of (a) apply to an application for compensation for services rendered by an attorney or accountant, even though a creditor or other entity files the application.

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	(3) *Copy to United States Trustee.* Except in a Chapter 9 case, the applicant must send a copy of the application to the United States trustee.
(b) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.	**(b) Disclosing Compensation Paid or Promised to the Debtor's Attorney.** Within 14 days after the order for relief—or at another time as the court orders—every debtor's attorney (whether or not applying for compensation) must file and send to the United States trustee the statement required by § 329. The statement must show whether the attorney has shared or agreed to share compensation with any other entity and, if so, the particulars of any sharing or agreement to share, except with a member or regular associate of the attorney's law firm. Within 14 days after any payment or agreement to pay not previously disclosed, the attorney must file and send to the United States trustee a supplemental statement.
(c) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO BANKRUPTCY PETITION PREPARER. Before a petition is filed, every bankruptcy petition preparer for a debtor shall deliver to the debtor, the declaration under penalty of perjury required by § 110(h)(2). The declaration shall disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration shall also describe the services performed and	**(c) Disclosing Compensation Paid or Promised to a Bankruptcy Petition Preparer.** (1) *Basic Requirements.* Before a petition is filed, every bankruptcy petition preparer for a debtor must deliver to the debtor the declaration under penalty of perjury required by § 110(h)(2). The declaration must: (A) disclose any fee, and its source, received from or on behalf of the debtor within 12 months before the petition's filing, together with

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documents prepared or caused to be prepared by the bankruptcy petition preparer. The declaration shall be filed with the petition. The petition preparer shall file a supplemental statement within 14 days after any payment or agreement not previously disclosed.	all unpaid fees charged to the debtor; (B) describe the services performed and the documents prepared or caused to be prepared by the bankruptcy petition preparer; and (C) be filed with the petition. (2) *Supplemental Statement.* Within 14 days after any later payment or agreement to pay not previously disclosed, the bankruptcy petition preparer must file a supplemental statement.

ORIGINAL	REVISION
Rule 2017. Examination of Debtor's Transactions with Debtor's Attorney	**Rule 2017. Examining Transactions Between a Debtor and the Debtor's Attorney**
(a) PAYMENT OR TRANSFER TO ATTORNEY BEFORE ORDER FOR RELIEF. On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.	**(a) Payments or Transfers to an Attorney Made Before the Order for Relief.** On motion of a party in interest, or on its own, the court may, after notice and a hearing, determine whether a debtor's direct or indirect payment of money or transfer of property to an attorney for services rendered or to be rendered was excessive if it was made: (1) in contemplation of the filing of a bankruptcy petition by or against the debtor, or (2) before the order for relief is entered in an involuntary case.
(b) PAYMENT OR TRANSFER TO ATTORNEY AFTER ORDER FOR RELIEF. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.	**(b) Payments or Transfers to an Attorney Made After the Order for Relief Is Entered.** On motion of the debtor or the United States trustee, or on its own, the court may, after notice and a hearing, determine whether a debtor's payment of money or transfer of property—or agreement to pay money or transfer property—to an attorney after an order for relief is entered is excessive. It does not matter for the determination whether the payment or transfer is made, or to be made, direct or indirect, if the payment, transfer, or agreement is for services related to the case.

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Rule 2018. Intervention; Right to Be Heard	**Rule 2018. Intervention by an Interested Entity; Right to Be Heard**
(a) PERMISSIVE INTERVENTION. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.	**(a) In General.** After hearing on such notice as the court orders and for cause, the court may permit an interested entity to intervene generally or regarding any specified matter.
(b) INTERVENTION BY ATTORNEY GENERAL OF A STATE. In a chapter 7, 11, 12, or 13 case, the Attorney General of a State may appear and be heard on behalf of consumer creditors if the court determines the appearance is in the public interest, but the Attorney General may not appeal from any judgment, order, or decree in the case.	**(b) Intervention by a State Attorney General.** In a Chapter 7, 11, 12, or 13 case, a state attorney general may appear and be heard on behalf of consumer creditors if the court determines that the appearance is in the public interest. But the state attorney general may not appeal from any judgment, order, or decree entered in the case.
(c) CHAPTER 9 MUNICIPALITY CASE. The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case. Representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court.	**(c) Intervention by the United States Secretary of the Treasury or a State Representative.** In a Chapter 9 case: (1) the United States Secretary of the Treasury may—and if requested by the court must—intervene; and (2) a representative of the state where the debtor is located may intervene on matters the court specifies.
(d) LABOR UNIONS. In a chapter 9, 11, or 12 case, a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees. A labor union or employees' association which exercises its right to be heard under this subdivision shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law.	**(d) Intervention by a Labor Union or an Association Representing the Debtor's Employees.** In a Chapter 9, 11, or 12 case, a labor union or an association representing the debtor's employees has the right to be heard on the economic soundness of a plan affecting the employees' interests. Unless otherwise permitted by law, the labor union or employees' association may not appeal any judgment, order, or decree related to the plan.

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(e) SERVICE ON ENTITIES COVERED BY THIS RULE. The court may enter orders governing the service of notice and papers on entities permitted to intervene or be heard pursuant to this rule.	**(e) Serving Entities Covered by This Rule.** The court may issue orders governing the service of notice and papers on entities permitted to intervene or be heard under this Rule 2018.

ORIGINAL	REVISION
Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases	**Rule 2019. Disclosures by Groups, Committees, and Other Entities in a Chapter 9 or 11 Case**
(a) DEFINITIONS. In this rule the following terms have the meanings indicated: (1) "Disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest. (2) "Represent" or "represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.	**(a) Definitions.** In this Rule 2019: (1) "disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest; and (2) "represent" or "represents" means to take a position before the court or to solicit votes regarding a plan's confirmation on another's behalf.
(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES. (1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another. (2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as: (A) an indenture trustee; (B) an agent for one or more other entities under an agreement	**(b) Who Must Disclose.** **(1)** *In General*. In a Chapter 9 or 11 case, a verified statement containing the information listed in (c) must be filed by every group or committee consisting of or representing, and every entity representing, multiple creditors or equity security holders that are: (A) acting in concert to advance their common interests; and (B) not composed entirely of affiliates or insiders of one another. **(2)** *When a Disclosure Statement Is Not Required.* Unless the court orders otherwise, an entity need not file the statement described in (1) solely because it is: (A) an indenture trustee;

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for the extension of credit; (C) a class action representative; or (D) a governmental unit that is not a person.	(B) an agent for one or more other entities under an agreement to extend credit; (C) a class-action representative; or (D) a governmental unit that is not a person.
(c) INFORMATION REQUIRED. The verified statement shall include: (1) the pertinent facts and circumstances concerning: (A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or (B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged; (2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee: (A) name and address; (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and (C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee	**(c) Required Information.** The verified statement must include: (1) the pertinent facts and circumstances concerning: (A) for a group or committee (except a committee appointed under § 1102 or § 1114), its formation, including the name of each entity at whose instance it was formed or for whom it has agreed to act; or (B) for an entity, the entity's employment, including the name of each creditor or equity security holder at whose instance the employment was arranged; (2) if not disclosed under (1), for each member of a group or committee and for an entity: (A) name and address; (B) the nature and amount of each disclosable economic interest held in relation to the debtor when the group or committee was formed or the entity was employed; and (C) for each member of a group or committee claiming to represent any entity in addition to its own members (except a committee appointed under § 1102 or § 1114), the quarter and year in which each disclosable economic interest was acquired—unless it was acquired more than 1 year before the petition was filed;

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appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed; (3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code: (A) name and address; and (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and (4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.	(3) if not disclosed under (1) or (2), for each creditor or equity security holder represented by an entity, group, or committee (except a committee appointed under § 1102 or § 1114): (A) name and address; and (B) the nature and amount of each disclosable economic interest held in relation to the debtor on the statement's date; and (4) a copy of any instrument authorizing the group, committee, or entity to act on behalf of creditors or equity security holders.
(d) SUPPLEMENTAL STATEMENTS. If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemental statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.	**(d) Supplemental Statements.** If a fact disclosed in its most recent statement has changed materially, a group, committee, or entity must file a verified supplemental statement whenever it takes a position before the court or solicits votes on a plan's confirmation. The supplemental statement must set forth any material changes in the information specified in (c).
(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS. (1) On motion of any party in interest, or on its own motion, the court may determine whether there has been a failure to comply with any provision of this rule.	**(e) Failure to Comply; Sanctions.** **(1)** ***Failure to Comply.*** On a party in interest's motion, or on its own, the court may determine whether there has been a failure to comply with this Rule 2019.

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(2) If the court finds such a failure to comply, it may: (A) refuse to permit the entity, group, or committee to be heard or to intervene in the case; (B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or (C) grant other appropriate relief.	**(2)** ***Sanctions.*** If the court finds a failure to comply, it may: (A) refuse to permit the group, committee, or entity to be heard or to intervene in the case; (B) hold invalid any authority, acceptance, rejection, or objection that the group, committee, or entity has given, procured, or received; or (C) grant other appropriate relief.

ORIGINAL	REVISION
Rule 2020. Review of Acts by United States Trustee	**Rule 2020. Reviewing an Act by a United States Trustee**
A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014.	A proceeding to contest any act or failure to act by a United States trustee is governed by Rule 9014.

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Appendix B-2

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

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(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

* * * * *

(5) An individual debtor in a chapter 11 case (unless under subchapter V) shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.

* * * * *

(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental

schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. ~~The~~ This duty to file a supplemental schedule ~~in accordance with this subdivision~~ continues even after the case is closed, except for property acquired after an order is entered: ~~notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order~~

(1) confirming a chapter 11 plan (other than one confirmed under § 1191(b)); or

(2) discharging the debtor in a chapter 12 case, ~~or~~ a chapter 13 case, or a case under subchapter V of

chapter 11 in which the plan is confirmed under § 1191(b). * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. As amended, subdivision (b)(5) of the rule includes an exception for subchapter V cases. Because Code § 1129(a)(15) is inapplicable to such cases, there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

Subdivision (h) is amended to provide that the duty to file a supplemental schedule under the rule terminates upon confirmation of the plan in a subchapter V case, unless the plan is confirmed under § 1191(b), in which case it terminates upon discharge as provided in § 1192.

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Rule 1020. ~~Small Business~~ Chapter 11 Reorganization Case for Small Business Debtors

(a) SMALL BUSINESS DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V of chapter 11 apply. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V of chapter 11 apply. ~~Except as provided in subdivision (c), the~~ The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(b) OBJECTING TO DESIGNATION. ~~Except as provided in subdivision (c), the~~ The United States trustee or a party in interest may file an objection to the debtor's

statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

~~(c) APPOINTMENT OF COMMITTEE OF UNSECURED CREDITORS. If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a~~

~~determination at any time as to whether the committee has been sufficiently active and representative.~~

(~~d~~c) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; the creditors included on the list filed under Rule 1007(d) or, if ~~any~~ a committee has been appointed under § 1102(a)(3), the committee or its authorized agent~~, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d)~~; and any other entity as the court directs.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019 ("SBRA"), Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to include that option and to require a small business debtor to state in its voluntary petition, or in a statement filed within 14 days after the order for relief is

entered in an involuntary case, whether it elects to proceed under subchapter V. The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.

Former subdivision (c) of the rule is deleted because the existence or level of activity of a creditors' committee is no longer a criterion for small-business-debtor status. The SBRA eliminated that portion of the definition of "small business debtor" in § 101(51D) of the Code.

Former subdivision (d) is redesignated as subdivision (c), and the list of entities to be served is revised to reflect that in most small business and subchapter V cases there will not be a committee of creditors.

Rule 2009. Trustees for Estates When Joint Administration Ordered

(a) ELECTION OF SINGLE TRUSTEE FOR ESTATES BEING JOINTLY ADMINISTERED. If the court orders a joint administration of two or more estates under Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered, unless the case is under subchapter V of chapter 7 or subchapter V of chapter 11 of the Code.

(b) RIGHT OF CREDITORS TO ELECT SEPARATE TRUSTEE. Notwithstanding entry of an order for joint administration under Rule 1015(b), the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code, unless the case is under subchapter V of chapter 7 or subchapter V of chapter 11 of the Code.

(c) APPOINTMENT OF TRUSTEES FOR ESTATES BEING JOINTLY ADMINISTERED.

(1) *Chapter 7 Liquidation Cases*. * * * * *

(2) *Chapter 11 Reorganization Cases*. If the appointment of a trustee is ordered or is required by the Code, the United States trustee may appoint one or more trustees for estates being jointly administered in chapter 11 cases.

* * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. In a case under that subchapter, § 1183 of the Code requires the United States trustee to appoint a trustee, so there will be no election. Accordingly, subdivisions (a) and (b) of the rule are amended to except cases under subchapter V from their coverage. Subdivision (c)(2), which addresses the appointment of trustees in jointly administered chapter 11 cases, is amended to make it applicable to cases under subchapter V.

Rule 2012. Substitution of Trustee or Successor Trustee; Accounting

(a) TRUSTEE. If a trustee is appointed in a chapter 11 case (other than under subchapter V), or the debtor is removed as debtor in possession in a chapter 12 case or in a case under subchapter V of chapter 11, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.

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Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (a) of the rule is amended to include any case under that subchapter in which the debtor is removed as debtor in possession under § 1185 of the Code.

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Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall:

(1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case (other than under subchapter V), file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed;

(2) keep a record of receipts and the disposition of money and property received;

(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

(4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case;

(5) in a chapter 11 reorganization case (other than under subchapter V), on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6), file and transmit to the United States trustee a statement of any disbursements made

during that quarter and of any fees payable under 28 U.S.C. § 1930(a)(6) for that quarter; and

(6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and transmit to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by § 308. If the order for relief is within the first 15 days of a calendar month, a report shall be filed for the portion of the month that follows the order for relief. If the order for relief is after the 15th day of a calendar month, the period for the remainder of the month shall be included in the report for the next calendar month. Each report shall be filed no later than 21 days after the last day of the calendar month following the month covered by the report. The obligation to file reports under this subparagraph

terminates on the effective date of the plan, or conversion or dismissal of the case.

(b) TRUSTEE, DEBTOR IN POSSESSION, AND DEBTOR IN A CASE UNDER SUBCHAPTER V OF CHAPTER 11. In a case under subchapter V of chapter 11, the debtor in possession shall perform the duties prescribed in (a)(2)–(4) and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the debtor's property within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this subdivision (b). The debtor shall perform the duties prescribed in (a)(6).

(~~b~~c) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the

United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this ~~paragraph~~ subdivision (c).

(~~c~~d) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) *Business Cases*. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

(2) *Nonbusiness Cases*. In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the

duties prescribed by clause (2) of subdivision (a) of this rule.

(d~~d~~e) FOREIGN REPRESENTATIVE. In a case in which the court has granted recognition of a foreign proceeding under chapter 15, the foreign representative shall file any notice required under § 1518 of the Code within 14 days after the date when the representative becomes aware of the subsequent information.

(e~~e~~f) TRANSMISSION OF REPORTS. In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports. A copy of every report or summary mailed or published pursuant to this subdivision shall be transmitted to the United States trustee.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) is amended to prescribe the duties of a debtor in possession, trustee, and debtor in a subchapter V case. Those cases are excepted from subdivision (a) because, unlike other chapter 11 cases, there will generally be both a trustee and a debtor in possession. Subdivision (b) also reflects that § 1187 of the Code prescribes reporting duties for the debtor in a subchapter V case.

Former subdivisions (b), (c), (d), and (e) are redesignated (c), (d), (e), and (f) respectively.

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Rule 3010. Small Dividends and Payments in Cases Under Chapter 7 ~~Liquidation~~, Subchapter V of Chapter 11, Chapter 12 ~~Family Farmer's Debt Adjustment~~, and Chapter 13 ~~Individual's Debt Adjustment Cases~~

* * * * *

(b) CASES UNDER SUBCHAPTER V OF CHAPTER 11, CHAPTER 12, AND CHAPTER 13 ~~CASES~~. In a case under subchapter V of chapter 11, chapter 12, or chapter 13, ~~case~~ no payment in an amount less than $15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates $15. Any funds remaining shall be distributed with the final payment.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. To avoid the undue cost and inconvenience of distributing small payments, the title and subdivision (b) are amended to include subchapter V cases.

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Rule 3011. Unclaimed Funds in Cases Under Chapter 7 ~~Liquidation~~, Subchapter V of Chapter 11, Chapter 12 ~~Family Farmer's Debt Adjustment~~, and Chapter 13 ~~Individual's Debt Adjustment Cases~~

The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The rule is amended to include such cases because § 347(a) of the Code applies to them.

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Rule 3014. Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. In a case under subchapter V of chapter 11 in which § 1125 of the Code does not apply, the election may be made not later than a date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is amended to provide a deadline for making an election under § 1111(b) in such cases that is set by the court.

Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case

(a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

(b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement, if required under § 1125 of the Code, or evidence showing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated, and Rule 3017.1 shall apply as if the plan is a disclosure statement.

* * * * *

(d) STANDARD FORM SMALL BUSINESS DISCLOSURE STATEMENT AND PLAN. In a small

business case or a case under subchapter V of chapter 11, the court may approve a disclosure statement and may confirm a plan that conform substantially to the appropriate Official Forms or other standard forms approved by the court.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) of the rule is amended to reflect that under § 1181(b) of the Code, § 1125 does not apply to subchapter V cases (and thus a disclosure statement is not required) unless the court for cause orders otherwise. Subdivision (d) is amended to include subchapter V cases as ones in which Official Forms are available for a reorganization plan and, when required, a disclosure statement.

Rule 3017.1. Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. In a small business case or in a case under subchapter V of chapter 11 in which the court has ordered that § 1125 applies, the court may, on application of the plan proponent or on its own initiative, conditionally approve a disclosure statement filed in accordance with Rule 3016. On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

* * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to cover such cases when the court orders that § 1125 of the Code applies.

Rule 3017.2. Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement

In a case under subchapter V of chapter 11 in which § 1125 does not apply, the court shall:

(a) fix a time within which the holders of claims and interests may accept or reject the plan;

(b) fix a date on which an equity security holder or creditor whose claim is based on a security must be the holder of record of the security in order to be eligible to accept or reject the plan;

(c) fix a date for the hearing on confirmation; and

(d) fix a date for transmitting the plan, notice of the time within which the holders of claims and interests may accept or reject it, and notice of the date for the hearing on confirmation.

Committee Note

The rule is added in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No.

116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is added to authorize the court in such a case to act at a time other than when a disclosure statement is approved to set certain times and dates.

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017, 3017.1, or 3017.2. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court under Rule 3017.2, or fixed for cause~~,~~ after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an

amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * * *

Committee Note

Subdivision (a) of the rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and cases under subchapter V of chapter 11.

Rule 3019. Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(b) MODIFICATION OF PLAN AFTER CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification shall be filed and served on the debtor, the proponent of the modification, the trustee, and

any other entity designated by the court, and shall be transmitted to the United States trustee.

(c) MODIFICATION OF PLAN AFTER CONFIRMATION IN A SUBCHAPTER V CASE. In a case under subchapter V of chapter 11, a request to modify the plan under § 1193(b) or (c) of the Code is governed by Rule 9014, and the provisions of this Rule 3019(b) apply.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in such cases under § 1193(b) or (c) of the Code.

Appendix B-3

Rule 3002. Filing Proof of Claim or Interest

*** * * * ***

(c) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply:

* * * * *

(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the

motion. The motion may be granted if the court finds that:

~~(A)~~ the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim ~~because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or~~

~~(B) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address~~.

* * * * *

Committee Note

Rule 3002(c)(6) is amended to provide a single standard for granting motions for an extension of time to file a proof of claim, whether the creditor has a domestic address or a foreign address. If the notice to such creditor was "insufficient under the circumstances to give the creditor reasonable time to file a proofe of claim," the court may grant an extension.

Rule 5005. Filing and Transmittal of Papers

* * * * *

(b) TRANSMITTAL TO THE UNITED STATES TRUSTEE.

(1) The complaints, notices, motions, applications, objections and other papers required to be transmitted to the United States trustee ~~by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending~~ may be sent by filing with the court's electronic-filing system in accordance with Rule 9036, unless a court order or local rule provides otherwise.

(2) The entity, other than the clerk, transmitting a paper to the United States trustee other than through the court's electronic-filing system shall promptly file as proof of such transmittal a

verified statement identifying the paper and stating the manner by which and the date on which it was transmitted to the United States trustee.

(3) Nothing in these rules shall require the clerk to transmit any paper to the United States trustee if the United States trustee requests in writing that the paper not be transmitted.

Committee Note

Subdivision (b)(1) is amended to authorize the clerk or parties to transmit papers to the United States trustee by electronic means in accordance with Rule 9036, regardless of whether the United States trustee is a registered user with the court's electronic-filing system. Subdivision (b)(2) is amended to recognize that parties meeting transmittal obligations to the United States trustee using the court's electronic-filing system need not file a statement evidencing transmittal under Rule 5005(b)(2). The amendment to subdivision (b)(2) also eliminates the requirement that statements evidencing transmittal filed under Rule 5005(b)(2) be verified.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(i) SERVICE OF PROCESS BY TITLE. This subdivision (i) applies to service on a domestic or foreign corporation or partnership or other unincorporated association under Rule 7004(b)(3), or on an officer of an insured depository institution under Rule 7004(h). The defendant's officer or agent need not be correctly named in the address – or even be named – if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title.

Committee Note

New Rule 7004(*i*) is intended to reject those cases interpreting Rule 7004(b)(3) and Rule 7004(h) to require service on a named officer, managing or general agent or other agent, rather than use of their titles. Service to a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," "Managing Agent," "General Agent," "Officer," or "Agent" (or other similar titles) is sufficient.

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Rule 8023. Voluntary Dismissal.

(a) STIPULATED DISMISSAL. The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due.

(b) APPELLANT'S MOTION TO DISMISS. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

(c) OTHER RELIEF. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the bankruptcy court, or remanding the case to it.

(d) COURT APPROVAL. This rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Committee Note

The amendment is intended to conform the rule to the revised version of Federal Rule of Appellate Procedure 42(b) on which it was modelled. It clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not

alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., Fed. R. Bankr. P. 9019 (requiring court approval of compromise or settlement). The amendment clarifies that any order beyond mere dismissal—including approving a settlement, vacating or remanding—requires a court order.

Appendix B-4

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 02/20

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY
  Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

❑ No
❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

❑ No
❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

❑ No
❑ Yes. Name of Person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

Print Save As... Add Attachment Reset

Committee Note

Line 13 is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 13 is amended to add a check box for a small business debtor to indicate that it is making that choice, and the existing check box for small business debtors is amended to allow the debtor to indicate that it is not electing to proceed under subchapter V.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

12/21

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 (other than under Subchapter V). If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** ➔	$_____	$_____

6. **Net income from rental and other real property**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here** ➔	$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total current monthly income

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Committee Note

Official Form 122B is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. As amended, the initial instruction in the form includes an exception for subchapter V cases. Because Code § 1129(a)(15) is inapplicable to such cases, there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

☐ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 02/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. **Debtor's name** _____

2. **All other names debtor used in the last 8 years**
   Include any assumed names, trade names, and *doing business as* names
   _____
   _____
   _____
   _____
   _____

3. **Debtor's federal Employer Identification Number** (EIN) __ __ – __ __ __ __ __ __ __

4. **Debtor's address**

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. **Debtor's website** (URL) _____

6. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes .

___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check all that apply*:
  - ❑ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625 (amount subject to adjustment on 4/01/22 and every 3 years after that).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and it chooses to proceed under Subchapter V of Chapter 11.
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____
  District _____ When _____
  MM / DD / YYYY
  Case number, if known _____

11. Why is the case filed in *this district*?

Check all that apply:

- ❑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- ❑ No
- ❑ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

- ❑ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
  What is the hazard? _____
- ❑ It needs to be physically secured or protected from the weather.
- ❑ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- ❑ Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

- ❑ No
- ❑ Yes. Insurance agency _____
  Contact name _____
  Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- ❑ Funds will be available for distribution to unsecured creditors.
- ❑ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

15. Estimated assets

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

16. Estimated liabilities

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition 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 _____
MM / DD / YYYY

✘ _____ _____
Signature of authorized representative of debtor Printed name

Title _____

18. Signature of attorney

✘ _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

Committee Note

Line 8 of the form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 8 is amended to provide a check box for a small business debtor to indicate that it is making that choice.

THIS PAGE INTENTIONALLY BLANK

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)

Case number: _____

[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

Official Form 309E–1 (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

02/20

For the debtors 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 and debtors, 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 or the debtors' property. 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 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or 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 deadlines specified in this notice. (See line 10 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 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 ▶

6. 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 _____ Location:
Date Time

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

7. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

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.

Deadline to object to exemptions:

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.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

8. Creditors with a foreign address

If you are a creditor receiving mailed notice at 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.

9. 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 the debtor's business.

10. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). 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 believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), 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. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

11. 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 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 7.

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)

Case number: _____

[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

Official Form 309E–2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

02/20

For the debtors 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 all 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 or the debtors' property. 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 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or 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 deadlines 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.

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 _____

For more information, see page 2 ▶

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
_____

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.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

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.

Deadline to object to exemptions:

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.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at 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. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.

For more information, see page 3 ▶

11. **Discharge of debts**	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), 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. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.
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 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.

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Information to identify the case:

Debtor _____ (Name) EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

[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

Official Form 309F–1 (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

02/20

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 and debtors, 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** 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. **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 The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

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 _____ (Name) EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

[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

Official Form 309F–2 (For Corporations or Partnerships under Subchapter V)

Notice of Chapter 11 Bankruptcy Case 02/20

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 12 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 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 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 The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. 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.	
9. 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:** _____	
10. 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.	
11. 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. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.	
12. 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.	

Committee Note

Official Forms 309E-2 and 309F-2 are new. They are promulgated in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11.

Because a trustee is always appointed in a subchapter V case, both forms require the name and contact information of the trustee to be provided.

Previously existing Official Forms 309E and 309F have been renumbered 309E-1 and 309F-1, respectively. Other changes are stylistic.

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Official Form 314 (02/20)

[Caption as in 416A]

Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the Plan) for the Debtor in this case. {The Court has [conditionally] approved a disclosure statement with respect to the Plan (the Disclosure Statement). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]}

{Court approval of the Disclosure Statement does not indicate approval of the Plan by the Court.}

You should review {the Disclosure Statement and} the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [ ] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives;]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [ ] claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [ ] claim against the Debtor, consisting of Dollars ($) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [ ] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor

[In each case, the following language should be included:]

Check one box only

☐ **Accepts the plan**

☐ **Rejects the plan**

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

_____

_____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The first three paragraphs of the form are amended to place braces around all references to a disclosure statement. Section 1125 of the Code does not apply to subchapter V cases unless the court for cause orders otherwise. See Code § 1181(b). Thus, in most chapter V cases there will not be a disclosure statement, and the language in braces on the form should not be included on the ballot.

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Official Form 315 (02/20)

[Caption as in 416A]

Order Confirming Plan

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [*if applicable*, as modified by a modification filed on _____,] or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [or, if appropriate, 11 U.S.C. § 1129(b), 1191(a), or 1191(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____, [*If appropriate*, include dates and any other pertinent details of modifications to the plan] is confirmed. [*If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020*.]

A copy of the confirmed plan is attached.

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Citations to the statutory provisions governing confirmation in such cases are added to the form for the court to include as appropriate.

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 **02/20**

[Name of Proponent]'s Plan of Reorganization, Dated [Insert Date]

[If this plan is for a small business debtor under Subchapter V, 11 U.S.C. § 1190 requires that it include "(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization." The Background section below may be used for that purpose. Otherwise, the Background section can be deleted from the form, and the Plan can start with "Article 1: Summary"]

Background for Cases Filed Under Subchapter V

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. 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 the Plan as Exhibit___.

C. 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 as Exhibit ___.

The Plan Proponent's financial projections show that the Debtor will have projected disposable income (as defined by § 1191(d) of the Bankruptcy Code) for the period described in § 1191(c)(2) 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.

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 clams; 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. Or 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 [specify terms of treatment, including the form, amount, and timing of distribution, consistent with section 1191(e) of the

Code].

[Note: the second provision is appropriate only in a subchapter V plan that is confirmed non-consensually under section 1191(b).]

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	❑ Impaired ❑ 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*.]	❑ Impaired ❑ 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**	❑ Impaired ❑ 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**	❑ Impaired ❑ 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

[Include the appropriate provision in the Plan]

[No Discharge -- Section 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.

[Discharge -- Section 1141(d)(3) IS NOT applicable; use one of the alternatives below]

*[The following 3 alternatives apply to cases in which a discharge is applicable and the Debtor **DID NOT** elect to proceed under Subchapter V of Chapter 11.]*

[Discharge if the Debtor is an individual and did not proceed under Subchapter V]

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 did not proceed under Subchapter V]

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 did not proceed under Subchapter V]

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).

*[The following 3 alternatives apply to cases in which the Debtor **DID** elect to proceed under Subchapter V of Chapter 11.]*

[Discharge if the Debtor is an individual under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the 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:

(i) imposed by this Plan; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the 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.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a corporation under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the 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).

If the Debtor's Plan is confirmed under § 1191(b), 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 due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

✘ _____ _____

[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed Name]

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there will generally not be a disclosure statement in subchapter V cases, § 1190 of the Code provides that plans in those cases must include a brief history of the debtor's business operations, a liquidation analysis, and projections of the debtor's ability to make payments under the plan. Those provisions are added to a new Background section of the form with an indication that they are to be included in plans only in subchapter V cases.

Article 3.02 is amended to reflect a special rule for the treatment of administrative expense claims in subchapter V plans that are confirmed non-consensually. See § 1191(e).

Article 9 of the form is amended to include descriptions of the effect of a discharge in a case under subchapter V. The plan proponent is directed to include in the plan the particular provision that is appropriate for the case.

APPENDIX C

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

April 6, 2020

MEMORANDUM

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

FROM: Honorable Dennis R. Dow, Chair Dennis R. Dow
Advisory Committee on Bankruptcy Rules

RE: ISSUANCE OF INTERIM BANKRUPTCY RULE IN RESPONSE TO THE CARES ACT

On March 27, Congress passed and the President signed into law the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Section 1113 of that legislation made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the coronavirus crisis.

The enactment of the CARES Act requires amendments to be made to one bankruptcy rule and five official forms to account for a new definition of "debtor" applicable to subchapter V of chapter 11 and a new exclusion from the definitions of "current monthly income" and "disposable income." Because the Act took effect immediately upon enactment and its bankruptcy provisions are of limited duration, the Advisory Committee seeks to propose an interim local Rule 1020 that can be adopted by each judicial district. The Advisory Committee also has exercised the authority delegated to it by the Judicial Conference to make conforming technical changes to five bankruptcy forms (Official Forms 101, 122A-1, 122B, 122C-1, and 201). Because the CARES Act is already in effect, those forms have been posted on the judiciary's public website (uscourts.gov) for

immediate use, and will be presented to the Standing Committee for review and approval at its June meeting.

The CARES Act modifies the definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Previously, § 1182(1) defined "debtor" under subchapter V as "a small business debtor." A "small business debtor" is defined in § 101(51D) and requires that the prospective debtor have "aggregate noncontingent liquidated secured and unsecured debts . . . in an amount not more than $2,725,625" (a figure subject to adjustment every three years under § 104). Under the CARES Act, § 1182(1) was amended to include a separate definition of "debtor" for subchapter V purposes that is identical to the definition of "small business debtor" in all respects except that the debt limitation is $7,500,000. The CARES Act also amended § 103(i) to provide that subchapter V of chapter 11 applies to a "debtor (as defined in section 1182(1))" who elects such treatment, rather than a "small business debtor" who so elects. The definition of "debtor" in § 1182(1) will revert to its prior version one year after the effective date of the CARES Act.

Bankruptcy Rule 1020 provides procedural rules for "small business chapter 11 reorganization cases." In response to the enactment of the Small Business Reorganization Act of 2019, which took effect in February, and after review and approval by the Advisory Committee, Standing Committee, and the Judicial Conference Executive Committee, all districts have adopted an interim Rule 1020 that reflects the new option for a small business debtor of proceeding under subchapter V of chapter 11. Now, in response to the CARES Act, that interim rule must be modified for one year to include references to "a debtor as defined in § 1182(1) of the Code." Although a small business debtor (debts not more than $2,725,625) will always satisfy the definition of debtor in § 1182(1) (debts not more than $7,500,000), a debtor's status as a small business debtor must still be designated because special provisions of the Code apply to such debtors who do not elect to proceed under subchapter V of chapter 11. The text of the proposed interim rule is attached to this report.

Action Item: The Advisory Committee recommends that amendments to the existing interim Rule 1020 be approved as set out in the attachment to this report and that the Standing Committee request approval from the Executive Committee of the Judicial Conference to distribute the amended interim rule to the district and bankruptcy courts for adoption.

Attachment

Rule 1020. Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V

(a) ~~SMALL BUSINESS~~ DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter ~~so~~, whether the debtor elects to have subchapter V of chapter 11 apply. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter ~~so~~, whether the debtor elects to have subchapter V of chapter 11 apply. The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(b) OBJECTING TO DESIGNATION. The United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held

under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(c) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; the creditors included on the list filed under Rule 1007(d) or, if a committee has been appointed under § 1102(a)(3), the committee or its authorized agent; and any other entity as the court directs.

Committee Note

The interim rule is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law provides a new definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Subdivision (a) of the rule is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

TAB 4B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
MINUTES
April 2, 2020
Held Remotely by Conference Call and Webex

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Thomas Moers Mayer, Esq.
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Professor David A. Skeel
District Judge George Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel Coquillette, consultant to the Standing Committee
Professor Catherine Struve, reporter to the Standing Committee
Professor Brian Garner, style consultant to the Standing Committee
Professor Joseph Kimble, style consultant to the Standing Committee
Bankruptcy Judge Laurel L. Isacoff, Liaison to the Committee on the Administration of the Bankruptcy System
Circuit Judge William J. Kayatta, Jr., liaison from 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. Trustees
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Allison Bruff, Administrative Office
Beth Wiggins, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group and thanked them for their flexibility in holding this meeting remotely. He also thanked the staff of the Administrative Office for finding a platform for the meeting. He introduced Brittany Bunting, who is new to the staff of the Administrative Office, and thanked her for her work on this meeting. He also introduced new members Judge Donald and Judge Oetken. He introduced a new liaison, Judge Isacoff, from the Bankruptcy Committee. He noted that there is a supplement to the agenda book. Judge Dow also described technical issues relating to the software program used for the meeting.

2. Approval of minutes of Washington, D.C. Sept. 26, 2019 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) Jan. 28, 2020 Standing Committee meeting

Judge Dow gave the report. The Standing Committee commended the Advisory Committee for its fast work in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA).

The Advisory Committee presented proposed amendments to three official forms—Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period)—to implement the Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 which became effective on August 23, 2019. The Standing Committee retroactively approved (and undertook to provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Gibson also provided the Standing Committee information on the process by which the interim SBRA rules and forms were implemented, including the brief publication of the proposed interim SBRA rules and forms, their amendment in response to comments, their approval by the Advisory Committee and the Standing Committee and authorization by the Executive Committee of the Judicial Conference for distribution to the districts for adoption as

local rules. At this meeting, the Advisory Committee will begin the process of adopting permanent SBRA rules and forms for publication.

Professor Bartell described to the Standing Committee the progress of the restyling project and reported that the Advisory Committee expected to present Parts I and II of the restyled Bankruptcy Rules for publication at the next meeting of the Standing Committee.

(B) April 4, 2020 Meeting of the Advisory Committee on Appellate Rules

Judge Donald presented the report.

The Advisory Committee on Appellate Rules will be meeting remotely on April 4, 2020. Because the meeting had not yet taken place, there was no report.

(C) October 30, 2019 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report.

After extensive work, the MDL subcommittee concluded there was no reason to adopt rules governing third-party litigation funding ("TPLF") in the MDL context. The subcommittee reached that conclusion because (a) multi-district litigation doesn't appear to involve much TPLF, and (b) the TPLF phenomenon is evolving rapidly. The subcommittee referred the TPLF question back to the full Committee. Given the rapid evolution of TPLF, the Committee decided not to pursue possible rules for now and to reexamine the question in a year or two.

A joint subcommittee from the Appellate, Civil, and Bankruptcy Rules Committees is considering whether some amendment, probably to Fed. R. Civ. P. 42(a) or 54(b), would be appropriate in the wake of the Supreme Court's *Hall v. Hall* decision. At the subcommittee's request, the FJC is studying whether as a practical matter *Hall* poses enough of a problem to justify an amendment. That study is ongoing. No results should be expected for some time.

Another joint subcommittee is considering a proposal to move the deadline for papers filed electronically from midnight on the due date to the time when the clerk's office closes. The subcommittee is still in the information-gathering stage.

The Committee considered the same suggestion from "Sai" that the Bankruptcy Rules Committee considered at its fall meeting that would have required the clerk or the judge (or someone with the court) to calculate for each pro se litigant every potential deadline in the litigant's case. The Committee was sympathetic to the concerns Sai raised but agreed with the Bankruptcy Rules Committee and decided to take no action.

The Committee rejected amendments to Rule 68, Rule 26(b)(4)(B) and Rule 26.

The Mandatory Initial Discovery Pilot continues in N.D. Ill. and D. Ariz. and is reportedly "going pretty well," according to Judge Robert Dow. Five rounds of surveys have been sent to lawyers to gauge their reaction to the program. Results from the two participating districts have been positive and mostly similar, except that Illinois defense lawyers are more negative than their western counterparts.

Tom Mayer expressed the view that changing the time of electronic filing would be contrary to bankruptcy practice.

(D) Dec. 10-11, 2019 meeting of the Committee on the Administration of the Bankruptcy System

Judge Laurel Isacoff provided the report.

There was an emergency meeting this week precipitated by the CARES Act at which the Committee passed a motion directing staff to draft a proposal to present to the Committee regarding legislation allowing extension of deadlines that are not ordinarily subject to extension during a time of emergency.

Judge Dow commented that the Bankruptcy Committee had been approached with respect to the Bankruptcy Rules that impose deadlines on action. He intends to appoint a subcommittee to consider whether a new rule should be adopted to permit these extensions.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

(A) Consideration of whether to propose amendments to Bankruptcy Rule 8003 to conform to proposed amendments to FRAP 3(c)

Judge Ambro introduced the issue; the Advisory Committee of Appellate Rules has published a proposed amendment to FRAP 3(c) (Contents of the Notice of Appeal), which is intended to resolve the different practices in different courts of appeals. Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) that conform to amendments to FRAP 3(c). A change would make a notice of appeal encompass all issues that merge into the judgment, not merely those mentioned in the notice of

appeal. At the fall 2019 meeting of the Advisory Committee, the Subcommittee reported that it had some doubts about whether conforming amendments were necessary and that it wanted to consider any comments received on the FRAP 3(c) before making a recommendation regarding Rule 8003.

The Subcommittee has decided to make no recommendation at this meeting regarding conforming amendments to Rule 8003 and to continue to consider whether the proposed amendments can be properly adapted to the bankruptcy context. While some members stressed the possible negative consequences of failing to conform Rule 8003 and Official Form 417A to FRAP 3(c) and Appellate Form 1, others raised concerns about how the amendments would be applied in appeals from contested matters, as opposed to adversary proceedings that mirror civil litigation.

The Subcommittee also noted that the Appellate Committee meets after the Advisory Committee meets. That means that the Advisory Committee will not know what action the Appellate Committee is going to take in response to the comments until after the conclusion of our meeting. Rather than try to take action by email in between the spring meeting and the preparation of the Standing Committee report, the Subcommittee concluded that the better course would be to see what proposal for FRAP 3(c) and Form 1 goes forward and then to carefully consider the extent to which that approach can be adapted for bankruptcy practice.

5. Report by the Business Subcommittee

(A) Recommended amendments to Rule 5005 concerning notices sent to the United States trustee

Professor Bartell provided the report. The changes to Fed. R. Bankr. P. 9036 (entitled "Notice or Service Generally"), which became effective December 1, 2019, provide that whenever the bankruptcy rules "require or permit sending a notice or serving a paper by mail, the clerk or other party may send the notice to – or serve the paper on – a registered user by filing it with the court's electronic-filing system." The rule "does not apply to any complaint or motion required to be served in accordance with Rule 7004."

Transmittal of papers to the U.S. Trustee is governed by Rule 5005, which requires that such papers be "mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee" and that the entity transmitting the paper file as proof of transmittal a verified statement.

For the last year, the EOUST has been considering whether any changes should be made to Rule 5005 in light of the changes to Rule 9036. The EOUST has proposed amendments to Rule 5005 to conform this USTP-specific rule to both amended Rule 9036 and current bankruptcy practice under Rule 5005(b). The proposed changes would allow papers to be transmitted to the U.S. Trustee by electronic means, and would eliminate the requirement that the filed statement evidencing transmittal be verified.

The Advisory Committee approved the proposed amendments to Rule 5005 and committee note and directed that they be submitted to the Standing Committee for publication.

(B) Recommended amendments to Rule 7004

Professor Bartell provided the report. George Weiss, an attorney in Potomac, MD, proposed in Suggestion 19-BK-D that Bankruptcy Rule 7004(h) should be amended by "importing the language of" Civil Rule 4(h) (permitting service of process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process) to replace the requirement that service be made on "an officer," but retaining the requirement that such service be made by certified mail.

Several suggestions have been made in recent years requesting amendments to Rule 7004(h), most recently in 2017, 17-BK-E, which requested inclusion of credit unions in the Rule. Bankruptcy Rule 7004(h) was enacted verbatim by Congress in Section 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Because, under the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, bankruptcy rules cannot override statutory provisions, the Advisory Committee lacks the authority to modify Rule 7004(h) in a manner that is inconsistent with federal statutes. Because the text of Rule 7004(h) is in fact statutory, an amendment that modifies that language in the manner suggested by Mr. Weiss is beyond the power of the Advisory Committee, whatever its substantive merits.

Mr. Weiss followed up his initial suggestion with two others in 19-BK-J. Rather than modifying the statutory language of the rule, he suggested first that the Advisory Committee supplement the rule with a new definition of "officer" to include a resident agent appointed to accept service of process. The Subcommittee concluded that it could not label someone an officer who was not in fact an officer, and declined to act on this suggestion.

Mr. Weiss's second additional suggestion is that Rule 7004 be amended to specify that any service made on an officer need not name the officer but rather can be addressed to "officer of [name of institution]."

This issue is not confined to Rule 7004(h); the same issue arises under the general service of process rule, Rule 7004(b)(3), with respect to service on corporations. Courts are divided on whether service is adequate if the officer is not named, both under Rule 7004(h) and under Rule 7004(b)(3).

The Subcommittee concluded that this suggestion had merit. In looking at the history of Rule 7004, the Associate Reporter found that there was an Advisory Committee Note to its predecessor, Rule 704, that explicitly stated that under the predecessor to Rule 7004(b)(3),

> "In serving a corporation or partnership or other unincorporated association by mail pursuant to paragraph (3) of subdivision (c), **it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title**." (Emphasis supplied).

When the Bankruptcy Rules were revised following the enactment of the Bankruptcy Reform Act of 1978, and Rule 704 became 7004, the original Advisory Committee Note to Rule 704 was no longer included in the published version. Instead, the Advisory Committee Note to Subdivision (b) of the Rule simply stated: "Subdivision (b), which is the same as former Rule 704(c), authorizes service of process by first class mail postage prepaid. This rule retains the modes of service contained in former Bankruptcy Rule 704. The former practice, in effect since 1976, has proven satisfactory."

The Advisory Committee also rejected a suggestion to require a specific name in service under Rule 7004(b)(3) at its Sept. 1999 meeting.

In light of this history, the Subcommittee concluded that Rule 7004 should be amended to include the substance of the former Advisory Committee Note to Rule 704. (The Advisory Committee Notes cannot be amended without a modification to the Rule itself.) Therefore, the Subcommittee recommended approval of a new Section 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.

Judge Goldgar expressed the view that it is not difficult to find out the actual name of the officer or director, and he is therefore ambivalent about the proposed amendment. He also suggested that Rule 7004(i) seems to be a rule interpreting another rule, acting like a Committee

Note. Professor Gibson stated that she sees this as comparable to FRAP 3(c). Dan Coquillette said that he understands the concern, but agrees with Professor Gibson. Judge Donald also said that it is not always so easy to find the name of the officer or director, especially for pro bono filers, and supports the proposed rule.

The Advisory Committee approved the amendments to Rule 7004 and committee note and directed that they be submitted to the Standing Committee for publication.

(C) Recommended Rule amendments to implement the Small Business Reorganization Act of 2019

Professor Gibson provided the report. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act of 2019 ("SBRA") took effect as local rules or standing orders on February 19, 2020, the effective date of SBRA. Now the Advisory Committee will begin the process of promulgating national rules governing cases under subchapter V of chapter 11. The first step in that process is to seek publication of the amended and new rules for comment this summer, along with the SBRA form amendments. The Subcommittee was asked to make a recommendation to the Advisory Committee regarding any changes or additions that are needed to the interim rules for which publication will be sought.

Because the interim rules just recently went into effect, there is little experience with them so far. As a result, the only suggested changes the Subcommittee is aware of are a few stylistic changes to Rules 3017.2 and 3019 suggested by the style consultants. The Subcommittee accepted the stylistic changes to Rule 3017.2, but concluded that stylistic changes to Rule 3019 should await the restyling process.

The Advisory Committee recommended that the Standing Committee order publication of the SBRA rules.

Ramona Elliot provided data on small business filings since SBRA; filings are at twice the rate before SBRA, and 75% of those filing are electing subchapter V treatment. Things are operating as they should to this point. She expects an uptick in all chapter 11 cases and subchapter V cases in light of the CARES Act.

(D) Proposed amendments to Rules 3007 and 7007.1

Professor Gibson provided the report. Amendments to Rules 3007(a)(2) (manner of service for objection to claims of an insured depository institution) and 7007.1 (disclosure

requirements for recusal purposes) were published for public comment in August. Other than a general statement of support for the amendment to Rule 3007 by the National Conference of Bankruptcy Judges ("NCBJ"), no comments were submitted regarding that rule. The NCBJ also expressed general support for the amendments to Rule 7007.1, but in addition it suggested one change, as did another commenter. The comment of the other commentator will be addressed in the restyling process. The change suggested by the NCBJ was to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning and for consistency with references in other rules. The Subcommittee agreed with that change.

The Advisory Committee gave final approval to Rule 3007 as published, and to Rule 7007.1 with the change suggested by the NCBJ.

(E) Proposed amendments to Rule 9036

Professor Gibson provided the report. For several years, this Subcommittee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic noticing and service in the bankruptcy courts. One set of amendments to Rule 9036 (Notice and Service Generally) went into effect on December 1, 2019. Proposed amendments to Rule 2002(g) and Official Form 410 that were published along with the 2019 amendments to Rule 9036—authorizing creditors to designate an email address on their proofs of claim for receipt of notices and service—were held in abeyance by the Advisory Committee for further consideration by the Subcommittee. Most recently, additional amendments to Rule 9036 were published for public comment last August.

The published amendments to Rule 9036 would encourage the use of electronic noticing and service in several ways. The rule would recognize a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. In anticipation of the simultaneous amendments of Rule 2002(g) and Official Form 410, it would also allow courts and parties to serve or provide notice to a creditor at an email address designated on its proof of claim. And it would provide a set of priorities for electronic noticing and service in situations in which a recipient had provided more than one electronic address to the courts.

Seven sets of comments were submitted regarding the proposed amendments to Rule 9036. Most of them were from clerks of court or their staff, and they expressed several concerns about the proposed amendments to Rule 9036, as well as to the earlier published amendments to Rule 2002(g) and Official Form 410.

The Subcommittee noted that there was enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. No comments expressed opposition to it or concerns about it. The Subcommittee also recognized, however, that many clerks expressed opposition to several other aspects of the proposed Rule 9036 amendments. The concerns fell into 3 categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

In response to the concerns about clerk monitoring of email bounce-backs, the Subcommittee added a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

Because of the comments expressed about the administrative burden of a proof-of-claim opt-in, the Subcommittee decided that the proof-of-claim check-box option should not be pursued. Deciding not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, and deleting references to that option in Rule 9036, would allow the courts to receive the benefits of the high-volume paper-notice program, which is anticipated to result in significant savings to the judiciary, without imposing what many clerks perceive as an undue burden on them of having to review proofs of claim for email addresses. It is anticipated that future improvements to CM/ECF will allow the entry of email addresses in a way that will be accessible to parties as well as to those within the court system. Language proposed by the Subcommittee in Rule 9036(b)(2) would allow for that future possibility.

The concern about the interplay of the proposed amendments to Rules 2002(g) and 9036 will disappear if the Subcommittee's recommendation not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410 is accepted, because amended Rule 9036 by itself will make the use of electronic noticing and service optional.

Ken Gardner endorsed the Subcommittee's recommendation.

The Advisory Committee gave final approval to the proposed amendments to Rule 9036 as presented and decided to take no further action on the previously published amendments to Rule 2002(g) and Official Form 410.

(F) Consideration of Rule and Form Revisions under CARES Act

Professor Gibson and Professor Bartell presented the report. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES

Act"), which made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the coronavirus crisis.

The CARES Act modifies the definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Previously, § 1182(1) defined "debtor" under subchapter V as "a small business debtor." Under the CARES Act, § 1182(1) was amended to include a separate definition for "debtor" for subchapter V purposes. The definition of "debtor" in § 1182(1) will revert to its prior version one year after the effective date of the CARES Act.

For the next year there are three categories of debtors – (1) debtors that do not satisfy the requirements for "small business debtor" or "debtor" under subchapter V; (2) debtors that satisfy the requirements for "small business debtor" who do not elect to proceed under subchapter V; and (3) "debtors" who meet the requirements for subchapter V and elect to employ those procedures.

In existing Form 101, line 13 asks the debtor whether he or she intends to file under chapter 11, whether he or she is a small business debtor, and if so whether he or she intends to elect treatment under subchapter V of chapter 11. This line must be amended to ask not only whether the individual debtor is a small business debtor, but also whether he or she is a debtor as defined in § 1182(1) and whether he or she wishes to proceed under subchapter V.

In existing Form 201, line 8, if the debtor files under chapter 11 the debtor is asked to check a box (if applicable) to confirm its aggregate debts are less than the $ 2,725,625 figure in the definition of "small business debtor." The debtor is also asked to check a box if the debtor is a small business debtor, and a separate box if the debtor is a small business debtor and wishes to elect subchapter V treatment. Because of the amended definition of "debtor" in § 1182(1), line 8 must be modified to permit the debtor to confirm that its aggregate debts are less than $7,500,000 (the figure in the definition of "debtor" in § 1182(1)) and elects subchapter V treatment. The proposed amendments provide more language explaining the elections (which was modified during the meeting) and modify the elections to permit disclosure of whether the debtor is a "debtor" within the meaning of § 1182(1) and elects subchapter V treatment.

Ramona Elliot asked whether the form itself should disclose the time limit on the provisions. Scott Myers stated that the revised form would be withdrawn after the one-year period so it will not be misleading. In addition, there is a notation in the committee note that the legislation sunsets in one year.

Rule 1020 provides procedural rules for "small business chapter 11 reorganization cases." Because of the revised definition of "debtor" for purposes of subchapter V elections, it is proposed that the rule be amended to include separate references to a "debtor as defined in § 1182(1)" whenever the rule previously mentioned a "small business debtor."

The CARES Act also amends the definition of "current monthly income" in § 101(10A)(B)(ii) to add a new exclusion from the computation of "current monthly income" for ''(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).'' An identical exclusion was inserted in § 1325(b)(2) for computing disposable income. As a result, Forms 122A-1 (chapter 7 statement of current monthly income), 122B (chapter 11 statement of current monthly income), and 122C-1 (chapter 13 statement of current monthly income) must be amended to insert the same exclusion in line 10 of each of the proposed amended forms. These amendments have a duration of one year after the effective date of the CARES Act, at which time the Forms will revert to their former versions.

Because the CARES Act is immediately effective, the Advisory Committee exercised its delegated authority to make confirming changes to the Official Forms and approved the proposed amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference.

The Advisory Committee approved the amendments to Rule 1020 and will seek the approval of the Standing Committee and the Judicial Conference by electronic vote to issue the amended rule as an interim rule to be implemented by each district as a local rule or standing order. Because of the immediate effective date of the CARES Act, the limited duration of its bankruptcy provisions, and relatively minor nature of the amendments, the Advisory Committee concluded that the interim rule should be issued without publication.

Judge Campbell described the background of the language in the CARES Act asking the Judicial Conference to consider whether there should be rules that are applicable in a national emergency. The CARES Act includes the following provision:

(6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the ''Rules Enabling Act''), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The Rules Committee chairs are being asked to establish subcommittees to identify rules that might be affected in national emergencies and consider what should be done to those rules in such a situation. They are to report to the full Advisory Committee in the fall, and approve any emergency rules for publication the next year. Such rules would become effective at the end of 2023. Judge Campbell does not know whether any emergency procedures need to be built into the bankruptcy rules.

Judge Dow said he intended to appoint a special subcommittee to address these issues and invited members of the Advisory Committee who would be interested in serving on that subcommittee to let him know.

6. Report by the Consumer Subcommittee

(A) Proposed amendments to Rule 2005

Professor Bartell presented the report. Judge Brian Fenimore of the Western District of Missouri brought to the attention of Judge Dennis R. Dow that Federal Rules of Bankruptcy Procedure 2005(c) (dealing with conditions for release) contains references to repealed provisions of the Criminal Code, 18 U.S.C. §§ 3146(a) and (b). The topic of conditions is in 18 U.S.C. § 3142. Although much of Section 3142 is completely inapplicable to the subject of Federal Rule of Bankruptcy Procedure 2005(c) (conditions designed to assure attendance for examination or appearance before the court), the easiest technical fix is that suggested by Judge Fenimore, which is simply replacing the reference to "§ 3146(a) and (b)" in Rule 2005(c) with a reference to "§ 3142."

The Subcommittee recommended that change to the Advisory Committee at its spring meeting to be approved without publication. Although the Advisory Committee agreed with that recommendation, the Standing Committee decided to insert the word "relevant" before the word "provisions" and to publish the proposed modifications to the rule.

The only mention of the proposed change in the comments was a supportive statement from the National Conference of Bankruptcy Judges.

The Advisory Committee gave final approval to the amended Rule 2005(c) and accompanying committee note as published.

(B) Proposed amendments to Rule 3002.1

Professor Gibson provided the report. As was discussed at the spring and fall 2019 meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The Subcommittee began its consideration of the proposed amendments last summer by reviewing a draft presented by a working group of the Subcommittee. During its most recent conference call, the Subcommittee began reviewing an alternative draft presented by Subcommittee member Deb Miller, along with drafts of implementing forms. The alternative draft would simplify the mid-case review of the status of the mortgage, an approach that has been endorsed by several of members of the groups that made the original suggestions. The Subcommittee plans to continue its review of the proposed amendments and forms, and it hopes to have drafts to present to the Advisory Committee for discussion at the fall meeting.

(C) Proposed amendments to Rule 3002(c)(6)(A)

Professor Bartell provided the report. The Advisory Committee received a suggestion from George Weiss of Potomac, MD, 19-BK-F, with respect to Fed. R. Bankr. P. 3002(c)(6)(A). Rule 3002 requires creditors to file proofs of claim for their claims to be allowed, and specifies, in Rule 3002(c), the deadline for filing those proofs of claim in cases filed under chapter 7, 12 and 13. Rule 3002(c) then provides certain exceptions, including for domestic creditors, in clause (6)(A), when "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)." Mr. Weiss noted that this would not permit an extension of the deadline for creditors who actually did not get notice either because they were omitted from the matrix or were listed with an improper address.

The most recent amendments to Rule 3002(c) were made in connection with the adoption of the national chapter 13 plan, and were published twice, in 2013 and 2014. There were extensive comments on the amendments, many of which made the same point that Mr. Weiss is making now. There is no indication that these comments were considered by the Advisory Committee at the time, probably because of the volume of comments on the national chapter 13 plan.

At its meeting in September 2019, the Advisory Committee referred the suggestion to the Subcommittee to make a recommendation on the appropriate amendment to the Rule to address the problem. The Subcommittee recommended that the Rule be amended to allow an extension of time to file proofs of claim for both domestic creditors and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." That is the standard now applicable to foreign creditors under Rule 3002(c)(6)(B)). The Subcommittee endorsed this amendment because it provides a uniform standard for all creditors and gives bankruptcy judges maximum discretion.

David Hubbard noted that there may be concern about the interplay between Rule 3002(c)(1) and the amended Rule 3002(c)(6). The Advisory Committee decided that this is a separate issue and can await future developments.

The Advisory Committee approved the proposed amendments to Rule 3002(c)(6) and committee note for submission to the Standing Committee for publication.

7. Report by the Forms Subcommittee

(A) SBRA forms for publication

Professor Gibson provided the report. The new and amended forms that the Advisory Committee promulgated in response to the enactment of the Small Business Reorganization Act ("SBRA") took effect on February 19, the effective date of the Act. Unlike the interim SBRA rules, the forms were officially issued under the Advisory Committee's delegated authority to make conforming and technical amendments to Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. Nevertheless, the Advisory Committee has committed to publishing them for comment this summer, along with the SBRA rule amendments, in order to ensure that the public has a thorough opportunity to review them.

The Subcommittee considered whether any changes or additions are needed to the forms that will be published, and it recommends that they be published as they now appear, along with a minor amendment to an additional form.

A staff member at the Administrative Office of the Courts has pointed out the need to add an exception to the instructions set out at the beginning of Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). It currently begins, "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11." That statement is incorrect for individuals filing under subchapter V of chapter 11. The Subcommittee proposes that the first

sentence of those instructions be amended as follows: "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 (other than under subchapter V)."

The Advisory Committee agreed to seek the publication of the amended Official Form 122B and Official Forms 101, 201, 309E1, 309E2, 309F1, 309F2, 314, 315, and 425.

(B) Proposed conforming amendments to Official Form 417A (Notice of Appeal and Statement of Election)

Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Official Form 417A that conform to amendments to Appellate Form 1 (Notice of Appeal) that have been proposed by the Advisory Committee on Appellate Rules and published for public comment. At the fall 2019 meeting of the Advisory Committee on Bankruptcy Rules, this Subcommittee and the Subcommittee on Privacy, Public Access, and Appeals ("Appeals Subcommittee") jointly reported that they had some doubts about whether conforming amendments to Form 417A and Rule 8003 were necessary and that they wanted to consider any comments received on the amendments to FRAP 3(c) and Appellate Form 1 before making a recommendation regarding the bankruptcy rule and form.

As is explained in the Appeals Subcommittee's report, that Subcommittee voted to await further actions on the FRAP amendments before making a recommendation about possible conforming amendments to Rule 8003. This Subcommittee decided that it should follow the lead of the Appeals Subcommittee and hold off on making a recommendation about amendments to Official Form 417A. That approach will allow both subcommittees to know exactly what the Appellate and Standing Committees approve regarding FRAP 3(c) and Appellate Form 1 and to carefully consider the amendments' fitness for bankruptcy appeals. Joint conference calls of the two subcommittees before the fall meeting will be arranged for this purpose.

(C) Discharge orders for Subchapter V cases

Professor Gibson provided the report. The Bankruptcy Clerks' Advisory Group has suggested that it would be helpful to have one or more form orders of discharge for subchapter V cases. Currently the only chapter 11 discharge form is for individual debtors (Director's Form 3180RI). While it can be adapted for subchapter V cases, it is not appropriate in its entirety for those cases because the scope of discharge differs. As with the other discharge-order forms, forms that are adopted for subchapter V cases should be Director's Forms in order to allow individual courts flexibility in using them. Issuing Director's Forms will also expedite

implementation since they will only have to be reviewed by the Advisory Committee, rather than going through the approval process for Official Forms issued by the Judicial Conference.

The Subcommittee recommended the approval of three forms. One is for an individual case in which confirmation is consensual under § 1191(a). In those cases, discharge is governed by § 1141(d)(1)-(4). If, however, the plan is confirmed nonconsensually under § 1191(b), § 1192 governs the discharge. Two different forms are proposed for that situation, one for individuals and another for corporations and partnerships.

The Advisory Committee gave final approval to the proposed three Director's Forms.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger began with an expression of gratitude to Judge Campbell for his leadership in this area, and to those staff members at the Administrative Office who assisted with the programs to facilitate the process. She also thanked the style consultants for their contributions. She provided a general overview of the restyling process.

Judge Krieger then described the basic principles followed by the Subcommittee in the restyling process: make no substantive changes, respect defined terms, preserve terms of art, remain open to new ideas, and defer on matters of pure style.

Professor Bartell highlighted the area in which the Subcommittee had disagreements with the style consultants – the desire of the style consultants to restyle terms that are defined in the Bankruptcy Code, the differing views on terms of art, and the language of Rule 2002(n) (currently designated as Rule 2002(o)) that was enacted directly by Congress in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, rather than issued by the Supreme Court through the bankruptcy version of the Rules Enabling Act, 28 U.S.C. § 2075. The style consultants were invited to explain their position with respect to those issues and Bryan Garner and Joe Kimble both spoke, supporting their view that restyling defined terms and terms of art and Congressional language was desirable.

Judge Campbell expressed concern about Congressional sensitivity about modifications to something Congress has done. If a change were made in legislative language, it would have to be highlighted in every communication with respect to the restyled rules.

David Skeel said that he agrees with the reporters on the position the Subcommittee took with respect to defined terms. Tom Mayer agreed. Judge Goldgar said that the rules have to function with the Code, and he is not prepared to differ from the statute. Catherine Struve said that search functionality on electronic legal research programs will change with compound words. The Advisory Committee voted to support the position of the Subcommittee and not restyle defined terms.

The Advisory Committee discussed the use of terms of art, such as "property of the estate" and "meeting of creditors." The Advisory Committee agreed with the Subcommittee that these terms "should not be changed to "estate property" and "creditors' committee" and that other potential terms of art will be considered one by one, in context.

The Advisory Committee then turned to the language of Rule 2002(n). Judge Dow expressed the view that we should restyle the provision, as long as we do not change the substance. Judge Goldgar expressed the contrary view. Upon a vote, the Advisory Committee concluded that it would not change Rule 2002(n) from the language enacted by Congress.

The Subcommittee presented to the Advisory Committee for approval and publication Parts I and II of the restyled Federal Rules of Bankruptcy Procedure and the proposed committee note. Professor Bartell then asked the Advisory Committee for comments as to specific changes made during the process and an identification of any mistakes or substantive changes that the Subcommittee may have missed. The Advisory Committee made comments on various sections of the restyled rules and the committee note.

The Advisory Committee approved the restyled rules in Parts I and II and the committee note as amended at the meeting and recommended they be forwarded to the Standing Committee for publication for comment.

9. Future meetings. The fall 2020 meeting will be in Washington, D.C. on September 22, 2020.

10. New Business. There was no new business.

11. Adjournment. The meeting was adjourned at 5:10 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Consumer Subcommittee

   (A) Recommendation of no action regarding suggestions 19-BK-I and 19-BK-K with respect to DSO Certification for Deceased Debtor

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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

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 27, 2020

Introduction

The Advisory Committee on Civil Rules met by videoconference on April 1, 2020. The meeting was originally noticed for an in-person meeting in West Palm Beach, Florida, but was re-noticed in the Federal Register for a remote meeting, with the opportunity for public access. Draft minutes of the meeting are attached to this report.

Part I of this report presents three action items.

Part IA recommends approval for adoption of amendments to Rule 7.1 that were published for comment last August.

Part IB recommends approval for publication of two

proposals. The first is a set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The second is an amendment of Rule 12(a)(4) that would extend the time to respond when an action is brought against a federal officer or employee in an individual capacity.

Part II of this report presents several information items.

Part IIA describes the work of four subcommittees. The MDL Subcommittee continues to explore possible appeal rules and other rules for MDL proceedings. A joint subcommittee with the Advisory Committee on Appellate Rules is exploring possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. And a new subcommittee is working on the direction in the CARES Act that the Judicial Conference consider rules amendments that would address the effects of a declaration of a national emergency.

Part IIB describes three continuing projects that are being carried forward for further work. A potential ambiguity in Rule 4(c)(3) may affect the procedure for ordering a United States marshal to serve process in an in forma pauperis or seaman case. Rule 12(a) seems to recognize that a statute may alter the time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by Rule 12(a)(2) or (3). And a proposal has been made to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be named only by title, not name.

Part IIC describes three proposals that have been removed from the agenda. One proposal addresses the role of the judge in settlements. A second would require expedited action on proceedings to enforce subpoenas. And the third would make more precise the ways in which Rule 7(b) invokes Rule 10 caption requirements.

I. Action Items

A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). Rule 7.1(a)(1) and the conforming Rule 7.1(b) amendment are discussed first. The more complicated questions raised by Rule 7.1(a)(2) are discussed next. The proposed rule text, marked to show changes since

publication by double underlining, is:

Rule 7.1. Disclosure Statements

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a party~~ I In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names—and identifies the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) at the time the action is filed in or removed to federal court; or

(B) at another time that may be relevant to determining the court's jurisdiction.

* * * * *

(b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement with * * *."

Rule 7.1(a)(1)

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to

intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

Rule 7.1(b)

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:
(1) file the disclosure statement * * *.

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

Rule 7.1(a)(2)

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or

intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule seems to be well settled as well for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners——the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases.

The public comments indirectly illuminated the need to develop further the rule text that identifies the time that controls the existence of complete diversity. Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text, which called for disclosing citizenships attributed to a party "at the time the action is filed," did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped from the action in state court.

At least one comment suggested a specific addition to the rule text to call for disclosure "at the time the action is filed in federal court." The Advisory Committee's discussion of this proposal emphasized the rules that require complete diversity at some other time, notwithstanding the general proposition that jurisdiction is determined at the time an action is filed. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to read:

> at the time the action is filed in or removed to federal court, or at such other time as may be relevant to determining the court's jurisdiction

This rule text was reviewed by the Style Consultants after the Advisory Committee meeting. Their suggested revisions were accepted by the Committee by post-meeting submission. This part of the rule text proposed for adoption reads:

(A) at the time the action is filed in or removed to federal court; or
(B) at another time that may be relevant to determining the court's jurisdiction.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the committee note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal jurisdiction in cases that should be decided by state courts, and——at least as important——toward protecting against tardy revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names——and identifies the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor:

(A) at the time the action is filed in or removed to federal court; or

(B) at another time that may be relevant to determining the court's jurisdiction.

(b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement with * * *."

Committee Note

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1(a)(1) to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court, or at another time that may be relevant to determining the court's jurisdiction. Two examples of attributed citizenship are provided by

§ 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure

to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor at the time the action is filed in or removed to federal court, or at another time that may be relevant to determining the court's jurisdiction. In most actions diversity will be determined by the citizenships that exist at the time the action is initially filed in federal court, or at the time the action is removed to federal court from a state court. But in some circumstances diversity must be determined by looking to the citizenships that exist at some other time. Changes of parties are one example. More complicated examples may arise from the rules that determine diversity jurisdiction for actions removed from a state court.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provision in Rule 7.1(a)(1) that extends the disclosure obligation to intervenors.

Changes Since Publication

Rule 7.1(a)(2) was changed in these ways: (1) intervenors are required to file a diversity disclosure statement; and (2) the time of the citizenships and attributed citizenships that must be disclosed is expanded from the time the action is filed to focus not only on the time the action is filed in or removed to federal court but also another time as may be relevant to determining the court's jurisdiction.

Rule 7.1(b) governing the time for disclosure is amended without publication to reflect the amendment of Rule 7.1(a)(1) that requires disclosure by an intervenor.

A summary of the public comments is attached as an appendix to this report.

B. For Publication

1. Supplemental Rules for Social Security Review

Introduction

The Advisory Committee recommends publication for comment of a new set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The broad nature of this

project is familiar from discussion in earlier Standing Committee meetings. The particular concerns that arise from rules that address a specific substantive area, captured in the "transsubstantivity" label, were discussed at the January 2020 meeting. The proposal is strongly supported by the Administrative Conference of the United States (the Administrative Conference) and the Social Security Administration (the SSA). Groups representing claimants' representatives have offered modest opposition. The Department of Justice opposes publication; without expressing doubts about the value of the proposed procedures——indeed, having propounded a model local rule that closely reflects early drafts of these procedures——the Department of Justice is of the view that the potential gains are not great enough to overcome the presumption for transsubstantivity.

The details of the proposed Supplemental Rules are described below. It suffices for introduction to note that the rules reflect the character of the § 405(g) actions they cover. These actions seek review on a closed administrative record governed by the familiar substantial evidence standard. They are every bit as much appellate in character as administrative review proceedings that go directly to a court of appeals without beginning on what may be a detour to, but often is final disposition in, a district court.

This project was not self-generated within the Enabling Act committee structure. It began with an elaborate study of disparate district court practices and outcomes by Professors Jonah Gelbach and David Marcus for the Administrative Conference. The Administrative Conference sent a recommendation to the Judicial Conference urging that special rules be adopted for § 405(g) review actions. The recommendation was framed in general terms that did not specify whether the rules might be framed as Civil Rules, Supplemental Rules to the Civil Rules, or some other kind of rules. The project was delegated to the Advisory Committee to consider possible additions to the Civil Rules.

A subcommittee was formed. It first brought the project on for discussion at the Advisory Committee's November 2017 meeting. The work has been pursued steadily since then. The subcommittee held two meetings that included representatives of the SSA, the Administrative Conference, the American Association for Justice, and the National Organization of Social Security Claimants Representatives. Representatives of most of those groups engaged in some of the subcommittee's conference calls. District judges and magistrate judges were involved in the formal meetings. At least some of the judges expressed frustration over their perception that the Civil Rules do not work well for § 405(g) cases and either force adoption of local practices that do work

or, for some, require adherence to unsuitable practices. Such resistance as plaintiffs' representatives have offered seems to be based on the comfort of adhering to known procedures that they have mastered, as well as the fear that some judges will be displeased by displacement of their own preferred practices and will react by providing less efficient review. No reasons have been expressed to doubt the efficacy of the practices embodied in the supplemental rules.

The subcommittee and the Advisory Committee repeatedly considered an alternative project that would attempt to draft uniform procedures for all administrative review actions that begin in a district court. A broader set of rules might offer several advantages. The first would be to establish procedures good for more than social security review actions. Another advantage would be to allay the concerns that arise around any proposal to create a substance-specific rule of procedure, concerns that are familiar from earlier meetings and that will be summarized below.

All-agency review rules, however, present serious challenges. The realm of administrative agencies is broad, and includes very different entities that act in very different ways on very different subjects. Indeed it could prove difficult to define limits that distinguish purely executive acts from "agency" acts. Some of the review actions that come to the district courts involve little if anything more than review on a paper administrative record. But others call for some use of the pretrial and even trial procedures that are used for actions brought to the court for initial disposition on the merits. An integrated set of rules for all of these actions would be complicated and might easily fail in practice.

Powerful reasons can be advanced for framing rules that address only social security review proceedings. A central reason is that almost all of them are pure appeals on a closed administrative record, whether it be the original record or a record as supplemented or completed on remand to the Social Security Administration. This uniform characteristic supports uniform review procedures. A related reason is that there are a great many social security review actions. A common estimate is that 17,000 to 18,000 are brought to the district courts every year, accounting for 7% to 8% of the civil docket. They receive substantial judicial attention——it may not be an exaggeration to suggest that a district court often lavishes more time on an individual claimant's case than it received in the agency hearing and appeal.

One last note of introduction. The draft Supplemental Rules are modest, indeed rather spare. The drafting process began by simplifying a long and intricate draft provided by the SSA, and proceeded by pruning off and paring down what remained. Clarity has been promoted by reverting to the supplemental rules format adopted for the first several drafts, abandoning the more compact effort to squeeze all provisions into a single new Civil Rule. These rules are so clear that they should be readily accessible to most pro se claimants. At the same time they establish an approach that will enable lawyers and courts to manage these appeals in a way that best realizes the aspirations of Civil Rule 1.

The Supplemental Rules

Rule 1. Review of Social Security Decisions Under 42 U.S.C. § 405(g)

(a) APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim.

(b) FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules.

Rule 2. Complaint

(a) COMMENCING ACTION. An action for review under these rules is commenced by filing a complaint with the court.

(b) CONTENTS.

(1) The complaint must state:

(A) that the action is brought under § 405(g), identifying the final decision to be reviewed;

(B) the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed;

(C) the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and

(D) the type of benefits claimed.

(2) The complaint may include a short and plain statement of the grounds for relief.

Rule 3. Service

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district [where the action is filed]. [If the complaint was not filed electronically, the court must notify the plaintiff of the transmission.] The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4. Answer; Motions; Time

(a) SERVING THE ANSWER. An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 3.

(b) THE ANSWER. An answer may be limited to a certified copy of the administrative record, and to any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

(c) MOTIONS UNDER CIVIL RULE 12. A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Rule 3.

(d) TIME TO ANSWER AFTER A MOTION UNDER RULE 4(c). Unless the court sets a different time, serving a motion under Rule 4(c) alters the time to answer as provided by Civil Rule 12(a)(4).

Rule 5. Presenting the Action for Decision

The action is presented for decision by the parties' briefs. A brief must support assertions of fact by citations to particular parts of the record.

Rule 6. Plaintiff's Brief

The plaintiff must file and serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(c), whichever is later.

Rule 7. Commissioner's Brief

The Commissioner must file a brief and serve it on the plaintiff within 30 days after service of the plaintiff's brief.

Rule 8. Reply Brief

The plaintiff may file a reply brief and serve it on the Commissioner within 14 days after service of the Commissioner's brief.

Committee Note

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to be the Commissioner. There is not enough experience with such actions to determine whether they should be brought into the simplified procedures contemplated by these rules. But a court can employ these procedures on its own if they seem useful, apart from the Rule 3 provision for service on the Commissioner.

Some actions may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a defendant or a claim for relief beyond review on the administrative record. Such actions fall outside these Supplemental Rules and are governed by the Civil Rules alone.

The Civil Rules continue to apply to actions for review under § 405(g) except to the extent that the Civil Rules are inconsistent with these Supplemental Rules. Supplemental Rules 2, 3, 4, and 5 are the core of the provisions that are inconsistent with, and supersede, the corresponding rules on pleading, service, and presenting the action for decision.

These Supplemental Rules establish a uniform procedure for pleading and serving the complaint; for answering and making motions under Rule 12; and for presenting the action for decision by briefs. These procedures reflect the ways in which a civil action under § 405(g) resembles an appeal or a petition for review of administrative action filed directly in a court of appeals.

Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil action be commenced by filing a complaint with the court. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal.

Simplified pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the action as one brought under § 405(g). The elements of the claim for review are adequately pleaded under Rule 2(b)(1)(B), (C), and (D). Failure to plead all the matters described in Rule 2(b)(1)(B), (C), and (D), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff who wishes to plead more than Rule 2(b)(1) requires to do so.

Rule 3 provides a means for giving notice of the action that supersedes Civil Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices for service, so long as it provides a means of electronic access to the complaint. Notice to the Commissioner is sent to the appropriate regional office. The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4's provisions for the answer build from this part of § 405(g): "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 made." In addition to filing the record, the Commissioner must plead any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer or to file a motion under Civil Rule 12 is set at 60 days after notice of the action is given under Rule 3. If a timely motion is made under Civil Rule 12, the time to answer is governed by Civil Rule 12(a)(4) unless the court sets a different time.

Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action for decision on the merits. This procedure displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record. Rule 5 also displaces local rules or practices that are inconsistent with the simplified procedure established by these Supplemental Rules for treating the action as one for review on the administrative record.

> All briefs are similar to appellate briefs, citing to the parts of the administrative record that support an assertion that the final decision is not supported by substantial evidence or is contrary to law.
>
> Rules 6, 7, and 8 set the times for serving and filing the briefs: 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(b) for the plaintiff's brief, 30 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.
>
> * * * * *

Rule 5 establishes the functional core of the Supplemental Rules. The case is presented for decision through the briefs. That is how an appeal is effectively presented. The other seven rules establish the procedures that establish the foundation for the briefs and set the times for serving and filing the briefs.

Rule 1 defines the cases that come within the Supplemental Rules and the relationship between the Supplemental Rules and the Civil Rules for those cases.

Rule 1(a) defines the scope of the Supplemental Rules. It limits them to the actions that present only a claim for benefits for a single individual, or perhaps plural claimants who rely on a single individual's wage record and circumstances. Such actions comprise an overwhelming majority of all § 405(g) review actions. Other actions, those that involve more claimants, more defendants, or claims in addition to the § 405(g) review claim, are governed by the Civil Rules alone.

Rule 1(b) supplements Rule 1(a) by recognizing that the Civil Rules "also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." A great many of the Civil Rules remain relevant, even necessary, beginning with Rule 1. They are essential to orderly management of the action. Other of the Civil Rules will be relevant only in unusual circumstances. In rare cases, discovery may be appropriate to explore such matters as claims of improper ex parte contacts with an administrative law judge, other improprieties, or the completeness of the materials filed as the administrative record. Still other rules, such as the jury trial rules, are irrelevant. And as observed in the committee note, the procedure for review and decision on the briefs supersedes Rule 56 summary-judgment practice.

Pleading is simplified by Rules 2 and 4.

Rule 2 contemplates a complaint that is designed to do no more than identify the plaintiff, including the last 4 digits of the social security number that the SSA needs to ensure proper identification of the administrative record. The plaintiff remains free to add "a short and plain statement of the grounds for relief," but may omit any such statement. The Commissioner as defendant is required by Rule 4 to answer by filing the administrative record and pleading any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, freeing the Commissioner from any obligation to respond to allegations in the complaint, but the Commissioner may respond to the allegations. Claimants, more likely those represented by counsel, may find it useful to plead more than Rule 2 requires as a means of educating the Commissioner about issues that may persuade the Commissioner to seek a voluntary remand. Voluntary remands are a common occurrence, and pleading may expedite the Commissioner's decision whether to ask for a remand.

Rule 3 supersedes the Civil Rule 4 provisions for service of the summons and complaint by directing that the court must notify the Commissioner by transmitting a Notice of Electronic Filing. This procedure has been adopted in some districts, and wins strong support from plaintiffs' representatives, the SSA, and court clerks. It has been universally popular from the moment it was introduced. The proposed rule text includes in brackets a sentence directing the court to notify the plaintiff of the transmission if the complaint was not filed electronically. Initial information indicates that the CM/ECF system cannot be manipulated in a way that will automatically generate a notice that can be delivered by non-electronic means. The brackets indicate a hope for comments that will address the level of the burden imposed on the clerk's office by requiring notice outside the CM/ECF system and the importance of providing this notice to the plaintiff.

Rule 4 is rounded out by subdivisions that address motion practice. These provisions serve primarily as reminders of Civil Rules provisions that would apply under Rule 1(b), in part to form a single compact package but more importantly to guide pro se plaintiffs.

As noted earlier, Rules 5 through 8 form a package that establishes the practice of presenting § 405(g) actions as appeals to be decided on the briefs and administrative record. The package is divided among separate rules to guide pro se plaintiffs as readily as can be managed.

The rule text is ready for public comment. The rule text has been reviewed by the Style Consultants and the Advisory Committee has approved the changes made in response to their comments. The prolonged process that generated these rules has included more contributions, from a wider variety of perspectives, than often emerge from public comments on rules that have no obvious constituencies. The process also revealed a number of engaged constituencies. Publication of the rules for comment in the full course of the rules committee process will provide an invaluable test. The subcommittee and full committee deliberations have come as far as can be without publication for comment, but public comments inevitably point out opportunities for improvement in both style and substance.

Substance-Specific Rules

Publication for comment also will test the wisdom of adopting any rules specific to the substantive task of § 405(g) review. The reasons for caution are familiar from earlier meetings, but can be summarized to pave the way for further discussion.

The reasons for caution in approaching substance-specific rules begin with the text of the Rules Enabling Act. Section 2072(a) authorizes "general" rules of practice and procedure and rules of evidence. Subsection (b) admonishes that "[s]uch rules shall not abridge, enlarge or modify any substantive right." Caution, however, is not the same as prohibition. The powerful tradition that Enabling Act rules generally should be transsubstantive is not unyielding. Familiar examples of substance-specific provisions in the Civil Rules are noted below. Other examples may be drawn from the Evidence Rules as well as from the Appellate Rules, authorized in the same sentence as the Civil Rules.

Familiar examples of Civil Rules and adjunct sets of rules that address specific subjects include both broad and narrow provisions. Broad examples include the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Rule G was adopted in response to strong urging by the Department of Justice); the Rules for § 2254 Cases and the Rules for § 2255 Proceedings (the § 2254 Rules may be seen as hybrid because of the civil character of habeas corpus); and Civil Rule 71.1 for proceedings to condemn real and personal property by eminent domain. An earlier example was provided by the Copyright Rules that were framed around the 1909 Copyright Act and repealed through the Enabling Act process after enactment of the 1976 Copyright Act, surviving only in Civil Rule 65(f), which applies Rule 65 to copyright impoundment proceedings. Civil Rule 5.2 is

an example of a narrow provision that limits remote access to court files in social security and immigration proceedings. Even the familiar Civil Rule 9(b) provisions for pleading fraud and mistake with particularity are sometimes offered as substance-specific, although at least the fraud provision applies across a wide swath of fraud statutes as well as common-law fraud.

These examples suggest that transsubstantivity is best addressed by asking whether a particular proposal for procedures that apply only to a specific subject matter promises gains sufficient to overcome the grounds for caution. The inquiry might be expressed as a rebuttable presumption, applied by weighing the values advanced by a particular proposal against the general grounds for resisting substance-specific rules.

One of the chief concerns is that good substance-specific rules can be framed only by reaching a clear understanding of the substantive law and the real-world character of litigation to enforce that law. The long-drawn process that framed the proposed Supplemental Rules included several missteps that were corrected with the advice of expert social security litigators. The simplification of the rules that resulted may have erased all such mistakes. Public comment will provide an essential check, and a means of correcting any substance-related mistakes that may remain.

Another concern is that substance-specific rules may be tainted by special interests. The careful process of generating these rules, and the clear simplicity of the final proposal, provide strong reassurances on this score. The Administrative Conference has no apparent special interest. The SSA has its own interests, but one of them is acting in the public interest. To the extent that the rules make review actions more efficient, the benefits will flow to all parties and the courts as well.

Even rules that do not favor one side or another may be viewed with suspicion by one side or all sides. Perceptions are important. Care must be taken in advancing rules that in fact are neutral but that are clouded by suspicions of favoritism.

Concerns such as these focus on the fear that substance-specific rules may prove inferior in application to applying the general rules. They have played a relatively minor role in considering rules for social security review actions. As noted above, some representatives of the claimants' bar have suggested that new rules would disrupt proceedings before judges that have become comfortable with their own practices, whatever they may be. And some perceive that rules advocated by the SSA must benefit the SSA, even if only from a workload or resource

perspective. But the practical value of the proposed supplemental rules has not been seriously questioned. Only publication for comment will test their value further.

Concern about making yet another departure from transsubstantivity has largely displaced questions about the quality of the proposed rules. The Department of Justice explained its dissenting vote from the committee recommendation that the rules be published for comment by invoking this concern. The fear is that adopting any new substance-specific rules will serve as an invitation to private interest groups to press for other substance-specific rules that promote private advantage. Even public entities that seek to promote their own views of the public interest may be encouraged to make unwise proposals. At best, the Rules Committees will need to devote limited resources to fending off these proposals. At worst, the barrier may be breached for unworthy procedures.

Experience with proposals designed to advance particular interests is not wanting. Often the proposals are framed in transsubstantive terms. At other times they take on a more particular, and occasionally clear, substance-specific focus. Proponents may take their proposals to Congress after failing in the Rules Committees, or may choose to go directly to Congress. Resisting legislative proposals is a sensitive and burdensome responsibility. Unwavering adherence to a strong presumption against substance-specific rules may make resistance more effective.

Balancing the value of particular proposed rules against the general concerns expressed as transsubstantivity is an important and at times difficult task. The social security review rules present an instance that can fairly be described as weighing the value of good and nationally uniform procedures against the generic concerns about substance-specific rules. The Department of Justice itself has propounded a model local rule for social security review actions and supported it for adoption by district courts. The model rule closely resembles earlier committee drafts. The Department’s doubts about the proposed rules reflect its view that the presumption against substance-specific rules should not be rebutted simply because better procedures can be crafted for a particular category of adjudication. On this view, substance-specific local rules do not impair the transsubstantivity approach that should be preserved in national rules.

The Advisory Committee believes that the proposed Supplemental Rules will advance adjudication of § 405(g) appeal actions in important ways, sufficient to overcome the

transsubstantivity presumption. That proposition deserves to be tested by publication for comment.

2. Rule 12(a)(4): Time to Respond When Official Sued as Individual

The Advisory Committee recommends publication for comment of a proposal made by the Department of Justice to amend Rule 12(a)(4). Rule 12(a)(4) sets at 14 days the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. The Department of Justice suggests that the time should be set at 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States:

> (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
> (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

This proposal is a logical extension of the concerns that led to the adoption of Rule 12(a)(3) in 2000 and of Appellate Rule 4(a)(1)(B)(iv) in 2011. Rule 12(a)(3) sets the time to respond in such actions at 60 days, and Rule 4(a)(1)(B)(iv) sets the time to appeal at 60 days. The Department of Justice often provides representation for officers and employees sued in these individual-capacity actions. The Department needs more time than most litigants, in part in deciding whether to provide representation and in part in providing the representation. These needs may arise when the Rule 12 motion is made, and perhaps even denied or postponed, before the Department has become involved.

The need for more than the usual 14-day period to respond is enhanced in the 12(a)(4) setting by at least one further concern. An official or employee sued in an individual capacity often may invoke an official-immunity defense. The collateral-order doctrine establishes appeal jurisdiction over denial of a motion to dismiss based on qualified or absolute immunity, free from the distinctions that complicate appeals from denials of summary judgment. If the Department is already representing the employee

it needs time to decide whether a collateral-order appeal is sensible, including the time needed for authorization of the appeal by the Solicitor General. And if it has not yet undertaken to provide representation, the need for time is still greater, and the officer or employee may be uncertain as to who is responsible for filing a notice of appeal.

If a case should present an unusual need for a faster response, the court retains authority to set a different time.

Proposed 12(a)(4) Amendment

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

* * * * *

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

Committee Note

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days to serve a responsive pleading after the court denies a motion under Rule 12 or postpones its disposition until trial. The United States often represents the officer or employee in such actions. The same reasons that support

the 60-day time to answer in Rule 12(a)(3) apply when the answer is required after denial or deferral of a Rule 12 motion. In addition, denial of the motion may support a collateral-order appeal when the motion raises an official immunity defense. Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days in these cases, and includes "all instances in which the United States represents that person [sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf] when the judgment or order is entered or files the appeal for that person." The additional time is needed for the Solicitor General to decide whether to file an appeal and avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

II. Information Items

A. Subcommittee Work

1. MDL Subcommittee

Since the Standing Committee's last meeting, the MDL Subcommittee has continued to explore and gather information about the issues it has been considering, though the COVID-19 crisis delayed some work. It has held conference calls on Jan. 10, 2020, and March 10, 2020.

This work is ongoing. As reported at the last Standing Committee meeting, the subcommittee concluded that third party litigation funding, though seemingly of growing importance, was not peculiarly important in MDL litigation. Accordingly, the Advisory Committee is continuing to monitor developments on this topic, and to compile information about it. The Rules Law Clerk is doing research as well. It remains unclear whether any rulemaking will result, however.

This report updates the Standing Committee on the three areas that remain on the MDL Subcommittee's "front burner." Recently, the subcommittee's main focus has been on the third topic discussed below——a possible role for the court in settlement review in connection with supervision of leadership counsel. On the first topic——the new idea of an initial "census" of claims——it is awaiting developments in ongoing MDL proceedings in which such novel efforts are being attempted. Regarding the second topic——expanded interlocutory review of orders in MDL proceedings——it has tentatively concluded that there is no promising way to limit a rule authorizing such review to certain

MDLs or to certain types of orders, and is therefore attempting to gather information about how any such rule might affect other MDL proceedings.

(1) Early Vetting, PFS and DFS Requirements, and an initial "census" of claims: Often, JPML centralization of litigation is followed by the filing of a large number of new claims. It appears to the subcommittee that there has been a significant shift in the positions of attorneys about how best to address this issue as subcommittee discussions have also evolved. That evolution continues.

One reaction early reported to the subcommittee was the development of orders for "plaintiff fact sheets" (PFS). At the subcommittee's request, the Federal Judicial Center (the FJC) researched the use of PFS orders, and found that they were already used very frequently in larger MDL proceedings, and used in virtually all of the "mega" MDL proceedings with more than 1,000 cases. In most of those "mega" proceedings, defendant fact sheets (DFS) were also required, often calling for defendants to provide information to the plaintiffs without the need for formal discovery.

One view of PFS and DFS practice is that it is an effective way to "jump start" discovery in larger MDLs. Another view of this practice is that it enables early screening out of unsupportable claims. Although to some extent plaintiffs' counsel and defense counsel agreed that methods of determining whether there were unsupportable claims might be desirable, there was resistance to rules requiring plaintiffs to provide discovery before they were allowed to take discovery. And the point was also made that, even if some proportion of the claims were not supportable, the rest should be allowed to go forward without undue delay.

The FJC research also showed that PFS and DFS requirements, while often having similarities from one MDL proceeding to another, were almost always tailored to the specific MDL proceeding before the court. And that tailoring often took considerable time to complete. Beyond that, some viewed the PFS and DFS requirements in some MDL proceedings as excessive and overly demanding. These concerns made the prospect of drafting a rule for all or certain MDL proceedings exceedingly challenging.

That challenge was compounded by the recurrent point made by experienced MDL transferee judges that they needed flexibility in designing appropriate procedures for the cases before them. One size would not likely fit all, the subcommittee was repeatedly told.

As these discussions proceeded, the views of the participants seemed to evolve. It might even be that the subcommittee's attention served as a small catalyst to this evolution. In any event, eventually the focus shifted somewhat. In place of reliance on PFS/DFS practice, the more promising idea came to be known as a "census," an effort to gain some basic details on the claims presented——e.g., evidence of exposure to the product at issue——so as to permit an initial assessment of the dimensions and challenges of the litigation. This need not be a substitute for a PFS, but rather a beginning for an information exchange that might later include a PFS and a DFS. It might also provide the court with information that could be valuable in selection of leadership counsel.

This census idea has been the focus of work since mid-2019. As of this writing, something of the sort is ongoing or under consideration in at least four major MDL proceedings:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding *In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation* (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by representatives of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve plaintiff profile sheets or a PFS. The census in this case was not primarily designed as a vetting device, but it is possible that having in hand a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of complexity to the

census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

In re Zantac (Judge Rosenberg, S.D. FL) (Judge Rosenberg is a member of the MDL Subcommittee): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The litigation is in the early stages of organization. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There have been 63 applicants for leadership positions, and the court has received initial census forms regarding more than 800 filed claims and more than 40,000 unfiled claims. Leadership counsel are to be appointed in May, and a "census plus" form will be due 60 days after that.

In re Allergan (Judge Martinotti, D.N.J.): This litigation involves medical implant devices alleged to cause a very specific harmful medical condition in some users. Initial phases of the litigation have focused on selection of leadership counsel. It is possible, but not certain, that a census will be used once leadership counsel are appointed. In this litigation, it may be that records of implants and development of the signature medical consequence would be suitable subjects for a census. Judge Martinotti had extensive experience with complex litigation while on the New Jersey state court before appointment to the federal bench.

The above four MDL proceedings are the only ones of which the subcommittee is presently aware that may produce information about census techniques. But there may be additional proceedings trying out this technique during 2020.

For the present, the subcommittee is monitoring these developments. Depending on the results of these efforts, it may emerge that a census technique is often desirable. But it may be that a rule amendment addressing that technique would be less flexible and useful than a manual or judicial education effort. Whatever the ultimate outcome, it does seem that ongoing attention from the subcommittee has contributed to the evolution of innovative responses to these problems.

(2) Interlocutory Review of Orders in MDL Proceedings: If the positions of the parties have moved closer together in regard

to the census idea described above, no similar confluence has occurred with regard to facilitating interlocutory review of rulings by MDL transferee judges.

The proponents of rules facilitating interlocutory review in MDL proceedings have urged that orders in those cases may have much greater importance than orders in ordinary civil actions. In particular, when orders effectively apply in a multitude of individual cases the importance of interlocutory review increases appreciably. Moreover, proponents of expanded review cited several recurrent critical issues——preemption and *Daubert* decisions on admissibility of expert testimony, for example——that could resolve most or all cases in the MDL. As to these sorts of "cross-cutting" issues, they contended, there was inequality of treatment: a victory by defendants would often result in a final judgment that would permit plaintiffs to appeal, while a victory by plaintiffs would not permit defendants to take an immediate appeal because the litigation would continue.

Opponents of rule-based expansion of interlocutory review in MDL proceedings emphasized that there are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). For recent examples of interlocutory review sought or obtained in MDL proceedings, *see In re National Opiate Litig.*, 956 F.3d 838(6th Cir., Apr. 15, 2020)(granting writ of mandamus on defendants' petition); *In re General Motors LLC Ignition Switch Litig.*,___ F. Supp.3d ___, 2019 WL 6827277 (S.D.N.Y., Dec. 12, 2019) (certifying issue for appeal under § 1292(b) on plaintiffs' motion); *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 WL 3326850 (N.D. Ala., June 12, 2018) (certifying issue for appeal under § 1292(b) on defendants' motion). Expanding review would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order is ultimately affirmed after extended proceedings in the court of appeals. And, of course, the "inequality" of treatment complained of is a feature of our system for all civil cases, not just MDLs.

One concern the subcommittee had about whether § 1292(b) might not be suited to MDL proceedings was that it authorizes a district court to certify an order for immediate appeal only on finding that (i) there is a "controlling question of law" as to which (ii) "there is substantial ground for difference of opinion" and (iii) that immediate review would "materially advance the ultimate termination of the litigation." But research by the Rules Law Clerk indicated that judges asked to certify orders in MDL proceedings do not suggest that the statutory standards constrain their ability to grant certification if appropriate, although they scrupulously examine each factor and

frequently comment on their circuit's receptivity to § 1292(b) appeals. No case shows that a district judge has denied certification because of inflexibility of the statutory criteria.

In sum, the research to date seems to support the following conclusions:

1. There are not many § 1292(b) certifications in MDL proceedings.

2. The reversal rate when review is granted is relatively low (about the same as in civil cases generally).

3. A substantial time (nearly two years) on average passes before the court of appeals rules.[1]

4. The courts of appeals (and district courts) appear to acknowledge that there may be stronger reasons for allowing interlocutory review because MDL proceedings are involved.

The subcommittee continues to work on these issues, with its current focus on a number of issues:

Scope - all MDLs or only some of them: Various ways of distinguishing among MDL proceedings and creating a special avenue of appeal only in some of them have been raised. These include case type (e.g., "personal injury"), dimensions of the MDL proceeding (100 claims or cases, or 500 claims or cases, or 1,000 claims or cases) or perhaps other criteria. Applying some of these criteria seemed likely to be difficult. At least equally important, however, was a sense that it is very difficult to draw a principled line between MDL proceedings eligible for broadened interlocutory review and those that are not. Instead, if a rule is to be considered seriously, it may be best to focus

[1] Prof. Steven Sachs, a member of the Appellate Rules Advisory Committee, has made an intriguing suggestion that a rule might provide that the district judge could indicate in a § 1292(b) certification that immediate review would "materially advance the ultimate termination of the litigation" (in the statute's words) only if the court of appeals handled the case on an "expedited" basis. This might support a rule that leaves it entirely up to the court of appeals' discretion whether to expedite review or limits the court of appeals' discretion to granting review only if there will be expedited review. Such limitations might unduly intrude into the court of appeals' management of its docket. The MDL Subcommittee has begun to consider this idea.

on a rule that applies to all MDLs and leaves the decision whether to authorize an appeal in a given proceeding to the judicial officers involved.

Scope - type of order: A different, or additional, method of creating only a narrow additional avenue for interlocutory review would be to limit the rule to certain types of orders. Examples suggested include admissibility decisions under the *Daubert* standard, preemption decisions, and perhaps some jurisdictional decisions. As noted below, the subcommittee has reached an initial consensus that it would be important to include a method for the district court to express views on whether immediate review would be helpful. Given that, it may be counterproductive to permit the district court to recommend immediate review only with regard to orders of certain specified types. In addition, the application of such a standard might itself invite litigation.

Scope - "Cross-cutting orders": A related idea is that review should focus on orders that could significantly affect large numbers of cases. Some orders (perhaps preemption in some instances) could be cross-cutting because they would effectively resolve many or perhaps most of the pending cases. Whether specific types of orders (e.g., preemption) are more likely to satisfy such a standard is uncertain. But it does seem that few endorse expanded immediate review for orders of whatever sort that apply to only one or two of the cases in an MDL. Perhaps transferee judges would customarily defer consideration of such single-case matters and instead concentrate on the cross-cutting issues in the proceeding. But putting this idea into a rule might prove quite difficult.

Role of district court: Some proponents of expanded interlocutory review regard the district court "veto" under § 1292(b) as an unfortunate obstacle in some cases, perhaps leaving some defendants "trapped" in the district court facing hundreds or thousands of cases. So the proponents of expanding review urge the Rule 23(f) model, with the decision whether to accept an immediate appeal left entirely up to the court of appeals. But it can be said that the issues involved in Rule 23(f) petitions for review (whether the court properly applied Rule 23 certification standards) involve a much narrower band of legal questions than those that might arise regarding all pretrial orders in MDL proceedings. The difficulty discussed above in relation to limiting the scope of any rule to only some types of orders underscores this point.

After discussion, the subcommittee's initial consensus is that a rule should call for an expression up front from the district judge on whether immediate review would be helpful. It is difficult to understand, for example, how the court of appeals could make a decision whether to accept a petition for immediate review without receiving such a report. Accordingly, it seems better to contemplate making such a recommendation part of the architecture of any rule, if one is to be devised, than to depend on an invitation from the court of appeals.

"Expedited" review: One matter that may bear substantially on the desirability of immediate review is the amount of time that review will take. It may be that receiving an answer from the court of appeals in six months would make immediate appeal a good deal more promising than getting an answer in two or three years. (In this connection, the question of a stay during appellate review might become important.)

Although the duration of prospective appellate review may be of great importance to a district judge asked to express an opinion about the desirability of such review, it is difficult to see how this factor could be fit into a rule as a criterion. For one thing, there may be considerable variety in what different courts of appeals would consider "expedited" treatment. The Speedy Trial Act actually includes time limits expressed in specified numbers of days; at present, there is no enthusiasm in the subcommittee for a rule of that sort, whether in the Appellate Rules or the Civil Rules. And any emphasis on "expedited" treatment necessarily raises the question "expedited in comparison to what"? Surely there are some matters pending before courts of appeals that all would agree are more urgent than review of one or another order in an MDL proceeding.

Standard for granting review: Section 1292(b) articulates standards for granting review. Rule 23(f), relying entirely on the discretion of the court of appeals, does not articulate any standards. Most or all courts of appeals have, however, developed and announced standards for handling Rule 23(f) petitions. Some concerns had arisen about whether the § 1292(b) standards were really suited to MDL proceedings. Should review be limited to a "controlling question of law" as to which there is "substantial ground for difference of opinion"? Particularly in light of the promulgation of Fed. R. Evid. 702, it might be said that *Daubert* issues might never fit such a standard. Though there may be a fierce debate about how the Rule 702 standard

should be applied to proposed expert testimony, that does not seem to be a substantial difference of opinion about the standard itself.

It is not clear, however, that the arguably strict statutory terms have actually constricted district judge decisions whether to certify questions for immediate review. As research by the Rules Law Clerk showed, many courts regard MDL proceedings as presenting good reasons for a more expansive attitude toward the § 1292(b) standards. There is little or no indication in reported decisions from district judges in MDL proceedings that the statutory standards have prevented them from certifying for review when they felt it was appropriate. But it may be that other MDL transferee judges take a more literal view of the statute's standards and do feel they cannot certify for immediate review even though they think it would be desirable.

It may be, thus, that a standard focusing only on whether review would be helpful to the district court, and leaving out the "controlling question of law" and "substantial ground for difference of opinion" criteria would be a helpful change. The other standard in § 1292(b)——"materially advance the ultimate termination of the litigation"——also seems somewhat off the mark for proceedings in which the transferee judge is authorized only to complete "pretrial proceedings" and cannot, without consent, hold a trial of an action transferred pursuant to § 1407 due to the Supreme Court's *Lexecon* decision. Perhaps a standard better focused on the MDL situation——such as "materially [advance] {facilitate} [expedite] the pretrial proceedings before the district court" would be the proper focus.

Retaining district court veto: If revising the § 1292(b) standards would provide important benefits, it might be sensible to retain the district court veto that is in the statute. Particularly if a rule modified the standard and prompted the district court to express its view that an appeal would not be desirable, it seems unlikely that a court of appeals would often grant review nonetheless. So the actual difference between a rule directing only that the transferee court should articulate its views on the desirability of immediate review and a rule requiring district court certification as a prerequisite for immediate review might be very small. And if that's true, it is not clear why the additional effort and delay of having the court of appeals review the matter to decide whether to go ahead over the objections of the district court would be warranted.

As part of its effort to obtain guidance about these interlocutory appeal issues, the subcommittee hoped to receive insights from practitioners experienced with MDL proceedings other than "mass tort" cases during an event scheduled to occur on April 14. But that event could not go forward due to the COVID-19 crisis. An online event of this sort is scheduled for June 19. Pending the results of that discussion, these topics remain on the agenda.

(3) Settlement Review, Appointment of Leadership Counsel, Attorney's Fees, and Common Benefit Funds: This may be the toughest area the MDL Subcommittee faces. The subcommittee has begun focusing on this set of issues during the Spring, and explored these issues during the Advisory Committee meeting in April. It invites insights from Standing Committee members. In general, the idea would be to develop for at least some MDL proceedings some judicial supervision regarding settlement like that provided in Rule 23 for class actions.

The class action settlement review procedures were recently revised by amendments that became effective on Dec. 1, 2018, which fortified and clarified the courts' approach to determining whether to approve a proposed settlement. Earlier, in 2003 Rule 23(e) was expanded beyond a simple requirement for court approval of class-action settlements or dismissals, and Rules 23(g) and (h) were also added to guide the court in appointing class counsel and awarding attorney's fees and costs to class counsel. Together, these additions to Rule 23 provide a framework for courts to follow that was not included in the original 1966 revision of Rule 23.

In class actions, a judicial role approving settlements flows from the binding effect Rule 23 prescribes for a class-action judgment. Absent a court order certifying the class, there would be no binding effect. After the rule was extensively amended in 1966, settlement became normal for resolution of class actions, and certification solely for purposes of settlement also became common. Courts began to see themselves as having a "fiduciary" role to protect the interests of the unnamed (and otherwise effectively unrepresented) members of the class certified by the court.

Part of that responsibility connects with Rule 23(g) on appointment of class counsel, which requires class counsel to pursue the best interests of the class as a whole, even if not favored by the designated class representatives. The court may approve a settlement opposed by class members who have not opted out. The objectors may then appeal to overturn that approval; otherwise they are bound despite their dissent. Now, under

amended Rule 23(e), there are specific directions for counsel and the court to follow in the approval process.

MDL proceedings are different. True, sometimes class certification is a method for resolving an MDL, therefore invoking the provisions of Rule 23. But otherwise all of the claimants ordinarily have their own lawyers. Section 1407 only authorizes transfer of pending cases, so claimants must first file a case to be included. ("Direct filing" in the transferee court has become fairly widespread, but that still requires a filing, usually by a lawyer.) As a consequence, there is no direct analogue to the appointment of class counsel to represent unnamed class members (who may not be aware they are part of the class, much less that the lawyer selected by the court is "their" lawyer). The transferee court cannot command any claimant to accept a settlement accepted by other claimants, whether or not the court regards the proposed settlement as fair and reasonable or even generous. And the transferee court's authority is limited, under the statute, to "pretrial" activities, so it cannot hold a trial unless that authority comes from something beyond a JPML transfer order.

Notwithstanding these structural differences between class actions and MDL proceedings, one could also say that the actual evolution of MDL proceedings over recent decades——perhaps particularly "mass tort" MDL proceedings——has somewhat paralleled the emergence since the 1960s of settlement as the common outcome of class actions. Whether or not this outcome was foreseen in the 1960s when the transfer statute was adopted, it seems to be the norm today.

This evolution has involved substantial court participation. Almost invariably in MDL proceedings involving a substantial number of individual actions, the transferee court appoints "lead counsel" or "liaison counsel" and directs that other lawyers be supervised by these court-appointed lawyers. The *Manual for Complex Litigation* (4th ed. 2004) contains extensive directives about this activity:

> § 10.22. Coordination in Multiparty Litigation——Lead/Liaison Counsel and Committees
> § 10.221. Organizational Structures
> § 10.222. Powers and Responsibilities
> § 10.223. Compensation

So sometimes——again perhaps particularly in "mass tort" MDLs——the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs——individually represented plaintiffs'

attorneys), they may have a limited role in managing the course of the MDL. A court order may forbid the IRPAs to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel. In class actions, a court order appointing "interim counsel" under Rule 23(g) even before class certification may have a similar consequence of limiting settlement negotiation (potentially later presented to the court for approval under Rule 23(e)), which might be likened to the role of the court in appointing counsel to represent one side or the other in MDL proceedings.

At the same time, it may appear that at least some IRPAs have gotten something of a "free ride" because leadership counsel have done extensive work and incurred large costs for liability discovery and preparation of expert presentations. The *Manual for Complex Litigation* § 14.215 (4th ed. 2004)provides: "Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions."

One method of doing what the *Manual* directs is to set up a common benefit fund and direct that in the event of individual settlements a portion of the settlement proceeds (usually from the IRPA's attorney's fee share) be deposited into the fund for future disposition by order of the transferee court. And in light of the "free rider" concern, the court may also place limits on the percentage of the recovery that non-leadership counsel may charge their clients, sometimes reducing what their contracts with their clients provide.

The predominance of leadership counsel can carry over into settlement. One possibility is that individual claimants will reach individual settlements with one or more defendants. But sometimes MDL proceedings produce aggregate settlements. Defendants frequently are not willing to fund such aggregate settlements unless they offer something like "global peace." That outcome can be guaranteed by court rule in class actions, because preclusion is a consequence of judicial approval of the classwide settlement, but there is no comparable rule for MDL proceedings.

Nonetheless, various provisions of proposed settlements may exert considerable pressure on IRPAs to persuade their clients to accept the overall settlement. On occasion, transferee courts may also be involved in the discussions or negotiations that lead to agreement to such overall settlements. For some transferee judges, achieving such settlements may appear to be a significant objective of the centralized proceedings. At the same time, some

have wondered whether the growth of "mass" MDL practice is in part due to a desire to avoid the greater judicial authority over and scrutiny of class actions and the settlement process under Rule 23.

The absence of clear authority or constraint for such judicial activity in MDL proceedings has produced much uneasiness among academics. One illustration is Prof. Burch's recent book *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge U. Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h) applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that "[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation." Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 Rev. Lit. 129, 135 (2018). Her recommendation: "[B]etter authority for MDL judicial power might be accomplished through amendment of the MDL statute or thorough authority conferred by a liberal construction of the All Writs Act." *Id.* at 183.

Achieving a similar goal via a rule amendment might be possible by focusing on the court's authority to appoint and supervise leadership counsel. That could at least invoke criteria like those in Rule 23(g) and (h) on selection and compensation of such attorneys. It might also regard oversight of settlement activities as a feature of such judicial supervision. However, it would not likely include specific requirements for settlement approval like those in Rule 23(e).

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further direction on how to wield authority already widely recognized. Research has found that judges do not express a need for greater or clarified authority in this area. And the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line. All participants——transferee judges, plaintiffs' counsel and defendants' counsel——seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.[2]

[2] One more recent development deserves mention. On Sept. 11, 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with

For the present, the subcommittee has begun discussing this subject. This very preliminary discussion has identified a number of issues that could be presented if serious work on possible rule proposals occurs. These issues include the following:

Scope: Appointment of leadership counsel and consolidation of cases long antedate the passage of the Multidistrict Litigation Act in 1968. As with the PFS/census topic and the possible additional interlocutory appeal provisions, a question on this topic would be whether it applies only to some MDLs, to all MDLs, or also to other cases consolidated under Rule 42. The *Manual for Complex Litigation (Fourth)* has pertinent provisions, and has been applied to litigation not subject to an MDL transfer order. Its predecessor, the Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960), antedated Chief Justice Warren's appointment of an ad hoc committee of judges to coordinate the handling of the outburst of Electrical Equipment antitrust cases, which proved successful and led to the enactment of § 1407.

Standards for appointment to leadership positions: Section 10.224 of the *Manual for Complex Litigation (Fourth)* contains a list of considerations for a judge appointing leadership counsel. Rule 23(g) has a set of criteria for appointment of class counsel. Though similar, these provisions are not identical. Any rule could opt for one or another of those models, or offer a third template. When an MDL includes putative class actions, it would seem that Rule 23(g) is a reasonable starting place, however.

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(b)(4) that counsel act in the best interests of the class as a whole, not only those with whom counsel has a retainer agreement. In some MDL proceedings, an initial census or other activity may precede the formal appointment of leadership counsel. Whether such interim leadership counsel can negotiate a proposed global settlement (as interim class counsel can negotiate before certification about a pre-certification classwide settlement) could raise issues not pertinent in class

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claims involved in the Opioids MDL. *See In re National Prescription Opiate Litigation*, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019). On Nov. 8, 2019, the Sixth Circuit granted a petition under Rule 23(f) to review Judge Polster's certification order. *See In re National Opiate Litigation*, 6th Cir. Nos. 19-305 and 19-306.

actions. It may be that the more appropriate assignment of such interim counsel should be——as seems to be true of the MDL proceedings where this has occurred——to provide effective management of such tasks as an initial census of claims.

Duties of leadership counsel: Appointment orders in MDL proceedings sometimes specify in considerable detail what leadership counsel are (and perhaps are not) authorized to do. Such orders may also restrict the actions of other counsel. Significant concerns have arisen about whether leadership counsel owe a duty of loyalty, etc., to claimants who have retained other lawyers (the IRPAs). Some suggest that detailed specification of duties of leadership counsel from the outset would facilitate avoiding "ethical" problems later on. The subcommittee has heard that some recent appointment orders productively address these issues.

It seems true that the ordinary rules of professional responsibility do not easily fit such situations. Regarding class actions, at least, Restatement (Third) of the Law Governing Lawyers § 128 recognized that a different approach to attorney loyalty had been taken in class actions. It may be that similar issues inhere in the role of leadership counsel in MDL proceedings. Both the wisdom of rules addressing these issues, and the scope of such rules (on topics ordinarily thought to be governed by state rules of professional conduct) are under discussion. Given that most (or all) claimants involved in an MDL actually have their own lawyers (not ordinarily true of most unnamed class members), it may be that rule provisions ought not seek to regulate these matters.

Common benefit funds: Leadership counsel are obliged to do extra work and incur extra expenses. In many MDLs, judges have directed the creation of "common benefit funds" to compensate leadership counsel for undertaking these extra duties. A frequent source of the funds for such compensation is a share of the attorney fees generated by settlements, whether "global" or individual. In some instances, MDL transferee courts have sought thus to "tax" even the settlements achieved in state-court cases not formally before the federal judge. From the judicial perspective, it may appear that the IRPAs are getting a "free ride," and that they should contribute a portion of their fees to pay for that ride.

Capping fees: Somewhat in keeping with the "free ride" idea, judges have sometimes imposed caps on fees due to IRPAs at a

lower level than what is specified in the retainer agreements these lawyers have with their clients. The rules of professional responsibility direct that counsel not charge "unreasonable" fees, and sometimes authorize judges to determine that a fee exceeds that level. It is not clear whether this "capping" activity is as common as orders creating common benefit funds. Whether a rule should address, or try to regulate, this topic is uncertain.

Judicial settlement review: As some courts put it, the court's role under Rule 23(e) is a "fiduciary" one, designed to protect unnamed class members against being bound by a bad deal. But ordinarily in an MDL each claimant has his or her own lawyer. There is no enthusiasm for a rule that interferes with individual settlements, or calls for judicial review of them (although those settlements may result in a required payment into a common benefit fund, as noted above).

So it may seem that a rule for judicial review of settlement provisions in MDL proceedings is not appropriate. But it does happen that "global" settlements negotiated by leadership counsel are offered to claimants, with very strong inducements to them or their lawyers to accept the agreed-upon terms. In such instances, it may seem that sometimes the difference from actual class action settlements is fairly modest. Indeed, in some instances there may be class actions included in the MDL, and they may become a vehicle for effecting settlement.

As noted above, it appears that some leadership appointment orders include negotiating a "global" settlement as among the authorities conferred on leadership counsel. Even if that is not so, it may be that leadership counsel actually do pursue settlement negotiations of this sort. To the extent that judicial appointment of leadership can produce this situation, then, it may also be appropriate for the court to have something akin to a "fiduciary" role regarding the details of such a "global" settlement.

Ensuring that any MDL rules mesh with Rule 23: As noted, MDLs include class actions with some frequency. So sometimes Rules 23(e), (g) and (h) would apply. But it is certainly possible that in some MDLs there are both claims included in class actions and other claims that are not. If the MDL rules for the topics discussed above do not mesh with Rule 23, that could be a source of difficulty. Perhaps that is unavoidable; this potential dissonance presumably already exists in some MDL proceedings. But the possibility of

tensions or even conflicts between MDL rules and Rule 23 merits ongoing attention.

In March, the subcommittee had a conference call to begin discussing the foregoing issues in some detail. The focus was on whether there should be some formal statement of many practices that have been adopted——and sometimes become widespread——in managing MDL proceedings. Whether such a statement ought to be in the rules is not clear. There are alternative locations, including the *Manual for Complex Litigation (Fourth)*, the annual conference the Judicial Panel puts on for transferee judges, and the JPML's website. Perhaps it could be sufficient to expect that experienced MDL litigators will carry the issues and related practices from one proceeding to another, and experienced MDL transferee judges will communicate among themselves and with those new to the fold.

Relying on informal circulation prompted a repeated concern during the subcommittee's conference call——there is good reason to make efforts to expand and diversify the ranks of lawyers who take on leadership positions. Anything that formalizes best practices should not impede progress on this important effort. On the other hand, some formal statement might be advantageous by making these practices known more widely and more accessible to those not steeped in this realm of practice.

Another consideration is the possibility that some judges or litigators might entertain doubts about the courts' authority to do the sorts of things that have commonly been done to manage MDL proceedings. Though Rule 23 is a secure basis for judicial authority to review the terms of proposed settlements, in MDL proceedings not involving Rule 23 the judicial role is more advisory or supervisory. There may be serious questions about whether a rule can authorize a judge to "approve" or perhaps even comment on the terms of a proposed settlement in MDL proceedings. There seems scant basis for judicial authority to bind individual parties to a proposed settlement simply because they have been aggregated, sometimes unwillingly, under § 1407.

So it may be that if more formalized provisions are needed the anchor could be the court's authority to designate a leadership structure, something that has been widely recognized. The reality is that judges may prescribe specific duties for leadership counsel (and also on occasion restrict the authority of non-leadership lawyers to act for their clients). A judge's authority to appoint and prescribe responsibilities for leadership counsel might also include continuing authority to supervise the performance of the leadership lawyers, including in connection with settlement negotiation. This undertaking could

introduce further complexity in addressing the nature of possible responsibilities leadership counsel have to claimants who are not their direct clients.

In the background, then, are questions about whether the mere creation of an MDL proceeding provides authority for a federal judge to regulate matters of attorney-client contracts, ordinarily governed by state law. One thought is that establishing a leadership structure is a matter of procedure that can properly be addressed by a Civil Rule. Establishing the structure in turn requires definition of leadership roles and responsibilities, and also requires providing financial support for the added work and attendant risks and responsibilities assumed by leadership counsel. Even accepting these structural elements, however, does not automatically carry over to creating a role for the MDL court in reviewing proposed terms for settlements, particularly of individual claims. Judges have differing views on the appropriate judicial role in providing settlement advice. Even in terms of broader "global" settlements, a wary approach would be required in considering an attempt to regularize a role for judges in working toward settlements in MDL proceedings.

The subcommittee focused during its conference call in March on identifying some of these problems without attempting to suggest that the full Advisory Committee take on the task of attempting to develop new Civil Rule provisions. During the April Advisory Committee meeting, the subcommittee sought reactions from Advisory Committee members on the following questions (as reflected in the minutes of the Advisory Committee meeting):

1. Is there any need to formalize rules of practice——whether in structuring management of MDL proceedings or in working toward settlement——that are already familiar and that continue to evolve as experience accumulates?

2. Do MDL judges actually hold back from taking steps that they think would be useful because of doubts about their authority?

3. There are powerful indications that any formal rulemaking would be opposed by all sides of the MDL bar and resisted by experienced MDL judges. Is that an important concern that should call for caution? Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free of formal rules?

4. Even apart from concerns about the reach of Enabling Act authority, would many or even all aspects of possible rules interfere improperly with attorney-client relationships?

5. Would rules in this area unwisely curtail the flexibility transferee judges need in managing MDL proceedings?

6. Would rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal authority now?

7. Would formal rules for designating members of the leadership somehow impede efforts to bring new and more diverse attorneys into these roles?

Discussion during the Advisory Committee meeting reflected different views on these questions. One common theme was the need to gather information about the large number of MDL proceedings that have not been the focus of the subcommittee's discussions so far. Gathering such information will be the focus of the subcommittee's work this spring and summer.

2. Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

The Civil and Appellate Rules Committees have established a joint subcommittee to consider the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1818 (2018). The Court ruled that final disposition of all claims among all parties in what began as a separate action constitutes a final judgment for appeal purposes, even when the action has been completely consolidated with another action under Civil Rule 42(a). The Court also suggested, however, that the Rules Enabling Act committees are the place to look for an answer if this approach creates problems.

The subcommittee decided to begin its work with empirical research by the FJC. The FJC study encompasses all civil actions filed in the federal courts in 2015, 2016, and 2017. This period has the advantage that some of these actions reached final judgment before *Hall v. Hall* was decided, generating data under each of the three other approaches to post-consolidation finality that, in all, had been adopted by a substantial majority of the circuits.

The FJC work has progressed to the point of identifying all Rule 42 consolidations in actions that are not part of MDL proceedings. For these three years there are 5,953 "lead" cases, consolidated with an another 14,777 "member" cases, making a total of 20,730 originally separate actions joined in consolidations. The types of cases that most frequently appear in consolidations have been identified. Patent actions, for example, account for 16% of all cases in consolidated actions, while consumer credit cases account for 3%. The modes of disposition also have been identified. Eighty-four percent of the lead cases have been terminated--32% settled, 10% voluntary dismissals, 22% "other dismissals," 13% dismissals on motion, and 2% tried (rounded and incomplete figures).

Much work remains. With so many cases, decisions must be made about how to construct a sample for case-specific research. Different types of cases may present different appeal profiles. Bankruptcy appeals, for example, accounted for 6% of the consolidations, but often involve proceedings distinct from most civil actions and involve different rules of appeal jurisdiction. Different modes of disposition present more obvious distinctions. Settlement of one action in a consolidation, for example, is less likely to generate final-judgment appeal issues than other modes of disposition. Some categories of cases, in short, should be under-sampled, while others should be over-sampled.

The important questions remain after the sample universe is established. These questions address the dispositions that may lead to confusion as to the time to appeal and may lead to inefficient appeals that threaten to disrupt continuing proceedings in the trial court and present appellate courts with the prospect of multiple appeals that involve the same or closely related questions. How often is there a complete disposition of one originally separate action while other parts of the consolidation remain undecided? How often is an appeal taken at that point? How often is an appeal delayed, but attempted after complete disposition of the consolidated proceeding? How often is the tardiness of an appeal recognized and dismissed, or noticed and ignored, or apparently not noticed? Is there any way to measure the consequences for effective management of the litigation that remains in the district court pending a *Hall v. Hall* final-judgment appeal, or for efficient expenditure of appellate court resources?

Detailed data may reach a level of statistical confidence, and will surely be informative. But completion of the FJC study may not be able to provide firm reassurance that the rule of *Hall v. Hall* does not lead to forfeiture of appeals as untimely, timely appeals that interfere with intricately related trial-

court proceedings, and wasteful consideration of multiple related appeals. Important subcommittee work will remain once the FJC study is completed.

3. E-Filing Deadline Joint Subcommittee

The Time Project generated a uniform definition of the end of the day for electronic filing that appears in the Appellate, Bankruptcy, Civil, and Criminal Rules. The relevant Civil Rule is 6(a)(4)(A)——the day ends at midnight in the court's time zone.

A joint subcommittee is exploring a suggestion that the end of the day be set at an earlier time. A likely candidate would be parallel to the deadline for filing by other means, "when the clerk's office is scheduled to close."

The FJC has undertaken a comprehensive study of current filing practices around the country. "This is a big data project."

The subcommittee will continue its work as the FJC study progresses.

4. CARES Act Subcommittee

The CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 527 (2020), includes a provision that has not been much noticed in the popular press. After establishing a set of interim measures that authorize videoconferencing and teleconferencing for various steps in a criminal prosecution, the Act provides:

> (6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The advisory committees have taken up this direction to consider possible rule amendments. In some measure the challenges courts have encountered in addressing public health measures to contain COVID-19 may seem common to all rules. But it is too early to guess whether common approaches will emerge. Different sets of rules address different kinds of procedures and operate under different constraints. Careful study may lead to correspondingly different responses, including a conclusion that one or another present sets of rules provide sufficient

flexibility to support proper emergency measures without needing any amendments.

The Civil Rules Advisory Committee has appointed a subcommittee chaired by Judge Kent Jordan to explore these questions. The first subcommittee meeting concluded that the most important first step is to gather as much information as can be gained about the challenges that have confronted civil actions in the last several months and about responses to them. Many sources of information are being developed. Data bases gathering information about local rules and other responses in all federal courts are continually updated. A central list of frequently asked questions is regularly revised. State court experience is being considered, with the help of the National Center for State Courts. Additional research is being conducted by the Rules Committee Staff and the FJC. And the Administrative Office has posted on its website a solicitation for reports of problems encountered by bench and bar, including both problems that have been effectively resolved through flexible application of existing Civil Rules and problems that may have proved insurmountable.

The subcommittee will meet again in June to begin considering the information that is being gathered. It is apparent already that there is a wealth, perhaps a surfeit, of information. Appraising it will be hard work. The goal, however, is to generate an initial sense of direction by late summer. A report will be made for consideration at the Civil Rules Committee meeting scheduled for October 16, if possible by a time that will permit an exchange of views with other advisory committees that will meet before October 16.

It would be premature to speculate about what the subcommittee may propose. It may be that, wisely administered in the spirit of Rule 1, present rules have proved equal to present challenges. No amendments may be needed. Or it may be that amendments will be recommended to improve a few specific rules that have stood in the way of effective procedures. Or it may be that a rule will be recommended to establish a more general authority to depart from ordinary rule requirements in response to emergency circumstances, however and by whomever emergency circumstances might be defined.

Much hard work lies ahead over midsummer.

B. Rules Carried Forward

1. Rule 4(c)(3): In Forma Pauperis Service by the U.S. Marshal

Rule 4(c)(3) may be ambiguous. The first sentence says that "[a]t the plaintiff's request," the court may order that service be made by a United States marshal. The second sentence says "The court must so order if the plaintiff is authorized to proceed in forma pauperis * * * or as a seaman." The question is whether "must so order" is independent of the first sentence, or whether "so order" refers back to the request by the plaintiff that focuses the first sentence. The Style Consultants think the answer is clear. The court must order service by a marshal in all cases with an i.f.p. or seaman plaintiff whether or not the plaintiff requests it. That reading seems consistent with 28 U.S.C. § 1915(d), which directs that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." Some courts, however, have found the rule ambiguous.

This question has been considered at three committee meetings since it was first raised at the Standing Committee meeting in January 2019. Any ambiguity that may be perceived in the present rule text can be made clear. The question remains what a clear rule should say. The three most obvious choices would be to require service by a marshal only if the court enters an order on a "request" by the plaintiff; to require the court to enter the order without a request; or to require the marshal to make service without a court order.

Choosing the best clear rule requires practical information.

Requiring that the plaintiff request service by a marshal can be supported by solid reasons. Making service is a burden on the Marshals Service, particularly in districts that spread over large distances. Some plaintiffs may prefer to make service themselves——anecdotal information suggests that the choice to bypass the marshal is often made when an i.f.p. plaintiff is represented by counsel. One reason easily could be that counsel can arrange service more promptly.

Requiring that the court order service by a marshal in all i.f.p. cases can be supported as well. An i.f.p. plaintiff who does not have counsel may not understand the need to make a request, leading to lengthy delays or even potential failure of the action at the starting gate. The i.f.p. statute seems to impose a direct duty; a Civil Rule that conditions the duty on a

request by the plaintiff likely is valid as an orderly procedure for implementing the statutory right, whether or not the right be regarded as "substantive" within the meaning of § 2072(b), but good reasons should be found to justify even a modest procedural impediment.

Dispensing with the need for a court order, imposing an automatic duty on the marshal, might be an attractive alternative to requiring a court order even without a request by the plaintiff. An order, however, may be more than a bare formality. It provides direct notice to the marshal that i.f.p. or seaman status has been recognized by the court. And it makes sense for cases in which i.f.p. status is recognized after the plaintiff has already made service, and for cases in which the plaintiff prefers to make service.

The Advisory Committee has not yet been able to gather persuasive information to support a choice among these three simple alternatives.

Additional possible approaches could supplement any of these three choices. Rule 4(c)(3) refers to service "by a United States marshal or deputy marshal." It might prove more efficient to recognize the marshal's authority to appoint another person to act for the marshal. This authority might be inferred from the present rule text, but could be made secure by an explicit amendment. The amendment likely would leave the marshal free to appoint or not to appoint another person, recognizing that the marshal may not have funds available for this purpose even when it may be more efficient. There is little point in exploring this prospect, however, if the Marshals Service is unwilling to exercise the authority.

A more adventuresome approach would be to add a provision that allows the marshal to make service by electronic means with appropriate safeguards to ensure that the summons and complaint were in fact received. Electronic service could greatly reduce the burden of making service. The marshal would be relied upon to employ electronic service only in circumstances that promise a high probability of actual notice——it seems likely that many i.f.p. plaintiffs sue public institutions or public officers that have reliable electronic addresses the marshal can discover readily. Developing experience with this approach could yield an added benefit of information about the opportunity to make it available on a more general basis.

The Advisory Committee will make further efforts to gather information that will support resolution of these uncertainties. It hopes to reach a conclusion by the time of the October 2020

meeting. If solid information is found to support a choice among alternative possible amendments, the Committee will attempt to make the choice. If solid information remains elusive, however, that may of itself indicate that there is little pressing need to resolve the ambiguity that some perceive in Rule 4(c)(3).

2. Rule 12(a)(1), (2), and (3): Statutory Times to Respond

Rule 12(a)(2) is incomplete on its face in a way that illustrates a recurring dilemma: Should rule text be amended to correct every ambiguity or imperfection that may be identified? Or if the failure seems to have little practical consequence, is it better to avoid the burdens that constant rules changes impose on the Enabling Act process and a bench and bar confronted by the need to recognize, learn, and implement——or perhaps undermine——new rule language?

Rule 12(a) sets the time to serve a responsive pleading. Rule 12(a)(1) sets the presumptive time at 21 days, but begins with this qualification: "Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows * * *." The qualification appears only in (a)(1). Paragraph (a)(2) sets the time at 60 days when suit is brought against the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (a)(3) sets a like time of 60 days for a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

The problem is clearly presented by provisions in the Freedom of Information Act and the Sunshine Act that require a response in 30 days, not the 60 days specified by Rule 12(a)(2). The paragraph structure of Rule 12(a) makes it at best difficult to attempt to transport "unless another time is specified by * * * a federal statute" from (a)(1) to either (a)(2) or (a)(3). On its face, Rule 12(a)(2) seems to set up a supersession issue: assuming that the time to respond is not so far a substantive right that it cannot be abridged, enlarged, or modified by an Enabling Act rule, the 60-day period in (a)(2) would supersede a different period, whether longer or shorter, set by a statute enacted before adoption of this provision in (a)(2), while a later-enacted statute would supersede (a)(2). There is no reason to suppose that any such contest was or should be intended. Initial research has not uncovered any other statutes that cannot be reconciled with (a)(2), but they may exist now or be enacted in the future.

The situation is less clear as to (a)(3). Initial research has not uncovered any statute that sets a time different than 60 days to respond when suit is brought against a United States officer or employee in an individual capacity for line-of-duty acts or omissions. Here too, however, such a statute may exist or might be enacted in the future.

A clarifying amendment is readily drafted by transposing the exception for different times set by Rule 12 or by statute to become a preface to all of Rule 12(a): "Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: (1) * * *; (2) * * *; (3) * * * (4) * * *."

As easy as an amendment may seem, reasons for caution remain. There is no indication that widespread problems arise from the present rule text. The anecdote that inspired the suggestion to amend the rule recounted an incident in which a district court clerk initially refused to issue a summons calling for a response within the 30-day period set by the Freedom of Information Act but then was persuaded to do so. The Department of Justice regularly honors the 30-day period, or asks for an extension when an action combines claims that are subject to the 30-day period with other claims that are not. And an initial draft of a proposed amendment failed to account for the different times set by Rule 12(a)(4) for responding after the court denies or postpones disposition of a Rule 12 motion. Care is always required in amending rule text, and care may not always avoid mistake.

The Advisory Committee expects to conclude consideration of this question at its October 2020 meeting.

3. Rule 17(d): Naming Office in Official Capacity Cases

Rule 17(d) offers a choice: "A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added."

Sai, a regular contributor of suggestions for amendment, proposes that "must" be substituted for "may," requiring that the public officer be designated by official title in all cases. The officer's name could be used only when the officer is also sued in an individual capacity.

A major reason for the proposal is to simplify the procedure for responding when an individually named public official ceases

to hold office. Rule 25(d) provides that the action does not abate, and that the officer's successor is automatically substituted as a party. It also says that later proceedings should be in the substituted party's name and that any misnomer that does not affect the parties' substantive rights must be disregarded.

Automatic substitution looks nice, but something should happen to confirm the substitution in court records and the parties' filings. Naming the official capacity, in effect naming the office as the party, avoids the need for substitution so long as the office itself continues to exist. It also fills in the conceptual gap that may exist between departure from office of the incumbent who held office at the time of suit and a later appointment and substitution of a successor officer.

A more modest advantage of naming the official title or office would be to ease the task of following the subsequent history of a case as it wanders through what may be a series of substitutions as individuals enter and depart from public office. A single case may migrate through a series of names. But electronic court records and computerized legal data bases may effectively obviate most potential difficulties on this account.

Requiring that a public official sue or be sued only by official title or office may nonetheless generate conceptual problems that are avoided by offering the choice to name the official. An action that "designate[s]" only an official title for a party works only if the title represents an office that can be made a party.

The determination whether an office can be designated as a party may be made readily as to most United States offices that are frequently involved in litigation, whether as plaintiff or defendant. But uncertainty may remain in determining which names in the enormous array of those attached to elements of the federal government represent an "official title" in the sense that suit can be brought against the office and maintained by or against a successor. Imagine, for example, a title of "deputy assistant inspector of chicken processing facilities," named as defendant in an action for workplace harassment by others. It may be better to permit naming the incumbent alleged to have failed to stop the harassment than to worry about the existence of the office and corresponding official title.

The difficulties in determining whether an official title can be designated as a party are multiplied when the office is created by a state or a state subdivision. Federal litigants and federal courts may be poorly positioned to make distinctions

under obscure state law.

Conceptual difficulties abound when a state official is sued as defendant. Designating the official title as defendant invites arguments about the *Ex parte Young* fiction that avoids the Eleventh Amendment by positing that the suit is against the office holder, not the state. The fiction is so transparent that a court rule should be able to look through it to the reality. But an action against "Name, Attorney General of Minnesota" looks different from an action against "The Attorney General of Minnesota." A court rule should not lightly rely on the assumption that there is no real difference between suing the attorney general by name and suing the attorney general as attorney general.

Committee discussion suggested that few practical problems arise in present practice. Substitution of successor officials is managed readily, usually seamlessly.

This topic remains on the committee agenda for further consideration.

C. Items Removed from the Agenda

Introduction

The three proposals described here prompted initial discussion of the question whether the Advisory Committee should establish a consent calendar. The purpose would be to conserve committee resources by inviting members to reduce the effort devoted to determining that some agenda proposals should not advance for detailed development. No precise structure was identified. A rough sketch suggested that the committee chair and reporters would select items to be placed on the consent calendar, relying on criteria that indicate a low probability that committee resources should be invested in further consideration. The focus would be on proposals that seem doomed to fail, rather than on summary advancement of proposals that seem destined to advance. Some proposals rest on a misunderstanding of current law. Others involve specific instances of probably erroneous acts by courts that do not rise to a level of frequency or importance that justifies the work of pursuing an amendment through the full Enabling Act process and adoption into practice. Some topics prompt repeated proposals that have been studied and put aside, perhaps recently and at times persistently; the offer-of-judgment provisions in Civil Rule 68 are a leading example. Still others are simply puzzling. A proposal placed on the consent agenda would be advanced for full consideration on request by any single committee member made

at least a week before the committee meeting; later requests would defer full consideration to the next meeting.

Committee discussion did not reach a conclusion whether to institute a consent agenda. The Judicial Conference maintains a consent agenda that commonly includes proposals from the Standing Committee. The analogy is incomplete, however, because the Judicial Conference is acting on rules matters that have been carefully developed through repeated consideration by two committees and public comment. A consent calendar for an advisory committee would operate at the very beginning of the process.

Concerns were expressed that a proposal that seems ill-founded on first inspection may, after inspection by all committee members, prove worthy of further development. Careful examination should not be discouraged by an invitation for superficial review.

A further concern is that a consent calendar implies that some proposals are not treated with as much care as others. There would be an appearance that the committee does not take seriously proposals on some topics or from some sorts of proponents. It is important that diligent committee consideration be afforded all proposals, and also important that a high standard of care be perceived by all those interested in committee work, including the general public.

The hope for increased efficiency also may prove illusory. Committee members would need to devote some effort, often not inconsiderable, to searching for hidden value in proposals that at first sight do not seem worthwhile. Then the effort would have to be repeated and expanded if any member requested that a proposal be moved to the full discussion calendar. Further duplications of effort and delay would result if routine description of the consent calendar at a committee meeting led to advancement for full discussion, likely at the next regularly scheduled committee meeting.

The consent calendar question will be on the agenda for further discussion when the Advisory Committee meets in October.

1. Rule 16: Judicial Involvement in Settlement

This submission proposed three amendments of Rule 16. The central change would be to exclude trial judges from participating in settlement conferences. The committee considered a similar proposal in depth not long ago, and concluded that judges are well aware of the competing risks and need not be constrained by new rule provisions.

A second change would establish "objective" standards for sanctions for failure to prepare or participate in good faith in a Rule 16 conference. A few instances of seemingly inappropriate sanctions were described. The committee thought widespread misuse of sanctions is unlikely, and doubted that amended rule language would be effective to deter such misuse as may occur.

The third change would add "substantive and procedural safeguards" to local district ADR rules, or to the Evidence rules.

This topic was removed from the agenda.

2. Time Limits in Subpoena Enforcement Actions

The thrust of this suggestion was not entirely clear. Much of it seemed to argue for imposing strict time limits measured in days in all proceedings to enforce subpoenas of every sort. But the limits were so clearly inappropriate for trial subpoenas, discovery subpoenas, independent proceedings to enforce administrative subpoenas or equivalent demands for information that the proposal may have been intended only for the examples given——actions brought by Congress to enforce subpoenas directed to executive officials.

Committee discussion focused on congressional subpoenas. The time limits proposed did not seem sensible for these proceedings. Nor is there any apparent reason to consider more realistic limits. Courts seem to be responding to these actions by balancing the need for careful consideration of often sensitive issues against the need for prompt disposition that arises from the same sensitivities.

This topic was removed from the agenda.

3. Rules 7(b)(2) and 10

This proposal addresses issues of the fit of Rule 7(b)(2) with Rule 10. It describes the issues as "technical," and recognizes that in practice "litigants and counsel simply ignore the problematic language, if they notice it at all."

The problems described draw from the precise words used in Rules 7(b)(2) and 10(a). Rule 7(b)(2) seems direct: "The rules governing captions and other matters of form in pleadings apply to motions and other papers." Rule 10(a) directs that "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation." But how does this work? A motion is not a pleading. How, then, can it bear a

"Rule 7(a) designation"? Should a motion for summary judgment be called a complaint, an answer to a third-party complaint, or anything else in the Rule 7(a) list of all permitted pleadings? The list of paradoxes is extended across other examples.

The Advisory Committee concluded that there is little reason to work through the full Enabling Act process to address issues that even the proposal concedes do not present practical problems. Even as a matter of style, the profession recognizes that the relationship between Rule 7(b)(2) and Rule 10 "is a process of analogy, not literal reading."

This topic was removed from the agenda.

APPENDIX

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APPENDIX

Summary of Comments on Published Amendment to Rule 7.1

RULE 7.1(a)(1): INTERVENOR

0006: Richard Golden: Disclosure should be expanded beyond corporations and it does not define "publicly held." Other forms of entities may be publicly traded. The rule should require disclosure as to any entity subject to registration under the Securities [sic] Act of 1934. (The reasoning of this comment applies to disclosure by a party under the present rule, not to intervenors alone.)

0022: Frederick B. Buck for American College of Trial Lawyers: The intervenor proposal is "non-controversial and necessary for conformity with the Appellate and Bankruptcy Rules."

0029: Jim Covington for Illinois State Bar Association: This will conform Civil Rule 7.1 to Appellate Rule 26.1, and will provide information that may be relevant to the judge's decision on disqualification. There will be no undue burden.

RULE 7.1(a)(2): ATTRIBUTED CITIZENSHIP

General Support

(Several comments are identified by number and name only because they reiterate common themes in supporting the proposal.)

0013: Maria Diamond: Offers strong support. "This problem arises more frequently than might be thought." The problem has been encountered in nursing home injury cases involving LLC ownership.

0015: Tim Lange: "[I]n strong favor * * *. The Federal judiciary is regularly abused by improper removal of diversity cases." This is no inconvenience to the removing party.

0016: John H. (Jack) Hickey: "[A] positive step." The amendment "would prevent removal where it is in fact not available.

0017: Raeann Warner: Supports. "This will discourage improper removals and increase the efficiency of litigation or practice with regard to removals."

0018: Bruce Stern, American Association for Justice: "Information about the owners/members of defendant attributable-citizenship entities is often complicated and difficult for plaintiffs to ascertain before the benefit of discovery." Disclosure imposes only minimal burdens, providing information about jurisdiction earlier and protecting against delayed discovery.

0019 (duplicated as 0023): Philip L. Willman, DRI: Supports, with three suggestions to improve noted below.

0021: Bruce Braley: Recounts filing an action against an LLC, one of whose members is an LLC. The court ordered the plaintiff to identify the members of an LLC that is a member of the defendant LLC, and to identify their citizenships. If any of the members is an LLC, the same identifications must be provided. The order, entered on December 21, gives until January 19 to respond. "[P]arties have to incur substantial costs to track down the members of each individual LLC, and if that member is an LLC, each and every member of THAT LLC, and on and on and on." Disclosure will enable the parties and court to promptly identify who needs to be named and identified in the jurisdictional allegations.

0022:Frederick B. Buck for American College of Trial Lawyers: Opposes citizenship disclosure for reasons summarized with "general opposition" below.

0024: Richard Shapiro.

0025: Ian Taylor.

0026: Leland Belew: The defendant manufacturer of the ladder claims "not to really exist anywhere." Records of the state of incorporation can be out of date, and do not provide a reliable basis for determining the principal place of business. Jurisdictional discovery is ongoing. Disclosure would be better.

0028: Bill Cash: Ascertaining the citizenship of an LLC is often impossible before filing. Disclosure "makes sense."

0029: Jim Covington for Illinois State Bar Association: A plaintiff may have to plead diversity jurisdiction on information and belief. It is in the interests of the parties, the courts, and the public to determine diversity jurisdiction as early as possible.

0030: Sean Domnick: The earlier diversity can be determined, the better.

0031: Nicholas Deets.

0033: Patrick Yancey: "No more tricks and more time for treats!"

0034: Mike Stephenson.

0035: Nelson Boyle: "The proliferation of LLCs has created a problem and this is a logical solution."

0036: Stephen Marino: "The unnecessary and improperly broad exercise of diversity jurisdiction impairs the state courts' exclusive jurisdiction of non-diverse, state law based cases." Disclosure "also will protect the limited jurisdiction of federal courts."

0037: Brian Mohs: Now discovery is needed to determine diversity. Disclosure "is in everyone's interest."

0039: Ian Birk: The proposal "promot[es] the federalism balance that Congress struck in framing the diversity statute." It will avoid the waste that arises from belated realization that there is no diversity jurisdiction——waste that cannot always be cured by dismissing a diversity-destroying party. It will help when a party removes an action from state court without consulting with other parties about their citizenship. And the burden of disclosure, which "will take on a routine format," will be less than the burdens of jurisdictional discovery.

0040: Jonathan Feigenbaum: The same points as 0039, adding that some courts already require disclosure sua sponte.

0041: Frederick Berry: “Since the adoption of the Federal Insurance Office Act of 2010, 31 USC 313, and the Nonadmitted and Reinsurance Reform Act of 2010, 15 USC 8202, I have seen an explosion of nontraditional risk bearers who operate within complex business organizations * * *.” The forms may be LLC, partnership, trust, corporation, or association. “Unfortunately, they often seek diversity jurisdiction when there is none.”

0042: Cayce Peterson.

0043: Jessica Ibert: A plaintiff may find it difficult to determine citizenship, both because of the time required to investigate and because of the risk of reaching incorrect conclusions. The burden of disclosure is not onerous “as this is information that is easily accessible and readily available to the entity.”

0044: Chris Zainey: Similar to 0043.

0045: Richard Martin: This will preclude frivolous removal. It is not always easy to parse out the citizenship of an LLC defendant.

0046: Anonymous Anonymous: Inquiry into the ownership of an LLC or other business structure can be costly, and an attorney’s conclusions may be wrong. Plaintiffs, defendants, and courts will benefit from disclosure.

0047: Michael Cruise.

0048: Nicholas Verderame: “The fact that this rule change was proposed by a Federal judge demonstrates just how much these tactics clog up the Bench.”

0049: Neil Nazareth: The proposal “promotes transparency and forces parties to perform due diligence internally on the front end.”

0050: Crystal Rutherford.

0051: Mark Larson.

0052: Betsy Greene: “This rule is not onerous and puts little burden on the parties to provide information that frequently cannot be located anywhere else.”

0053: Elizabeth Hanley: Experience in employment and personal injury cases based on state law shows that these actions are often improperly removed. Disclosure will “greatly assist in reducing the waste of resources caused by improper removal.”

0054: George Tolley.

0055: Sam Cannnon: Supports, but finds an ambiguity in "at the time the action is filed," as noted below.

0056: Kyle Olive: "[I]t makes so much sense." A defendant seeking removal should be required to prove diversity.

0057: Eugene Brooks: "I've had a terrible experience in which Defendant LLC did not divulge all LLC members until trial court order went up on appeal * * *. Only then did Defendant, at Court[']s request, advise of over 40 LLC members, including additional LLCs. Lost diversity jurisdiction. Huge mess thereafter."

0058: Michael Goldberg: "The burden on counsel if any at all, is nominal.

0059: Ty Taber: "The proposed changes * * * are long overdue * * *."

0060: Ingrid M. Evans: Complex questions of citizenship often arise "when one or more party is a partnership, LLC, joint venture or other form of pass-through business entity involving a collection of individuals or businesses."

0061: Daniel Laurence: Litigants often play "hide the ball" "in efforts either to enter or exit a federal court for strategic reasons." Sometimes the strategies work, sometimes not. In the worst cases, a defendant may not seek immediate dismissal "to impose a great financial expense on another party, and/or to delay dismissal until after the limitations period has expired.:

0062: Kent Winingham.

0063: Kirk Laughlin.

0064: David Scott: This is a simple but important amendment. "Anytime a party to the case was an LLC, determining its citizenship prior to filing suit against it, was virtually impossible."

0065: P Gregory Cross: The proposal is important not only for the courts but also for the lawyers and parties. The difficulty of determining citizenship has expanded greatly since the early 1990s with the proliferation of LLCs, LLPs, and similar organizations. Lawyers uncertain whether diversity jurisdiction exists not only encounter real burdens in making the determination but also in the costs of uncertainty as to jurisdiction. They proceed cautiously in making litigation choices when they are not sure what procedures will apply, what choices of law will be made, and so on, "and

procrastination is commonplace."

0066: Lee Cope.

0067: Altom Maglio: Disclosure imposes no additional burden: "A party is aware of its own structure and citizenship." In consumer class actions against multinational corporations, "[t]he newest defense of the indefensible is jurisdictional Three-card Monte. Nope, you can't sue us []here, not there, not anywhere."

0068: Douglas E. Miller, USMJ, for Federal Magistrate Judges Association Rules Committee, as approved by the Executive Committee: Approves, suggesting two edits of the committee note.

0069: Hubert Hamilton: "This rule is long overdue. If a case is removed to federal court, all parties should be required to immediately disclose citizenship of owners/members * * *."

0070: Charles Monnett.

0071: Ryan Skiver.

0072: Nick Duva (Certified Anti-Money Laundering Specialist): the amendment "creates a minimal, if any, burden on the parties. Banks and other financial institutions are already required under state and federal law to collect and maintain disclosure statements from their entity customers, listing with specificity the ultimate beneficial owners, citizenship, ownership percentages, and other identifying information & documentation. The ultimate beneficial ownership disclosure is required to be complete and updated on a regular basis as an important component of the bank's anti-money laundering, financial crimes, and fraud protection programs."

0073: Michael Warshauer" "[T]his is information that [the party] has readily available." "Our courts should be public. Requiring a party (whether a plaintiff or a defendant) to identify itself completely is consistent with this long held tenant [sic] of our judicial system."

0074: Bill Cremins.

0075: Matthew Sims: Often privately held entities "do not have organizational information within the public domain. Almost always, this information is known to a defendant and is easily ascertainable at little or no cost."

0076: Edward Zebersky.

0077: David Arbogast: "[A]ll too often, a defendant sued in state

court removes a case to federal court who lacks diversity of citizenship."

0078: Christine Spagnoli.

0079: Marion Munley.

0080:Ellen Relkin: Offers one example of a medical device wrongful death case removed from state court and ultimately remanded. More than three weeks after removal, and after more than 20 filings were submitted to the federal court, a codefendant revealed an ownership interest that defeated diversity. But the manufacturer defendant persisted in refusing consent to remand and continuing litigation, including two motions to dismiss that were summarily denied. More than 30 filings had been made when the court granted the plaintiff's motion to remand. Nearly three full months were wasted in federal court.

0081: Katie Nealon.

0082: Melinda Ghilardi.

Expand

0005: GianCarlo Canaparo: The rule should require every party to disclose its own citizenship. Rule 8 is not enough——some pleadings fail to allege citizenship; counsel may not be diligent to uncover true citizenship; a party may deliberately conceal citizenship. "attributable to that party" could be read to require pleading the party's own citizenship, but that is an unnatural reading. The rule text should explicitly require disclosure of a party's own citizenship. (The same views are expressed in M. Canaparo's testimony at the October 29 hearing, set out in 0010.)

0008: William Cremins: This is a good idea, but it should apply "regardless of whether the defendant is a corporation, LLC, partnership, etc." Each business structure should be reached. (This might be read as a drafting question addressed to the proposed text: "every individual or entity," and related to the examples offered in the committee note.)

0011: Joseph Sanderson: Strongly supports as "vitally important." It should apply to all forms of jurisdiction based on citizenship, including alienage, "not just diversity jurisdiction." (Alienage is included in § 1332(a) and the proposed rule. The minimal diversity statutes are not——CAFA, §1332(d); interpleader, § 1335; single accident multiparty, multiforum, § 1369.)

0018: Bruce Stern, American Association for Justice: The rule should not be expanded "to apply to *all* parties, not just entity litigants whose owners/member citizenship can be attributed to them." "[N]o concerns have been raised about properly determining citizenship, for diversity purposes, of individuals or corporate litigants."

0019, 0023: Phillip L. Willman, DRI: suggests three additions to rule text: "identifies, as specified by that statute, the citizenship of that party and every individual or entity whose citizenship is attributed to that party at the time the action is filed in district court." (1) "As specified by that statute" makes clear that the rule includes all citizenships of a corporation, and the provisions for direct actions against insurers and for legal representatives. (2) "that party and" requires a party to disclose its own citizenship——a legal representative need not disclose its own citizenship since that is not relevant to diversity jurisdiction. (3) "in district court" to make it clear that the time of filing a notice of removal from state court is what counts.

DRI also proposes an amendment to Rule 7.1(b)(1) to forestall the risk that a party may go for a long time without triggering the time to disclose: "file the disclosure statement with its first

appearance, pleading, petition, motion, response, or other request addressed to the court or within 60 days of the [sic] filing the case in district court, whichever is earlier * * * [A similar suggestion is advanced by GianCarlo Canaparo, 0010: "or within 21 days after service of the first filing in the case, whichever is earlier.] {Note that 60 days after filing often will not work—— sixty days may elapse before a defendant is served, a new party is joined, and so on. 21 days after service of the first filing in the case could work if it means after service on the party obliged to make a disclosure, but again cleaner drafting would be required.}

0027: S. Taylor Chaney: This comment assumes that the citizenship of a subsidiary of an unincorporated entity parent is attributed to the parent. The suggestion is that the rule should be made crystal clear to reflect this rule.

0031: Karl Bengtson: Undue burdens may be imposed on a party by the requirement that it disclose all attributed citizenships. Identification may be difficult when a person has an ownership interest but no active involvement with the party. Examples include a member who has left his former domicile without providing a new address, or the death of a member with an estate too small or too encumbered to justify formal administration. "Unless the court orders otherwise" is a start, but it would be better to provide explicit discretion to limit the investigation a party must make into its own citizenship.

0003: Mariko Ashley: (1) Not clear which party is responsible for filing. (2) "Whose citizenship is attributable to that party" is confusing: Must a party disclose its own citizenship? (3) What if the defendant has not yet been served? (4) Removed actions are not specifically addressed.

0007: Allison Lee: "At the time the action is filed" is confusing: it should be "filed in federal court" to eliminate confusion in removed cases.

0010: GianCarlo Canaparo: Rule 7.1(b)(1) requires that a party filing a notice of removal include the 7.1 disclosure. But the complaint in state court may not provide the plaintiff's own statement of citizenship. (Implicitly ties to the fear that a complaint initially filed in federal court may not accurately plead the parties' citizenships——the notice of removal may do no better.)

0013: Maria Diamond: Expresses concern about "potential disclosures regarding the status of non-citizens."

0018: Bruce Stern, American Association for Justice: The committee note should be revised to allow the court to protect the names of identified persons against disclosure when there are substantial interests in privacy or safety, regardless of a need to support discovery by other parties to go beyond the disclosure. This is important to protect an undocumented foreign national.

0055: Sam Cannon: Supports, but fears that on strained reading, "at the time the action is filed" could be read to refer not to citizenship at the time of filing but to the time to file the disclosure statement. No reference is made to the time-of-filing provisions in present Rule 7.1(b)(1).

0068: Douglas E. Miller, USMJ, for Federal Magistrate Judges Association Rules Committee, as approved by the Executive Committee: Approves, but suggests two edits to the committee Note:

(1) " * * * the court may limit the disclosure upon motion of a party * * *." This will ensure that the Note does not imply an independent responsibility of the court.

(2) "Or the names of identified persons might be protected against disclosure to the public, or to other parties * * *." Protection of private information against public disclosure is often important, justifying filing under seal, in circumstances that require disclosure to other parties who need to determine whether diversity exists.

0014: Anonymous Anonymous: Rule 8 requires that the plaintiff plead jurisdiction. The defendant can admit or deny. Disclosure is redundant and imposes a burden. If a party denies diversity, the court can direct discovery or other procedures. In addition, requiring disclosure by a defendant improperly makes the defendant assist in its own prosection. The amendment applies to "individuals who are not entities and are alone." Nor does the rule say who is to file the disclosure. And it does not explain when the court should "order otherwise."

0022: Frederick B. Buck for American College of Trial Lawyers: The best, but unlikely, solution is for the Supreme Court to revise its view that LLCs should be distinguished from corporations for § 1332 diversity jurisdiction, or for Congress to amend § 1332. Failing that, Rule 7.1 disclosure is a bad idea. The necessary information should be sought through discovery or at the scheduling conference.

For the most part, jurisdiction is properly pleaded, and jurisdictional issues raised by the pleadings are resolved early in the proceedings through discovery or other means. It is not common to waste judicial resources on a case that ultimately must be dismissed for lack of diversity.

Rule 7.1 was adopted to call for disclosure of financial interests that may require judicial recusal. It should not be expanded to this quite different role.

Pleading subject-matter jurisdiction is addressed by Rule 8(a)(1). If a special provision is needed for diversity jurisdiction as to LLCs, it should be added to Rule 8 as a pleading requirement.

When the citizenship of an LLC presents a complex issue, Rule 7.1 disclosure may be unworkable. The disclosure must be filed early——so early that "an LLC may be unable to identify citizenship of all its members in order to timely comply."

Disclosure raises significant confidentiality concerns. The LLC form may be chosen because of a desire for confidentiality. "Unless the court orders otherwise" is not sufficient protection.

The better course is to address citizenship questions at the Rule 26(f) conference and to include a statement of jurisdiction in the 26(f)(3) discovery plan. If needed, the court can order jurisdictional discovery.

0038: New York City Bar Committee on Federal Courts: Offers seven sets of reasons for abandoning the Rule 7.1(a)(2) proposal:

(1)Rule 7.1 should be limited to disclosing facts that bear on judicial disqualification. The vast array of facts that may be disclosed under the proposal may distract attention from the bits of information that actually bear on disqualification; may risk unnecessary disqualification; and will generate unwarranted motion

practice.

(2) The court may be able to dismiss for failure to adequately allege diversity, bypassing the need for disclosure. If diversity is adequately alleged but not challenged, there is no need. Nor is there a need if there is an alternative basis for jurisdiction. The court can act sua sponte to require more information when that seems appropriate.

(3) The party asserting jurisdiction bears the burden of establishing it. It may be appropriate to allow general pleading——e.g., by alleging that no party is a citizen of State X——leaving it to a party who resists jurisdiction to disclose the diversity-destroying facts.

(4) The rule is overkill. Disclosure should be concluded on revealing a single citizenship that defeats diversity. The committee note recognizes that this is a ground for halting disclosure, but there is a "conundrum." Rule 7.1(b) requires disclosure with the party's first appearance——how can a party then know which citizenship will defeat diversity?

(5) In multiparty, multiclaim cases it may be difficult to determine from the pleadings whether diversity jurisdiction is even alleged as to some parts of the action.

(6) Disclosure may impose a substantial burden, reaching "potentially thousands of individuals and entities * * * as of the filing date." The burden may be compounded by the need to undertake legal research to determine, under evolving and at times conflicting [state] law, which individuals and entities are included in citizenship attribution. (Lloyd's is offered as an example of a unique structure that makes diversity analysis difficult, and that has created a circuit split, see footnotes 5 and 6.)

(7) These problems should be addressed by legislation. If Congress shares the concern about ascertaining diversity, "it stands to reason that Congress would expand § 1332(c) to identify a simpler method to determine the citizenship of non-corporate entities."

0004: Andrew U.D. Straw: This comment expresses frustration with orders in an MDL proceeding that allowed the United States, as defendant, to ignore the rules for timely answers, and deflected plaintiffs' attempts to win defaults and default judgments.

0012: Mapin Desai: This comment protests the payment of "unlimited attorney fees" in bankruptcy, focusing on a particular bankruptcy.

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DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
April 1, 2020

The Civil Rules Advisory Committee met by Zoom teleconference on April 1, 2020. The meeting was originally noticed for an in-person meeting in West Palm Beach, Florida, but was renoticed in the Federal Register for a remote meeting by Zoom, with the opportunity for public access by audio feed. Participants included Judge John D. Bates, Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Allison A. Bruff, Esq., S. Scott Myers, Esq., and Bridget M. Healy, Esq., represented the Rules Committee Staff. Zachary Prorianda, Esq., staff of the Committee on Court Administration and Case Management, also attended. Dr. Emery G. Lee, Tim Reagan, Esq., and Bridget M. Healy, Esq., represented the Federal Judicial Center. Seth Fortenberry, Supreme Court fellow, also attended.

Observers are identified in the attached Zoom attendance list.

Judge Bates noted that more than fifty participants and observers had joined the new adventure of meeting by Zoom, "a platform made popular in these trying times." He expressed thanks to the Administrative Office staff for the untiring efforts that had set up the meeting and provided practice sessions to facilitate easy participation by Committee members. He noted that Brittany Bunting, a new member of the Administrative Office staff, had lead responsibility for planning this meeting, and will be planning future meetings.

Judge Bates also extended a welcome to Susan Y. Soong, Clerk for the Northern District of California, Laura Briggs's successor as clerk representative. She was unable to participate in this meeting because of emergency demands at her court.

Judge Bates also noted the conclusion of rules committee terms for several veterans. Judge Campbell served for many years as a member and then Chair of the Civil Rules Committee, and this year will conclude four years as Chair of the Standing Committee. "No

individual has had a greater impact on the Rules Enabling Act process in the last 15 to 20 years." Judge Dow is completing his second term. His work as chair of the class-action and then MDL Subcommittees has made him perhaps the second most influential member in this year's graduating class. Virginia Seitz, who has served on several subcommittees and worked with the pilot projects has been an essential member. Judge Goldgar, who is completing his second term as a member of the Bankruptcy Rules Committee, has helped with many aspects of the Civil Rules work, including e-filing.

Finally, Judge Bates said that his term as Committee Chair is concluding this year. He has greatly enjoyed working with all members of the Committee and support staff, and will miss the work and engaging company.

Judge Bates also noted that draft minutes for the Standing Committee's January meeting are in the agenda materials, and reflect a generally positive reaction to the prospect that this Committee may advance a recommendation to publish for comment a set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The Judicial Conference held its March meeting by remote means of communication, with no Civil Rules business on the agenda.

Looking forward to new Civil Rules, amendments of Rule 30(b)(6) have been advanced from the Judicial Conference to the Supreme Court. If the Court prescribes them and Congress does not act, they will go into effect on December 1, 2020. Amendments of Rule 7.1 are on today's agenda. If the Committee recommends them for adoption and the Standing Committee approves, they will be on track to take effect no earlier than December 1, 2021.

October 2019 Minutes

The draft Minutes for the October 29, 2019 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Judge Bates said that there is not much present action in Congress on bills that would affect the Civil Rules. The CARES Act includes some small funding for the judiciary. It also includes provisions for video teleconferencing for some proceedings that were much improved with the help of Judge Campbell and the Criminal Rules Committee and its Reporters.

Judge Campbell prefaced his report on the CARES Act by saying that he will miss participating in the Civil Rules work, recalling the observation made by Peter Keisler that although there are term limits on committee membership, there are no limits on friendship. He feels pride for all Committee members.

Involvement with the CARES Act began two weeks ago when the Southern District of New York, and particularly Judge Furman — a member of the Standing Committee — became concerned about how the court could function in a time of pandemic. The CARES Act in its original form would have inserted direct amendments of the Criminal Rules that had no sunset provisions. The Criminal Rules Committee worked with Judge Campbell, Judge Furman, and Judge Bates to formulate statutory provisions, not Rules amendments, for video and teleconferencing in twelve categories of criminal proceedings. These provisions include "sunset" clauses. The provisions take effect upon findings made by the Judicial Conference, and then take effect in a particular district for ten categories of proceedings on authorization of the chief judge. They take effect for felony pleas and sentencing only if the chief judge finds a threat to public health and safety, and the presiding judge finds that sentencing cannot be deferred without injustice. An example of injustice would be the prospect of a sentence to time served that would result in immediate release. Consent of the defendant is required for all twelve categories. Initial reports are that defense counsel around the country are consenting. The Act also directs the Judicial Conference and the Supreme Court to consider rules provisions that would enable similar emergency measures in the future.

Judge Bates said that the Civil Rules Committees and others will be considering rules that would authorize emergency measures. He will appoint a Subcommittee, looking for progress that is expedited by extending over a period of months, not years. Volunteers are welcome. There will be technology issues, including public access and the presence of a detained defendant.

Social Security Disability Review Subcommittee

Judge Bates introduced the report of the Social Security Disability Review Subcommittee, noting that it had been working for nearly three years with Judge Lioi as chair. They have produced a modest but thoughtful draft of Supplemental Rules. The question at this meeting is whether to recommend publication of these rules for comment. The risks and problems tend to collect around issues that are characterized as transsubstantivity. "This is not an easy question. The views of the players are not uniform." But encouragement may be found in the reactions of several Standing Committee members that favored publication, at least as a means of

gathering more information.

Judge Lioi introduced the Subcommittee Report. The Subcommittee has received extensive input from the Social Security Administration, representatives of the Administrative Conference, the National Organization of Social Security Claimants Representatives, the American Association for Justice, magistrate judges and a few district judges, and academics. The Style Consultants have reviewed the current draft.

The Subcommittee proceeded cautiously, working to develop neutral rules that will be easy to understand and follow. Rule 1 defines the scope of the rules. Rule 2 establishes simplified pleading standards for the complaint. Rule 3 adopts a procedure that replaces Rule 4 service of the summons and complaint with electronic notice from the court. Rule 4 authorizes an answer limited to the administrative record and any affirmative defenses, and describes motion practice. Rule 5 is in many ways the central feature, providing for an appeal-like procedure that presents the action for decision on the briefs. Rules 6 through 8 address the sequence of the briefs. The Subcommittee deliberately chose to omit any page limits for the briefs.

The Committee decided at the meeting last October to ask for Standing Committee discussion about the transsubstantivity question. Several members suggested that it would be useful to publish proposed rules as a means of gathering additional information.

The Subcommittee decided that the transsubstantivity question cannot be avoided by developing a set of rules for all administrative review actions in the district courts. There is too much variety of agencies and substantive law, and too many different mixtures of reliance on an administrative record with independent court proceedings. But the Committee Note for the proposed rules observes that, apart from the Rule 3 provision for electronic notice to SSA, a court might find it useful to adapt the social security review practice to other administrative review proceedings.

The Rules draft is nearly ready for publication. A few minor drafting issues remain, and will be addressed by the Subcommittee.

The reasons for moving forward to publication should be considered alongside the reasons for abandoning the work.

Good, nationally uniform rules for social security review cases are intrinsically desirable. The project began with a request addressed by the Administrative Conference of the United States to

the Judicial Conference, supported by an extensive empirical study and analysis by Professors Jonah Gelbach and David Marcus. The Social Security Administration continues to offer strong support, even after its proposed draft rules were ruthlessly revised and trimmed back by the Subcommittee. SSA litigates these actions in all district courts, and encounters difficulties both with attempts to process them through the general Civil Rules and with some of the local practices and local rules that have been adopted to modify or displace the Civil Rules. The draft is neutral as between claimants and SSA. The Department of Justice has developed a model local rule that closely reflects earlier Subcommittee drafts and recommends it for adoption by district courts. These review actions are just that — proceedings for review on an administrative record that should be recognized and treated as appeals, not original trial proceedings. Judges who have reviewed successive Subcommittee drafts have been receptive; some of them already adopt practices closely similar to the draft rules, while others express frustration with the effort to provide review within the framework of the general Civil Rules. The sheer volume of these cases makes it appropriate to adopt substance-specific rules; the common figures are that they number between 17,000 and 18,00 actions a year, accounting for 7% to 8% of the federal civil docket. Finally, publishing the proposals does not commit the rules committees to recommending adoption; it would provide additional information to support the decision whether to recommend adoption.

The arguments against advancing to publication begin with the tradition that the Civil Rules should be transsubstantive, designed to apply equally to all actions. One of the concerns that underlie this tradition is that substance-specific rules may favor one identifiable set of interests over competing interests, or at least be perceived in that light. These rules may be perceived in that way, in part because one SSA hope is that the uniform and efficient procedure they embody will provide some measure of relief to an inadequately funded and overworked legal staff. Claimants' representatives express a fear that district and magistrate judges like the particular procedures they have worked out, and will be unhappy and thus less efficient if forced into a uniform national procedure. The affection for local practices, moreover, may present an insurmountable obstacle in some districts that persist in their established habits, ignoring new national rules. And the Department of Justice fears that adopting this set of substance-specific rules will prompt requests by special interest groups for their own favorable sets of rules.

One way of framing these competing arguments is to recognize a presumption against substance-specific rules. We have some substance-specific rules now. There is no absolute prohibition. But it is wise to adhere to something of a presumption that can be

overcome only by strong reasons for adopting a new set of substance-specific rules. On this approach, the question is whether the reasons that support a set of supplemental rules for § 405(g) review actions are strong enough to overcome the general presumption as well as the specific negative arguments.

This initial presentation was followed by a reminder that the Subcommittee is proposing publication. A potential recommendation to adopt is not yet an issue. Publication will yield additional information on the wisdom of adoption. It is reasonable to be concerned that adding yet another and significant set of substance-specific rules will be seen as a precedent supporting adoption of still other sets under pressure from interest groups. But that concern is offset by the fact that there are other specialized rules, both broad and narrow. In a different direction, it is also wise to remember the prospect that new national rules may not be fully successful in driving out eccentric local practices. At a minimum, local practices are likely to continue to regulate such matters as the length of briefs. And some critics may believe that the rules "were pushed by one side of the 'v,' and were pushed to make life easier for SSA lawyers."

General discussion began with a reiteration of the Department of Justice concerns that adoption of these rules would perhaps influence others to seek specialized rules. A close parallel might be found in arguing for rules for all Administrative Procedure Act cases. That could be a real problem. And local rules will persist; concerns about diverse practices will not be fully addressed. Publication, moreover, "implies imprimatur," a thumb pushing the scales toward eventual adoption.

Professor Coquillette said that the Subcommittee has done a great job. "I'm an apostle of transsubstantive rules." There have been a number of efforts to get specialized rules. Fighting them off at times is hard work — pressure in Congress for rules to address perceived problems with "patent troll" litigation provides a recent example. But the Subcommittee draft is really good work, particularly in the choice to frame the rules as a new set of Supplemental Rules, not as rules inserted into the body of general Civil Rules. They are worthy of publication.

A committee member expressed continuing concern about departing from transsubstantivity, but suggested that a further articulation of the reasons why the general Civil Rules are not well suited to § 405(g) actions would help. Might the Subcommittee help?

Judge Lioi responded that it is significant that the proposal originated in the Administrative Conference, an independent body

that has no self-interest in these questions, as well as winning support from SSA.

But it was observed that it may be better not to plead the case in the Committee Note. There is often a temptation to draft a Note as in part a work of advocacy during the publication process, adding provisions that go beyond explaining the purpose and working of new rules provisions. But that temptation is better resisted. Carrying forward words of advocacy may generate a risk of over-eager implementation as litigants and courts adjust to new provisions.

It also was observed that many courts process § 405(g) review actions through summary-judgment procedures. That can work well if it means presentation through briefs that, in the manner of point-counterpoint motions for summary judgment, present the positions of the claimant and SSA through competing but specific references to the administrative record. But Rule 56 itself does not fit. It could generate confusion if a party is misdirected by an attempt to follow the inapposite Rule 56(c) procedures for presenting materials for decision. Far worse, it would be flat wrong to invoke the standard for summary judgment, that there is no genuine dispute of material fact. A genuine dispute defeats summary judgment, but mandates affirmance of an SSA decision as supported by substantial evidence on the record. Apart from Rule 56, SSA counts nine districts that insist that the claimant and SSA provide a joint statement of facts to provide a basis for decision. Claimants and SSA alike agree that this procedure is at best a great deal of unnecessary work, and at worst provides an unsatisfactory basis for decision.

Another committee member provided a reminder that the summary-judgment procedures of Rule 56 do not work well. And rather than joint statements of fact, some courts demand individual statements of fact in forms that also do not work well.

The committee member who asked for further advice found these remarks helpful, but then asked how are § 405(g) review actions different from other administrative proceedings that come to the district courts? The fact that SSA supports the proposal is not of itself sufficient to distinguish § 405(g) actions from other administrative review actions.

A committee member responded that it is not only SSA that supports the proposal. The project was initiated by the Administrative Conference, a disinterested and neutral body. More importantly, half of his court’s docket is comprised of administrative review actions. There is a great variety among those cases, often involving specific substantive statutes. There are big

cases and small cases. There are cases that require something more for decision than the administrative record. The Freedom of Information Act is a source of many cases that are largely standardized in some dimensions, but that require processing before they are ready for decision. A general rule for all administrative review actions in the district courts "would be a big undertaking."

A different committee member recalled the volume of these cases, rising to 17,000 or 18,000 a year and accounting for 7% to 8% of the federal civil docket. Can the fear of stimulating other proposals for substance-specific rules be reduced by the lack of any other category of administrative decisions that mount to like numbers?

The first response was that the Department of Justice concern is not limited to special rules for specific categories of administrative review. It extends to all types of civil actions. More narrowly, the Subcommittee considered this question but was unable to identify any category of administrative review actions with anything like comparable numbers. And reviewing the Administrative Office annual accounting of the types of cases that fill district-court dockets suggests that there is no room left for anything like comparable numbers of any particular category of administrative review actions.

Concerns returned about the reactions of some claimants' attorneys to a fear that the rules favor SSA. What basis is there for these concerns? Judge Lioi responded that there is no basis. The reaction seems to be based on no more than suspicions based on the long and very detailed draft rules that SSA proposed at the beginning of the project. Some provisions drew particular ire, such as one that limited a claimant's brief to fifteen pages. Another example was a proposed rule for determining awards of attorney fees for services in the district court. The rule was long and complex, addressing many details in ways that suggested an attempt to resolve disputed matters by rule provisions that could be adopted, if at all, only after deep inquiries into matters specific to social security review actions. The Subcommittee has pared away all of the complexities, leaving a compact set of rules that establish efficient procedures for the core of an appellate review process. All sides, claimants, SSA, and the courts will benefit from the efficiencies.

Similar observations followed. There is not much more to explain such suspicions as persist. The fact that SSA is pushing the project makes some claimants reluctant, fearing that somehow the rules will confer unintended benefits on SSA. These fears may draw in part from the fact that one of SSA's hopes is that SSA will achieve some efficiencies in the staff attorney resources devoted

to complying with the wide variety of local procedures.

Another committee member agreed that increased efficiency should not disadvantage claimants. It will work to the advantage of all sides.

Discussion turned to more specific questions.

Rule 1(a) defines the scope of the supplemental rules. They apply to a § 405(g) action "that presents only an individual claim." An action that extends beyond this bare model falls outside the supplemental rules and is governed in all matters by the ordinary Civil Rules. But are there cases that present only an individual claim where this is not the right model for the procedure? A plaintiff is allowed to plead more than the bare bones elements that identify the claimant and SSA proceeding. But may there be a need for discovery? Rule 1(b) is intended to invoke all of the Civil Rules, including discovery. Discovery is not inconsistent with the provisions for pleading, motions, notice of the action to the Commissioner, or presentation on the briefs. It was suggested that the Committee Note should be expanded to explain that discovery is available if needed, perhaps as an addition to the paragraph that notes that the Civil Rules continue to apply.

Rule 1(b) says that the Civil Rules "also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." Why does it say "also," and why does the Committee note say that the Civil Rules "continue" to apply? Why not just say that they apply? The wording of Rule 1(b) was taken directly from Supplemental Admiralty Rule A(2), one of the Supplemental Rules that has benefited from the style process when it was amended. It has seemed appropriate to borrow this language for a new set of supplemental rules; the different formula in Civil Rule 71.1 — "except as this rule provides otherwise" — might have been chosen if the social security rules were instead framed as new Civil Rules. "also" will carry forward.

Another question was whether the provision of proposed Rule 1(b) that the Civil Rules also apply except to the extent that they are inconsistent with the Supplemental Rules permits resort to the discovery rules? The answer was that discovery is almost never used in § 405(g) actions. If the record is insufficient, the cure is remand to SSA for further administrative proceedings, not adding to the record in the district court. Remands, indeed, are quite common. The Gelbach & Marcus study found wide variations in the remand rate from one district to another, ranging from a low of around 20% in some districts to a high of around 70% in some. But discovery may be appropriate in some situations, and is permitted under the general Civil Rules when not inconsistent with

administrative review practices. Examples that have been noted in Subcommittee discussions include ex parte communications with an administrative law judge, and one shocking example of routine bribery of an administrative law judge on a vast scale. Another concern is that the record filed by the SSA at times is not complete — an example often offered is failure to include materials excluded from evidence by the administrative law judge. Discovery may be necessary to compile a complete record. It was agreed that the Subcommittee should consider adding to the Committee Note a brief observation about the availability of discovery.

A second question asked why Rule 2.2(b) permits a plaintiff to add to the required elements of the complaint "a short and plain statement of the grounds for *review*." This formula tracks the familiar language of Rule 8(a)(2), but substitutes "review" for "relief." "[R]eview" was chosen because it emphasizes the appellate character of a § 405(g) action, as compared to an action that seeks independent adjudication on the merits including a remedy that at times may be determined by a specific formula but often is more open-ended than a determination of social security benefits. But the reference to "review" might lead some readers to mistake this as a provision for more elaborate pleading of jurisdiction. The Committee agreed to change "review" to "relief."

A related question addressed the structure of Rule 2(b)(1). It is divided as first (A), a statement that the action is brought under § 405(g). That corresponds to a Rule 8(a)(1) statement of the grounds for the court's jurisdiction. Then come (B)(i) and (ii), identifying the person for whom benefits are claimed and the person on whose wage record benefits are claimed. That corresponds to a Rule 8(a)(2) statement of the grounds for relief. (C) comes last, stating the type of benefits claimed, corresponding to a Rule 8(a)(3) demand for the relief sought. The correspondence of this three subparagraph structure with the three-paragraph structure of Rule 8(a) seemed an attractive contrast to remind the plaintiff of both the familiar structure and the simplified requirements of Rule 2. But a few words could be saved by eliminating the items and establishing a four-subparagraph structure, a change approved by the Committee:

(1) The complaint must state:
(A) ~~state~~ that the action is brought under § 405(g) and identify the final decision to be reviewed;
(B) ~~state (i)~~ the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed~~, and~~;
(C) ~~(ii)~~ the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and

(~~C~~D) ~~state~~ the type of benefits claimed.

Rule 3 provides that the court must send electronic notice of the action to the Commissioner "and to the United States Attorney for the district [in which the action is filed]." The final words are set off by brackets to indicate that they are unnecessary — no one would expect that the court would send notice to the United States Attorney for a different district. But they were included to see whether some observers would think them necessary. They will be carried forward in brackets.

Brackets also were suggested to set off a new sentence that the Subcommittee recently added to Rule 3: "If the complaint was not filed electronically, the court must notify the plaintiff of the transmission." This sentence was added in response to a fear that a pro se plaintiff who is not allowed to file electronically might not get notice that the required transmission actually occurred. Adding this provision to rule text is designed to provoke comment on the practical questions: Will CM/ECF systems automatically generate a prompt for paper notice when the complaint was filed on paper? If not, will clerks' offices develop protocols to make that happen? It was agreed to add brackets as a means of prompting public comment.

Another drafting question asked whether Rules 6, 7, and 8 should say only that plaintiff or Commissioner must serve a brief? The Appellate Rules call for filing. Although Civil Rule 5(d)(1)(A) directs filing within a reasonable time of any paper after the complaint that must be served, it would be useful to provide a reminder of the filing obligation. One drafting goal for the Supplemental Rules has been to make them accessible to pro se claimants. "File and serve" would help. The Committee adopted this change.

Changes in the Committee Note also were explored.

The addition of a sentence stating that discovery is available when appropriate is noted above.

Rule 5 provides that the action is presented for decision by the parties' briefs. The Committee Note states that reliance on Rule 56 summary-judgment procedures and directing submission of a joint statement of facts are inconsistent with Rule 5. The problem, however, is more general than these two specific and common examples. The problem is that some districts love their own district practices, and may persist in practices that thwart the efficient appeal procedure embodied in Rule 5. The Committee agreed that the Note should be expanded to include a statement that other practices that thwart this appeal procedure also are inconsistent

with Rule 5.

The Committee voted 11 yes, one no, to recommend to the Standing Committee that the draft Supplemental Rules, as revised by the Committee, and the Committee Note, also as revised, be published for comment.

Judge Bates thanked all participants for a thorough and helpful discussion.

MDL Subcommittee Report

Judge Bates introduced the report of the MDL Subcommittee chaired by Judge Dow. He noted that the Subcommittee had returned the topic of third party litigation financing to the full Committee as a matter for ongoing study, without any immediate plan to develop possible rules. Committee members who come across interesting information should send it to Professor Marcus, who will act as a clearing house and send the information on to the Administrative Office.

Of the many items that the Subcommittee has considered, three have become the focus of current deliberations.

Early Vetting. One ongoing topic is "early vetting." A recent development has been characterized as an "initial census," a concept that is evolving in practice. Plaintiffs and defendants may hold different views of the purposes of an initial census, but they are cooperating to develop this approach in big MDLs. It might be seen as a device for plaintiffs to get a hand on efficient conduct of the litigation; or as a device for defendants to weed out unsupported claims; or as a means for the court to establish a basis for managing the proceedings, including support for designating leadership. The Subcommittee is exploring how judges use the initial census, how lawyers use it, and whether the initial favorable views endure. Professor Marcus noted that it is not clear how long it will take to find out how this practice works as it evolves.

Judge Rosenberg described her early experience with an initial census in the Zantac MDL. Measures taken to combat the current pandemic have forced some delay in organizing the proceedings as communications switch from live hearings to remote means. A 2-page initial census form has been put together that meets with agreement by plaintiffs and a 4-lawyer initial defense firm. Professor Jaime Dodge reports that the lawyers have worked well together. By April 30 the vendor will report on everything in the system. The initial census form must be filled out for every case that has been filed. All lawyers who apply for leadership positions must also fill out

census forms for cases not yet filed. That will help in managing the proceedings, will provide a jump-start for discovery, and will remove some cases. There also is a 5-page initial census "plus" form that may at least delay the need to follow up with a plaintiff fact sheet process. This form will be due 60 days after appointment of lead counsel, an event that is scheduled for April 30. On this schedule, the time from the census order to receiving the census-plus forms will be 90 days. The information will include how many cases there are and who are prospective defendants, and perhaps supply records. Tolling provisions also are included. The census-plus form will include the case name and number; identify counsel; provide plaintiff's personal information, including Zantac usage information, where the drug was purchased, and the reasons that prompted usage; and what type of cancer is alleged. The form must be certified for truth and accuracy. A place is provided to attach medical documents, or to explain why they are not attached. The order provides that a plaintiff who attaches the documents need not file a plaintiff fact sheet "at this time." The plaintiff must attest to usage and to the injuries suffered.

The line between a plaintiff fact sheet and an initial census form with this much detail may be wavering. Plaintiff fact sheets have been tailored to the needs of individual MDLs, and are not uniform. The purpose of the initial census has been quicker development and responses because they seek less information than many plaintiff fact sheets demand.

Professor Marcus reflected that this discussion shows how difficult it would be to draft a rule that describes what an initial census should look like. The Subcommittee has learned from many sources, including rigorous research by the Federal Judicial Center, that plaintiff fact sheets commonly are developed through months of negotiation specific to a particular MDL, and seek a lot of information, even though generally they do not include "Lone Pine" orders to produce evidence to support the answers.

Judge Dow noted that the impetus is to get a consensus of plaintiffs and defendants on a census form. "Not even plaintiffs want bad cases" — it is not only MDL lead counsel that shun them. Judge Fallon has observed that the first two pages of plaintiff fact sheets are all that are needed to know how to organize an MDL. It remains a question whether the census form should be designed to winnow out unfounded cases as well as to support organization of the proceeding. Further experience may show that initial census practices are indeed desirable. If desirable, it will remain a question whether to attempt to capture the practice in a Civil Rule, or whether to leave it instead to the categories of best practices that are fostered by the JPML, Federal Judicial Center programs for judges, the Manual for Complex Litigation, and like

means. Judge Dow and Professor Marcus expressed favorable impressions of what has been heard about initial census developments and surprise at how fast the concept has evolved in practice.

Interlocutory Appeals. Judge Dow began discussion of the Subcommittee's work on interlocutory appeals by expressing thanks to the JPML and the FJC for providing useful data. It is difficult to get full data on experience with interlocutory appeals and attempted interlocutory appeals in MDL proceedings. And it is likely impossible to develop reliable data on the phenomenon described by lawyers who report that they do not even attempt to win certification for what would be useful interlocutory appeals because they fear antagonizing the MDL judge.

The inquiry has been narrowed. At the beginning, defendants argued that appeals should be made available as a matter of right from specified categories of orders. The questions that remain are whether the MDL judge should have a "veto" by refusing to certify an interlocutory appeal, or whether the judge should be either permitted or required to offer advice to the court of appeals but not to veto an attempted appeal; whether any new appeal rule should be available in all MDLs, or only in a specified subset; whether there is an advantage in developing new criteria for MDL appeals that supplant the three criteria specified in 28 U.S.C. § 1292(b); and whether there should be some direction that the court of appeals must promptly decide any accepted appeal to address the risk that substantial delay on appeal will disrupt ongoing progress in the MDL court.

The Subcommittee has heard about appeal opportunities from lawyers involved in "mega-MDLs." They remain divided. Defendants insist there is a great need for immediate appeal on questions that may resolve central issues that either simplify or even conclude the proceedings. Plaintiffs respond that § 1292(b) appeals are available, and that MDL judges recognize the need to apply the § 1292(b) criteria in light of the needs of complex MDL proceedings. Experience shows that most orders reviewed on interlocutory appeal are affirmed, as in other § 1292(b) appeals, and that § 1292(b) appeals generally inflict long delays on the proceedings.

These questions were reviewed by suggesting that a central question is whether to adopt the model of Civil Rule 23(f), which provides for interlocutory appeal in the sole discretion of the court of appeals. Rule 23(f) is focused on a narrowly defined category of orders that grant or deny class certification. It would be difficult, and probably counterproductive, to attempt to identify categories of orders that alone are eligible for a new MDL appeal rule. Still, placing sole discretion in the court of appeals

might reduce the reluctance of lawyers to offend the MDL judge by asking for permission to appeal. If the MDL judge retains power to veto an appeal, it remains possible that some help would be provided by establishing a new MDL-specific criterion for certifying an appeal. Some judges may be deterred from certifying an appeal by generally narrow circuit interpretations of the criteria that ask for a controlling question of law as to which there is substantial ground for difference of opinion and whose resolution may materially advance ultimate disposition of the litigation. A frequent example has been a Daubert ruling on the admissibility of expert testimony that, if reversed, could terminate the proceedings. Daubert rulings involve application of settled law in the district court's discretion: how is there a controlling question of law with substantial grounds for a difference of opinion? A criterion that asks whether an immediate appeal would advance the purposes of the MDL consolidation might prove liberating. But that is an uncertain prospect. Eliminating the MDL judge veto would at least create a possibility of more frequent appeals. Even then, it will remain important to provide for advice from the MDL judge on the desirability of an immediate appeal, in light of the importance and uncertainty of the issues underlying the challenged order and the impact that an appeal would have on continuing MDL proceedings. The advice could include an observation that an appeal might advance the proceedings if it is promptly decided, but would disrupt the proceedings if much delayed. The burden of providing advice ordinarily should not be great, at least if permission to appeal is sought soon after the ruling is made. And advice that an appeal would thwart orderly progress is likely to defeat permission by the court of appeals in most cases.

Judge Bates added that as with other MDL rules questions, the scope of an appeal rule must be decided. An attempt could be made to provide for appeals in some, but not all, MDLs. But it seems likely that any rule would apply to all MDLs, relying on common-sense application. "Changing § 1292(b) is a big step. We have authority under § 1292(e), but we should be cautious." Expansion seems attractive on its face, but careful examination is needed.

Judge Bates added that exploration of the appeal question will require an expansion of the Subcommittee's work in gathering information. So far we have heard only from lawyers and judges involved in mass-tort MDLs.

A committee member said that delay is a major concern. Plaintiffs are especially worried about delay, and suspect that defendants may appeal for the purpose of winning delay. Some help may be found in the MDL judge's advice about the desirability of an immediate appeal, including the delay factor. "We should look for

other creative input."

Judge Dow agreed that the Subcommittee hopes for more input. Professor Dodge has agreed to arrange a conference that will bring together lawyers and judges from MDL proceedings that do not involve mass torts, and will add appellate judges. The conference was scheduled for April 14, but has been postponed. The tentative plan is to hold it in mid-June if travel and general distancing protocols are relaxed soon enough to make final planning possible. A committee member expressed approval of the plan to bring in the perspective of appellate judges.

Settlement. Judge Dow began the discussion of settlement by noting that a rule addressing MDL judges' involvement with settlement may well be framed by addressing other issues as well. The origins of this work lie in the protests of many academics that MDL proceedings frequently evolve toward settlement through a process that has the same effect as settlement of a class action but lacks the safeguards that protect class members. In an MDL virtually all plaintiffs are represented by a lawyer, but settlement terms often are negotiated by a subset of plaintiffs' lawyers. The focus is on negotiations by lawyers who have been formally appointed to leadership positions, acting very much as class counsel appointed under Rule 23. Defendants negotiate for terms and practices that will bring "global peace" by winning settlement with at least a very large swath of plaintiffs. Lawyers outside the leadership structure may not fully understand what settlement alternatives may be possible, and may encounter terms that make it difficult to accept the settlement for some or many clients while rejecting it for others.

One possibility would be to focus a rule solely on encouraging MDL judges to be involved in settlements. Judicial involvement happens now. Some judges justify their involvement by invoking inherent authority, or by relying on authority implied by the structure and purpose of § 1407 transfer and consolidation. But a Civil Rule could provide a stronger foundation, and could encourage greater involvement.

The first question is whether this is a solution in search of a problem. It may be asked why there is any need for judicial involvement when every plaintiff has a lawyer. And if there is a need, it can be addressed, as it often is addressed, by detailed provisions in the order appointing lead counsel. The order may specify which lawyers can negotiate, and on whose behalf they negotiate. But again, an explicit Civil Rule might encourage more frequent use of detailed appointment orders, and perhaps greater detail.

The Subcommittee explored these questions in some detail in its March 10 conference call. The gist of the call is set out in the original agenda materials, and detailed notes were circulated before today's meeting.

Judge Bates observed that both the plaintiffs' bar and the defense bar have reported that they do not need help on settlements. They assert that they can work out fair settlements without the supposed help of any rule. MDL judges also report that they do not need the support of any rule. They say they know what to do. A rule would contribute nothing, and might interfere with flexible and creative response to the needs of a particular MDL. Only one or two of them — albeit an especially experienced one or two — think a rule would provide useful guidance and support. But the universe of MDL lawyers has been pretty much a closed club. Deliberate efforts have been made by MDL judges in recent years to increase the diversity of the MDL plaintiffs bar, with some success and the prospect of increasing success. The world of MDL judges also has been something of a closed club, but here too efforts have been made to open the doors, even in the large-scale MDLs. The academics continue to be the primary voices calling for constraining the role of lead counsel by increased judicial involvement.

Professor Marcus noted that Professor Burch has been prominent in the ranks of those who protest the closed and cozy social network of insiders who are content with the status quo, both in a recent book and in law review writing.

Professor Marcus went on to recall that when the basic form of current Rule 23 was adopted in 1966 there was no considerable discussion of settlement. The rule required judicial approval for settlement of a class action, but said nothing more. In 2003 Rule 23(e) expanded the provisions for settlement and Rules 23(g) and (h) were added to address appointment of class counsel and attorney fees. Rule 23(e) was further elaborated by amendments in 2018.

Nothing similar to the evolution of Rule 23 has occurred for multidistrict proceedings. The lack of any formal rules most likely stems from the conceptual difference between class actions and MDL consolidations that are resolved without certifying a class. A class-action settlement binds all members who remain in the class at the time the settlement is approved. Settlement terms negotiated by MDL leadership do not bind anyone — even clients of lead counsel must consent to individual settlements. But informal pressures may remain quite direct and powerful. Individually retained plaintiffs' attorneys who are not part of the MDL leadership may feel powerless to resist. And academics fear that leaders are feathering their own nests, perhaps even by negotiating terms more favorable for their

own clients than the terms offered to others. Conceptual distinctions may dissolve in the cold bath of reality.

All of that leaves the question whether to attempt to embody in a rule the creative things some judges are doing. How far should judicial authority and responsibility extend? Is a rule helpful?

The direct question of settlement leads to other questions. Many practices have grown up over the years since § 1407 was enacted. Appointment of lead counsel and leadership teams has become common, and indeed has roots extending far back before § 1407. These orders frequently restrict what individual retained plaintiff attorneys can do in the consolidated proceedings. Appointment orders commonly establish common benefit funds, seeking to compensate leadership for the time and money devoted to conducting the litigation on behalf of all. Common benefit funds usually are fed by "taxes" on the fees nonlead counsel win under contracts with their individual clients. And a court that fears that contract fees are unreasonable in light of the limited effort and risk borne by nonlead counsel, even as reduced by contributions to the common benefit fund, may cap individual attorney fees. These are strong measures. Perhaps it is useful, even important, to provide a secure foundation for these practices in a Civil Rule.

The interdependence of these phenomena suggests that a rule that addresses judicial involvement with settlement might best begin by focusing on the court's role in appointing and supervising lead counsel. The order can establish the roles of lawyers who are in the leadership team and the roles of lawyers who are not. That can include the establishment and terms of common benefit funds. It can include regulation of fees for leadership lawyers and for all other lawyers with cases in the MDL. And it can define roles in negotiating for settlement terms to be extended to any plaintiff that is not a client of a member of the negotiating team.

There are many pressure points for the lawyers involved in an MDL. Lead lawyers put up a lot of cash and time. IRPAs want to represent their clients, and may resist both paying a common-benefit tax and having their fees further reduced in an effort to protect against amounts that the court thinks unreasonable in light of the court's perception of the risk and effort involved. As roles become more complicated, and in some measures uncertain, questions of professional responsibility arise that cannot be addressed through the relatively less ambiguous questions that arise from the role of class counsel who represent not only representative class members but the entire class as well. There may be an increased risk of professional liability claims against lead counsel or indiviudally represented plaintiffs' attorneys (IRPAs).

The March 10 Subcommittee meeting identified six questions that will be a focus of its further work:

(1) Is there a need for rules that formalize well established practices?

(2) Do MDL judges refrain from taking steps they think would advance the purposes of the proceeding because of uncertainty about their authority?

(3) Is it important that any formal rulemaking would be vigorously opposed by plaintiffs' and defense lawyers, and likely would meet resistance among MDL judges?

(4) Can effective rules be crafted that do not improperly interfere with attorney-client relationships?

(5) Would a rule that formalizes common benefit funds and perhaps authorizes limitations on attorney fees for individual representation modify substantive rights in ways that § 2072 prohibits? The fact that courts do this now, relying on inherent authority and authority implied by § 1407 does not provide a complete answer.

(6) Can we be confident that a rule for designating MDL lead counsel would not impede the progress that is being made in diversifying the ranks of lawyers who take on leadership roles? This concern may relate to third-party funding: newcomers to leadership positions may need to rely on outside funding to be able to bear the investment required to support what often are years-long commitments of money and time.

This set of questions prompted the observation that a rule could be designed in ways that do not inhibit MDL-specific flexibility and creativity in developing new practices. A rule that firmly establishes the basic authority to do things that now rest on uncertain concepts of inherent and § 1407-implied authority could be authorizing and liberating, not confining. All details would be avoided. Authority to appoint leadership entails authority to define their roles in relation to counsel for other plaintiffs, including their role in negotiating settlement terms to be offered to plaintiffs not directly represented by leadership lawyers; to establish a process for determining lead counsel fees and for funding the fees; and to consider the often complicated ways in which what may be quite limited roles left open for nonlead counsel may bear on the reasonableness of fees charged to individual plaintiffs.

A committee member found it striking that all the players, lawyers on all sides and MDL judges, resist the idea of a formal MDL rule. "That should make us very cautious." The idea deserves continuing study, but we should respect the repeated pleas that formal rules should not interfere with the process by which things are worked out by means that are exported by many practices that keep both lawyers and judges at the leading edge of new and successful practices.

A subcommittee member observed that the Subcommittee recognizes that it has heard only from lawyers and judges in mass-tort MDLs. "We want to hear from all the MDL bar." So far, Judge Fallon is the only judge we have heard to say that a rule would be welcome. It will help to hear more from him and from other MDL judges.

Another subcommittee member expressed agreement with the MDL judges who believe we do not need formal rules. This question was explored with a number of MDL judges at the annual JPML conference. They agreed unanimously that rules are not needed. The academic concern about representation of plaintiffs whose lawyers are not leaders can be addressed by care in establishing the structure of the leadership. To the extent that the concern is that some plaintiffs are represented by lawyers who are not competent, the concern is common to all litigation, and is not something to be addressed by rules of procedure. The JPML is good at advising MDL judges on how to get non-lead counsel involved. Courts of appeals have blessed what's going on. Oversight of settlement is blessed by § 1407. Some statutes establish additional specific support. And we should be reluctant to have judges step on attorney-client relationships, even in the special structure of MDLs.

These views were echoed by another judge. Many of these issues are magnified in MDL proceedings, but are not unique to them. Across all litigation, judges confront questions of how far to become involved in settlement — indeed one of the agenda items for this meeting goes straight to those questions. In a large-scale MDL in his court, his judicial assistant gets calls from plaintiffs whose lawyers have forgotten about them, but clients of those firms probably have the same problems in non-MDL actions. In this MDL he gave notice to the parties of the point at which he would begin remanding cases to the courts where they were filed. The defendants reacted by retaining separate counsel to negotiate individual settlements, a process that has worked well. "Settlements are being reached."

Judge Bates agreed that these are difficult issues. And we should remember that many MDLs include actions that were filed as class actions. Settlement negotiations may produce agreement on

terms for a class-action settlement that are approved by the court after certifying a class. The protections of Rule 23 are frequently available.

Judge Dow underscored the desire to expand Subcommittee inquiries beyond mass-tort MDLs. His MDL proceedings have involved at most 40 actions, not the thousands or more that are brought together in some mega-MDLs.

Judge Dow went on to suggest that the Subcommittee's work has already had an impact on MDL practices without even developing rules proposals. Early vetting practices have evolved, including the recent development of initial census orders. There is more explicit recognition that the MDL context should be taken into account in determining whether an interlocutory order is so important to the further progress of proceedings that it should be certified for appeal under § 1292(b). And the Subcommittee has seen examples of lead-counsel appointment orders that provide excellent models for other proceedings. These can be used to educate other MDL judges. And "of course the in groups do not want to have rules that may disrupt their good thing." The Subcommittee may, in the end, conclude that there is no need to recommend a new Civil Rule. But it will continue to work hard.

Judge Bates thanked the Subcommittee for its work, and also thanked the JPML and FJC for contributing to the Subcommittee's work.

Appeals after Rule 42 Consolidation

Judge Bates introduced the report of the joint Appellate-Civil Rules Subcommittee that has been established to study the effects of the decision in *Hall v. Hall*, 138 S.Ct. 1818 (2018). The Court ruled that complete disposition of all claims among all parties in what began life as an independent action is a final judgment that can and must be appealed then even though the action was consolidated under Rule 42 with another action that has not reached final judgment. The Court also suggested that the rules committees could suggest a different rule if this approach causes problems.

Judge Rosenberg chairs the Subcommittee. She explained that the Subcommittee or smaller groups have held several calls to get the work started. Dr. Emery Lee is leading a detailed study by the FJC. He has established a data base of all 843,996 civil actions filed in the 94 United States District Courts in the years 2015, 2016, and 2017. That count includes actions that have been consolidated in MDL proceedings, but those actions will not be included in counting Rule 42 consolidations. Among the non-MDL proceedings, a total of 20,730 cases have been involved in Rule 42

consolidations. The total includes 5,953 "lead" cases; the rest are "membership" cases. They account for 2.5% of the civil-action total, and a greater share of the non-MDL cases. The data show that ten nature-of-suit codes account for 58% of all Rule 42 consolidations. Patent actions alone count for 13%, tracking on down through consumer-credit cases at 3%.

The ways in which courts have disposed of the consolidated actions have been counted. Eighty-four percent of the lead cases have terminated in the district court. Thirty-two percent were coded as settled. Another 22% were "other dismissal"; ten percent were "voluntary dismissals," likely for the most part reflecting settlements. Thirteen percent were dismissed on motion. Only 2% were disposed of at trial.

The next step will be to determine how to sample this large number of cases for detailed analysis. Some case types might be deliberately under-sampled because they seem less likely to lead to potential *Hall v. Hall* problems. Bankruptcy appeals, for example, accounted for 6% of the cases, but they often involve proceedings distinct from most civil actions and invoke special and more expansive concepts of interlocutory and final-order appeals. The means of disposing of the cases also may be distinguished. Settlements, for example, are less likely to involve final-judgment appeal problems than other dispositions.

Once the sample is established, the next steps will be to identify dispositions that may lead to problems in applying the *Hall v. Hall* rule. One problem may be confusion about the time to appeal. Additional problems may be appeals taken at times that disrupt trial-court proceedings or threaten to lead to multiple appeals presenting similar or identical questions to the court of appeals. How often is there a complete disposition of all of one of the original actions in the consolidation without disposing of all the others? How often is an appeal taken at that point? How often is an untimely appeal taken at a later point? If an untimely appeal is attempted, how often is untimeliness noticed and followed by dismissal? And how often is untimeliness disregarded and followed by decision of the appeal?

So many cases are involved in the years selected for study that it will not be practicable to extend the study to include actions first filed after the decision in *Hall v. Hall*. But looking to cases filed before then has an advantage because it will include cases filed in every circuit, and thus cases that for appeals decided before *Hall v. Hall* were governed by the *Hall v. Hall* rule in the few circuits that had already established that approach but, in other circuits, were governed by one of the three other approaches that had been adopted by different circuits.

The FJC work will proceed apace. The Subcommittee will resume its deliberations when the work has reached a suitable point.

e-Filing Deadline

Judge Bates reminded the Committee that Rule 6(a)(4) defines the end of the last day for computing a time period for electronic filing as midnight in the court's time zone. Identical provisions appear in all but the Evidence Rules. A joint Subcommittee has been established to study the question whether the end of the day might be shortened to the time when the clerk's office closes. The FJC is gathering a great deal of empirical information that bears on this question, including actual filing practices under the current rule; variations in filing times among types of firms, types of litigation, courts, and other dimensions; the hours clerk's offices are open, and the use of drop boxes for after-hours filings; the experience of pro se litigants that are permitted to use e-filing; problems confronting lawyers who file across multiple time zones; and still other questions. "This is a big data project." The Subcommittee will resume active work when the accumulation of data supports further consideration.

Rule 7.1: Intervenor Disclosure and Diversity Jurisdiction Disclosure

Judge Bates described two proposed amendments to Rule 7.1 that were published for comment in 2019. The questions now are whether they should be recommended for adoption.

Intervenor Disclosure: The first amendment would expand present Rule 7.1(a) to require disclosure by any nongovernmental corporation that seeks to intervene on the same terms as the rule requires for a nongovernmental corporate party. This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Publication of the intervenor amendment drew three comments. Two expressed approval. The third suggested several expansions of the present disclosure requirement for parties and intervenors alike. These changes would require study and then publication for comment. The question whether disclosure statements should be expanded to include other information that may bear on recusal has been explored recently. The MDL Subcommittee has considered proposals by lawyer groups for disclosure of third-party litigation financing. Other committees have considered other expansions of disclosure. These explorations have not led to any recommendations for amendments.

The Committee unanimously approved a recommendation that the Standing Committee approve the intervenor disclosure amendment for adoption.

Diversity Jurisdiction Disclosure: The second proposed amendment would add an entirely new provision that applies only in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a). This provision requires a party to file a disclosure statement "that names — and identifies the citizenship of — every individual or entity whose citizenship is attributed to that party at the time the action is filed."

Diversity disclosure was proposed to meet problems that arise in satisfying the complete diversity requirement. The problems have been multiplied by the emergence of limited liability companies as a common means of organizing business enterprise. The established rule attributes the citizenship of each owner to the LLC. If an owner is itself an LLC, the citizenship of all of its members is likewise attributed to it and through it to the LLC that is a party to the action. The chain of attribution can reach even higher. There is a real risk that a diversity-destroying citizenship exists somewhere. Prompt recognition that there is no diversity jurisdiction is important. If the case goes through to final judgment without recognizing the problem, the damage may seem conceptual, but remains a disruption of the allocation of authority for adjudicating state-law disputes with the attendant risk of a non-authoritative interpretation and application of state law. If the lack of diversity jurisdiction emerges while the action is still pending, perhaps after heavy investment by the parties and trial court or even for the first time on appeal, the required dismissal can impose heavy costs. Many federal judges respond to this problem now by requiring initial disclosure.

The proposed rule extends beyond LLCs to require disclosure as to any other "entity" whose citizenship is attributed to a party. Some of these entities have played familiar roles in determining diversity for many years, including partnerships, limited partnerships, some forms of trusts, and the like. Others are more exotic, and include such vague concepts as "joint ventures" that may not have existence as an "entity" for any other purpose. What counts as an "entity" for disclosure is any thing that is not an individual but that must be examined in determining a party's citizenship.

Public comments on this proposal were generally favorable. A substantial share of them observed that actions are often removed from state courts without adequate inquiry into the full details required to determine diversity jurisdiction. Some comments offered anecdotes about the misery created by belated discovery that

diversity does not exist. Many offered an optimistic view that disclosure will impose only a small burden, a view that may well be true for most LLCs.

Other public comments opposed the proposal. Two of these comments came from groups that have participated frequently and helpfully in the Committee's work, the American College of Trial Lawyers and the New York City Bar. Both comments said, in different ways, that the better solution for LLC diversity problems would be for the Supreme Court or Congress to treat an LLC in the same way as a corporation.

Beyond resisting the current attribution rule for LLCs, the negative comments suggested that expansive disclosure of ownership interests might prove overwhelming, distracting attention from the particular parts of the disclosure that should bear on judicial recusal. Rule 7.1 should continue to be confined to disclosure of information that bears on recusal. The comments also said that disclosure can impose heavy burdens of inquiry that should not be routinely imposed in all cases. The information can be obtained by targeted discovery in the subset of actions in which a party challenges diversity or seeks to establish a firm jurisdictional foundation at the outset. Disclosure also threatens interests in privacy that often account for establishing an LLC. A variation on the privacy concern addressed the privacy of "non-citizens."

An added problem was noted. There may be circumstances in which a party is not able to identify and determine the citizenship of everyone whose citizenship may be attributed to it. Interests in some forms of entity may be traded in a market or pass through other channels that are difficult to trace.

The comments also suggested a problem that may prove more difficult to resolve than it seems. The published proposal calls for disclosure of citizenship "at the time the action is filed." Those words were added to reflect that in most circumstances the citizenships that establish or defeat diversity jurisdiction are those set at the time the action is filed. The time of filing corresponds to that purpose, looking to the time the action is filed in federal court. If the action is removed from state court, citizenship is determined at the time the notice of removal is filed in the district court. These comments suggested this point should be made clear by adding "at the time the action is filed <u>in, or removed to, the federal court</u>." The difficulty with adding these words is that they may distract attention from the need to assess diversity jurisdiction anew if the parties are changed after the action is first filed or removed.

Judge Bates followed this introduction by noting that many federal judges are requiring disclosure now, either on their own or under local rules. There is no burden in cases that do not involve attributed citizenships. When there is a burden, it is often encountered now. Establishing a uniform practice by a national rule may not add much burden. And the difficulties that may arise in rare situations that make it impossible to determine all attributable citizenships seem likely to be rare enough that they should not stand in the way of a general rule.

Initial discussion provided support for adding "filed in, or removed to, the federal court." A complication was noted. 28 U.S.C. § 1447(e) provides that if after removal a plaintiff seeks to join a party that would destroy diversity jurisdiction, the court may deny joinder or may permit joinder and remand to state court. But requiring disclosure of attributed citizenships at the time of removal does not stand in the way of this statute. If anything, implementing the statute is supported by providing better information to determine whether joinder would destroy diversity. A related observation suggested that complexities are added by the need to work through arguments about fraudulent joinder designed to defeat diversity removal.

One suggestion was to add "at the time the court's jurisdiction is invoked." Concerns were expressed that litigants might not understand this. An alternative might be "at the time the disclosure is made," but that could be a time different from the controlling date for determining diversity. There are two separate concepts. One is the date that controls the determination of diversity, recognizing that some events may change the date — joining or dropping parties after the day the action is originally filed or is removed is a clear example. The other is the time for making the disclosure of citizenships as of the date that controls the existence or nonexistence of diversity jurisdiction. The time when the disclosure must be made is governed by Rule 7.1(b). A party that seeks to add another party has the usual burden of pleading jurisdiction, but the new party is responsible for making the diversity disclosure at the time directed by Rule 7.1(b).

Another suggestion was "at the time [or times] relevant to the determination of the court's jurisdiction." A further variation was suggested: "at the time the action is filed in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction." This gives better guidance. The time of filing in or removing to federal court will control the vast majority of diversity determinations. In removed cases the plaintiff who filed in state court will become obliged to disclose attributed citizenships after removal. A disclosure that defeats diversity may disappoint the removing defendant, and it may

disappoint a plaintiff who would rather have concealed an attributed citizenship that destroys diversity, but that serves the need to enforce complete diversity. But another time may become relevant. It was pointed out that a state-court defendant who is a co-citizen of a plaintiff at the time the action is filed in state court cannot manufacture diversity by establishing a diverse citizenship and then removing. The lack of diversity is then established by the time of filing in state court, not the time of removing to the federal court. The expanded language also conforms to another rule that permits a federal court to retain an action that was removed at a time when diversity was defeated by the citizenship of a party that is dropped from the action after removal. And, although "such other" often seems vague or indeterminate, it refers back to an antecedent time in this use and does not defeat the primacy of the time of original filing or the time of removal.

The Committee voted to approve the longer version, subject to a final style determination whether to refer to a "federal" or the "district" court. The Rules regularly refer to a district court, but refer to a "federal" court in contexts that embrace both state and federal courts. Rules 32(a)(8) and 41(a)(1)(B) are examples. Because Rule 7.1(a)(2) involves a similar emphasis on both state and federal courts, "federal" seems the appropriate word. The rule will go forward with "in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction."

Attention turned to the problem of a party who finds it difficult or impossible to determine all attributed citizenships. An initial suggestion was that language should be added to the text of Rule 7.1(a)(2) to limit the disclosure to information that can be gathered without undue effort. An alternative suggestion was that the paragraph in the Committee Note describing the court's authority to "order otherwise" might be expanded to recognize that the court can order that a party that has exercised due diligence to uncover attributed citizenships need do no more. Tangential support was found in Rule 11(b), which sets a standard of an inquiry reasonable under the circumstances to support legal contentions and factual contentions in any paper submitted to the court. But the standard for avoiding sanctions does not carry directly over to the obligation that may be placed on a party to determine its own citizenship. Disclosure may be closer to discovery of jurisdictional facts, and to invoke the proportionality standard in Rule 26(b)(1). But that does not answer what discovery burden is proportional to the need to determine subject-matter jurisdiction. A judge opposed these suggestions as inconsistent with the command to insist on complete diversity. "People ask me all the time to assume jurisdiction because

establishing the actual controlling facts is too difficult." We should not do anything in the rule that will encourage that approach. Neither the language of Rule 7.1(a)(2) nor the Committee Note will be changed on this account.

Other changes in the rule text were discussed. A motion to intervene should be brought within diversity disclosure, remembering the § 1367(b) limits on supplemental jurisdiction for claims by or against intervenors. So the text will read "a party or intervenor * * * must file * * * whose citizenship is attributed to that party or intervenor * * *." The tag line will be changed to conform: "Parties or Intervenors in a Diversity Case."

The discussion of supplemental jurisdiction raised a question about Rule 7.1(b), which sets the time for making Rule 7.1(a) disclosures. Paragraph (b) requires that a disclosure be supplemented "if any required information changes." A concern was expressed that it may be important to require a supplemental diversity disclosure of facts that may defeat supplemental jurisdiction. Meaningful illustrations proved hard to come by, however, and this topic was dropped.

Discussion of Rule 7.1(b) did lead to recognition that bringing intervenors into the text of Rule 7.1(a)(1) requires a parallel addition at the beginning of Rule 7.1(b): "A party or intervenor must: (1) file the disclosure statement * * *." The Committee agreed that this is a technical amendment that can be recommended for adoption without publication. It is consistent with what was published and ensures implementation without a technical gap in Rule 7.l(b).

The Committee Note was discussed. The Federal Magistrate Judges Association Rules Committee suggested two additions. First, words would be added to this sentence: "The rule recognizes that the court may limit the disclosure upon motion of a party * * *." The purpose is to avoid any implication that the court has an independent duty to limit disclosure. But a nonparty may wish to limit disclosure, usually a nonparty whose citizenship is attributed to a party. And there is no apparent reason to limit the court's authority to act on its own. An obvious circumstance would be disclosure by one party of a diversity-destroying citizenship; the court could readily suspend further disclosures, pending a determination whether to dismiss the action or instead to allow a change of parties that might make further disclosures necessary. The Committee decided not to add these words.

The second suggestion by the magistrate judges was to add words to ensure that the court may seal the disclosure: "the names * * * might be protected against disclosure to the public or to

other parties * * *." On balance, this suggestion also was rejected. It is difficult to imagine circumstances in which a court might wish to permit disclosure to the public, or even a particular nonparty member of the public, and at the same time arrange measures that would prevent the disclosure from leaking back to a party. In any event, the general authority to "order otherwise" does not require this degree of elaboration in the Note.

The Committee Note will be changed to reflect the changes in the rule text. For Rule 7.1(a)(2) the Note will add "or intervenor" where appropriate after references to a party's duty to disclose.

The final paragraph of the Committee Note on Rule 7.1(a)(2) will be expanded to describe the revised rule text that ties what must be disclosed both to the usual circumstances that determine diversity at the time of filing in, or removal to, the federal court and also to the unusual circumstances that may call for determining diversity at a different time.

And one further paragraph will be added to the Committee Note to reflect expansion of Rule 7.1(b) to include intervenors as well as parties in the provisions governing the time to disclose.

The Committee voted to recommend that the Standing Committee propose adoption of the Rule 7.1 text with the revisions adopted in this meeting, 10 yes and 1 no. It further agreed to consider the revisions that will be made in the Committee Note by electronic exchanges.

Rule 12(a)(1), (2), and (3): Statutory Times

Judge Bates described the question whether to recommend publication for comment of an amendment that would clarify the relationship between the times to respond set by Rules 12(a)(1), (2), and (3) and other times that may be set by statute.

The question arises from what may be seen as an ambiguity in the text of Rule 12(a)(1):

(a) TIME TO SERVE A RESPONSIVE PLEADING.
(1) *In General.* Unless a different time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows * * *.

The exception for times specified by this rule or a federal statute is not repeated in paragraphs (2) or (3). Paragraph (2) sets the time to respond at 60 days in an action against the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (3) sets the

time at 60 days for a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

The problem called to the Committee's attention by a frustrated lawyer is that at least two federal statutes, the Freedom of Information Act and the Sunshine Act, set a 30-day time to respond. Paragraph (2) does not seem to recognize the possibility that a different time is set by these, and perhaps other, statutes.

It is possible to read the present rule to extend the "different time" provision from paragraph (1) to paragraphs (2) and (3). That is not an obvious reading. The Style Consultants agree that if it had been intended to recognize statutes that set a different time than paragraphs (2) and (3), the rule would have been structured differently as presented in the agenda materials:

> Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:
> (1) * * *.
> (2) * * *.
> (3) * * *.

The proposed amendment is surely free from ambiguity. It does present a question whether clarity is appropriate when the Committee does not yet know of any statute that sets a different time than the 60 days of paragraph (3) for an action against a United States employee sued in an individual capacity. But little harm is done if there is no such statute. At worst, it may sidetrack some parties into a futile quest for a statute that does not exist. Most lawyers for an employee sued in an individual capacity, however, are likely to rest content with any statute that may bear immediately on the particular claims. And at best, a form that includes paragraph (3) in the different time provision will include any statutory time period now on the books or that may be enacted in the future. There is no reason to wish to supersede either a present or a future statute.

Discussion began with a report that the Department of Justice views the proposed amendment as "well intended," but there is no problem that needs to be addressed. The Department is capable of meeting deadlines, and of seeking extensions to align the times to respond when a single case advances claims that are governed by different times. Amending the rule might imply that the court should be reluctant to grant an extension even when warranted.

The next comment suggested that the second paragraph of the draft Committee Note is confusing to anyone who does not understand

the background. It attempts to explain the reason for including paragraph (3) even though there may not be any statutes that set a different time to respond when an official is sued in an individual capacity. But a reader pretty much has to know the answer to comprehend the explanation. Apart from that, Rule 12(a)(3) applies both when the officer or employee is sued only in an individual capacity and also when sued in both an official and individual capacity. "only" should be deleted. A response was that this paragraph could be deleted entirely. The rule text gives a clear answer if there is a statute setting a different time to respond, and will not be invoked if there is no such statute.

Two comments suggested that there is no indication that even paragraph (2) presents a real problem. The question was brought to the committee by a lawyer who was frustrated by the need to persuade a court clerk to issue a summons setting out the 30-day period to respond in the Freedom of Information Act. The problem was in fact resolved. There is no indication that this problem is widespread, nor that it cannot be resolved by pointing the clerk to the statute when it does arise. This is not reason enough to crank up the Enabling Act process.

The absence of evidence of a practical problem was met by the reply that the rule is incorrect on its face, at least if it is given the more obvious reading supported by the Style Consultants. This reply rekindled the argument that the present rule can and should be read to recognize different times set by statute for all of (a)(1), (2), and (3).

A distinct question was raised as to the relationship between all of Rule 12(a)(1), (2), and (3) and Rule 81(c)(2). The times for a defendant to answer after an action is removed from state court are independent of the times set in Rule 12. Rule 81(c)(2) does not on its face recognize any exceptions for different times set by statute or, for that matter, Rule 12. This possible tension between Rule 81 and Rule 12 will persist no matter whether Rule 12 is amended to provide a clear exception for different statutory response times in paragraphs (2) and (3). There seems little reason to add this complication to the project.

The discussion concluded with a decision to carry these questions forward. Some committee members are attracted to the value of correcting rule text that at best is ambiguous and at worst is incorrect. There is no urgent need for action. Time for further consideration will be welcome.

Rule 12(a)(4)

Judge Bates introduced a suggestion by the Department of Justice that Rule 12(a)(4) should be revised to add time to respond when a United States officer or employee is sued in an individual capacity:

> (4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
> (A)if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United states officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

This proposal rests in part on the same considerations that persuaded the Committee to adopt the 2000 amendment that established the Rule 12(a)(3) time to respond in such actions at 60 days. These considerations persuaded the Appellate Rules Committee to adopt the 2011 amendment of Appellate Rule 4(a)(1)(B)(iv) that establishes the time to file a notice of appeal in such actions at 60 days. The United States may or may not have been involved with defending its officer or employee at the time the Rule 12 motion was made, and may need the 60 days to respond just as much as it needs 60 days to frame an answer after the later of service on the officer or employee or service under Rule 4(*i*)(3) on the United States Attorney.

The ordinary need for 60 days to respond is enhanced by the complications that arise when the officer or employee moves to dismiss on the ground of official immunity. Denial of the motion often provides a basis for an interlocutory appeal under the collateral-order doctrine. The determination whether to appeal must be made by the Solicitor General. Serious confusions and inconveniences can arise if the officer or employee is required to file an answer within 14 days after the motion is denied or postponed. The burden of filing an answer, moreover, is one of the burdens of litigation that official immunity and the opportunity for collateral-order appeal are meant to alleviate.

The style consultants have reviewed the proposed rule text.

It was pointed out that Rule 12(a)(4) allows a court to set a different time. If there is an urgent need to proceed, the court could set the time to respond at less than 60 days. Account also

can be taken of the provisions in Appellate Rule 4(a)(4) that defer the time that starts appeal time.

The Committee voted, 11 yes and zero no, to recommend that the Standing Committee approve the proposed amendment of Rule 12(a)(4) for publication.

Rule 4(c)(3)

Judge Bates pointed out that the perceived ambiguity in the Rule 4(c)(3) provision for service by the United States Marshal in cases brought in forma pauperis or by a seaman was first on the agenda a year ago.

The question is whether the rule means that the plaintiff must request that the court "must so order," or whether the court must enter the order automatically in every i.f.p. or seaman case. The Style Consultants believe there is no ambiguity — the court must make the order even without a request by the plaintiff. But not every court has found the rule so clear.

It is easy to eliminate any possible ambiguity. But it would remain necessary to decide what the clear provision should say. At least three choices are apparent: The plaintiff must request the order; the court must enter the order without a request; or the marshal is obliged to make service in every case without bothering with the formality of an automatically entered order, a formality that might accidentally be omitted in some cases. More adventuresome possibilities could be added, such as an experiment with electronic service in cases where the marshal believes that would be effective.

The choice among these alternatives will depend on practical information. The Marshals Service has been consulted, but as yet has provided no clear guidance. It is clear that the marshals would prefer to avoid the burden of making service, particularly in sparsely populated districts that may require distant travel. But the forma pauperis statute imposes the duty. It also is clear that at least in cases where an i.f.p. plaintiff has counsel the plaintiff may prefer to make service without relying on the marshal. Service by the plaintiff seems fully consistent with Rule 4(c)(3) as it stands, but if it is to be amended that point might be added.

Discussion led to the conclusion that this subject should be carried forward to the October meeting, with the expectation that a decision will be made then. Efforts will be made to get additional advice from the Marshals Service.

Rule 17(d): Naming Public Official Sued in Official Capacity

Rule 17(d) has long provided that a public officer who sues or is sued in an official capacity may be designated by official title rather than name. Sai has proposed that permission should be changed to mandate: the officer must be designated by the relevant official title (or titles if the same officer holds two or more relevant offices) if the title is unique and capable of succession.

A major purpose of the proposal is to avoid the annoyance of remembering to substitute a successor official, even though Rule 25(d) provides automatic substitution when the original officer ceases to hold office. A secondary purpose is to ease the task of following events in the action; Sai cites an action that has migrated through nineteen names for the United States Attorney General and remains active.

Designating the party by title rather than the name of the incumbent office-holder has obvious advantages. That is why Rule 17(d) authorizes this practice. But it is not clear that the rule should prevent a plaintiff officer from proceeding under a personal name, or prevent a plaintiff from naming an officer defendant by individual name.

As a general problem, there may be cases in which it is not clear whether substantive law authorizes an action by or against a "title," or, more realistically, against the office that is designated by the title. That can easily hold true for countless numbers of federal employees, beginning with the question whether a particular employee is an "officer" within the meaning of Rule 17(d), and then progressing to the question whether every "officer" occupies an office that is capable of being sued as an office. Titles proliferate, perhaps without pausing to consider whether the title is attached to an office.

The difficulty of determining whether suit can be brought by or against a title or office is enhanced when the public officer is a state officer. It may be unwise to force litigants — and at times the courts — to wrestle with what may be obscure and uncertain questions of state law.

State officials pose a still greater caution when they are sued as defendants. The fiction that permits actions against state officials as a way to circumvent the Eleventh Amendment is vital, but still a fiction. It may be better to avoid entangling Rule 17(d) with disputes whether the official is a defendant in an individual capacity or an official capacity.

The value of amending Rule 17(d) may turn in part on pragmatic considerations. How great are the burdens it imposes? How can the Committee gather useful information?

Discussion began with a judge's observation that "the annoyance factor is a minor, but not a major, issue." Substitution is done routinely by law clerks or court clerks.

The Department of Justice observed that substitution "works seamlessly," and often is accomplished by the court acting on its own. Still, there is no harm in studying this proposal further.

The Committee decided to carry this subject forward.

Consent Agenda

Judge Bates reported that the reporters for the several rules committees have launched a still incomplete discussion of the question whether the advisory committees might establish a practice of placing some business on a consent corner of the agenda.

An analogy could be found in the consent calendar of the Judicial Conference. The Judicial Conference handles many matters, including many Enabling Act rules topics. The calendar is established by the Executive Committee, with advice from the Director and staff of the Administrative Office. But the work of the Judicial Conference comes from committees that have thoroughly prepared their recommendations. The rules advisory committees are the first line in Enabling Act work.

Obvious questions go to defining the way in which a consent calendar would work. What would be the criteria for selecting consent-calendar subjects? Who would make the selection — most likely some combination of the advisory committee chair and the reporters? What would be required to move a subject from the consent calendar for plenary discussion? Most likely any single committee member could effect the transfer. What provision should be made to ensure adequate notice to facilitate thorough preparation of the subject by committee members?

The agenda for this meeting includes three rules proposals that are offered to illustrate the variety of considerations that might point toward placing an item on a consent agenda. Discussion of the merits of these proposals may illuminate the general question.

The first member to comment suggested that it would be better not to have a consent agenda. The items most likely to be placed on it would be some of those that come in from public suggestions. The

need for committee consideration may begin with the prospect that some of these suggestions include useful kernels of information that may not be apparent when reviewed by only two or three persons responsible for constituting the agenda. And "we don't want to create an impression that some proposals receive 'short shrift' treatment."

Another judge agreed that public perception is an important consideration. But the reporters and chair would look for items "on which no one would want discussion." If even a single member wants discussion, full Committee treatment will be provided.

Another judge observed that the Bankruptcy Rules Committee has maintained a consent agenda for a few years now. "It has worked well for us." Occasionally a committee member asks to take up an item from the consent calendar. The criteria for selecting consent agenda topics remain unclear, but revolve around a determination that the topic is unlikely to raise any interest.

The possible advantages of a consent agenda were noted. It could reduce the amount of time committee members devote to some agenda topics, freeing time for topics that seem to demand greater attention. Advance notice that an item will be moved to the discussion agenda will ensure an opportunity to prepare for full deliberation. "Some proposals require a lot of digging. Some seem off the wall. We do not want to dilute consideration of the serious matters." Full consideration of all items could be too much work. Providing one week of advance notice that a topic has been moved to the discussion agenda reduces the value of the practice that seeks to provide agenda materials to committee members three weekends before the committee meeting, but it is not likely that more than one, at most a few, items would need to be studied a second time.

A committee member suggested that "matters come up with twists and turns that are not foreseen" when preparing an agenda. It is better to keep all items on a single agenda, "hoping for discipline on matters that do not require a lot of time."

Judge Bates suggested that this discussion provided a useful beginning, but that the question should be carried forward for further discussion at the October meeting. The three proposals offered to illustrate the general question remain for discussion.

Rule 16: Settlement Conferences

This topic suggests three changes with respect to settlement conferences, two in Rule 16 and a third evidently aimed at local rules or the Evidence Rules.

The first suggestion is that trial judges should be excluded from participating in settlement conferences. The fears include the possibility that the parties will feel coerced, that parties will engage in strategic behavior by presenting incomplete and misleading information, and that the judge may imbibe wrong views of the case. The Committee considered these problems in depth in November, 2017, and concluded that judges are well aware of them. Federal Judicial Center programs regularly explore the problems. And different approaches may be appropriate for different judges and different cases.

The second suggestion is that objective standards should be established to protect against undue sanctions under Rule 16(f)(1)(B), which authorizes sanctions "if a party or its attorney * * * is substantially unprepared to participate — or does not participate in good faith — in the conference." Examples are cited of sanctions imposed for "failing to bargain sufficiently, failing to make a reasonable offer, and failing to have a representative present at the settlement conference with 'sufficient settlement authority.'" Brief discussion suggested that although these examples sound extreme, it does not seem likely that there are widespread abuses of discretion, nor does it seem likely that amended rule language would be effective in constraining such abuses as are likely to occur.

The third set of suggestions seek to add "substantive and procedural safeguards" to be included in district court local ADR rules, or in the Evidence Rules. Two of them address the topics suggested in the sanctions section.

The Committee determined to remove these topics from the agenda.

Time Limits in Subpoena Enforcement Actions

This suggestion relies on impatience with the time courts take to decide actions brought by Congress to enforce subpoenas directed to executive officials. But the suggestion appears to be framed in general terms that would address all proceedings to enforce subpoenas of every type, including discovery subpoenas, trial subpoenas, and subpoenas or similar commands issued by administrative agencies.

Brief discussion focused on congressional subpoenas. Consideration of this topic was thought ill-advised. There was some discussion of the uncertain status of present law on enforceability. There was no thought that the specific and very tight time limits proposed for action by district courts, the courts of appeals, and the Supreme Court were sensible.

Discovery subpoenas also were noted. Not long ago the Committee devoted years of work to revising Rule 45. No problems were identified with respect to the time taken to reach decision on motions to enforce. At least as to discovery subpoenas, the proposal is a "nonstarter."

The Committee determined to remove this topic from the agenda.

Rules 7(b)(2), 10

This proposal suggests that Rules 7(b)(2) and 10 be amended to correct several "paradoxes" in their present relationship.

The paradox is said to begin with Rule 7(b)(2)'s direction: "The rules governing captions and other matters of form in pleadings apply to motions and other papers." Rule 7(a) lists the only "pleadings" that may be allowed. Motions are not pleadings.

Rule 10(a) directs that "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation."

How, the suggestion asks, can a motion bear a Rule 7(a) designation? It cannot be called a complaint, an answer to a third-party complaint, or by the name of any other pleading.

And how, the suggestion asks, can it have any other name, since the "title" referred to in Rule 10(a) manifestly refers to the title of the action, not the name to be fixed to a motion?

The examples proliferate. The submission recognizes that the problems are quite technical, and that "In practice, litigants and counsel simply ignore the problematic language, if they notice it at all."

Brief discussion suggested that the relationship between Rules 7(b)(2) and 10 "is a process of analogy, not literal reading." There is no practical problem, as the submission recognizes. There is no reason to undertake a revision project.

Judge Bates closed the meeting by stating that his term as Committee Chair has been a good time, expressing thanks to all Committee members and the others who worked in the common enterprise.

Respectfully submitted,

Edward H. Cooper
Reporter

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

MEMORANDUM

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

FROM: Hon. Ray Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 20, 2020

Introduction

The Advisory Committee on Criminal Rules met by videoconference on May 5, 2020. Draft minutes of the meeting are attached to this report.

This report focuses principally on one action item: the Advisory Committee's recommendation that its draft of amendments to Rule 16, which expand the scope of expert discovery, be published for public comment. It also briefly describes two information items: (1) the Committee's response to the statutory directive to develop proposals for emergency rules; and (2) the Committee's response to two suggestions that Rule 6(e)'s provisions governing grand jury secrecy be amended.[1]

[1] The Committee was also informed of a suggestion that the committee note to Rule 41 be amended to draw attention to an erroneous cross reference in 18 U.S.C. § 981(b)(3). Ms. Wilson advised the Committee that no action was required. She had drawn the problem to the attention of the Office of

I. Action Item: Rule 16; Discovery Concerning Expert Reports and Testimony (for Publication)

At its May meeting, the Advisory Committee unanimously approved a draft amendment to Rule 16 and an accompanying committee note for transmittal to the Standing Committee. The Advisory Committee recommends they be published for public comment. The draft amendment and committee note are attached as an appendix to this report.

The Advisory Committee developed its proposal in response to three suggestions to amend Rule 16 to follow more closely Civil Rule 26 regarding expert-witness disclosures. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm);18-CR-F (Carter Harrison, Esq.). In developing its proposal, the Committee drew upon two informational sessions:

- Presentations from the Department of Justice at the Advisory Committee's fall 2018 meeting in which the Department detailed the development and implementation of new policies governing disclosure of forensic evidence, efforts to improve the quality of its forensic analysis, and practices in cases involving forensic and non-forensic expert evidence; and

- An April 2019 miniconference where experienced practitioners from both the prosecution and defense presented perspectives on the pretrial discovery of expert witnesses in different districts and different kinds of cases.

The Advisory Committee's December 2019 report to the Standing Committee included a draft of the amendment. The current proposal reflects revisions adopted by the Advisory Committee at its May 2020 meeting after further review by the Rule 16 Subcommittee and consideration of comments received at the Standing Committee's meeting.[2]

The proposed amendment addresses two shortcomings of the current provisions on expert witness disclosure: (1) the lack of an enforceable deadline for disclosure; and (2) the lack of adequate specificity regarding what information must be disclosed.[3] The amendment clarifies the timing and content of expert witness disclosures. It is intended to facilitate trial preparation by

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Law Revision Counsel of the House of Representatives (OLRC). OLRC inserted a footnote directing readers to the correct subsection of Rule 41 and will also include the error in its annual compilation of issues provided to the Office of Legislative Counsel of the House of Representatives. According to OLRC, next time the statute is amended, the Office of Legislative Counsel should include a corrected reference to Rule 41 in the amended statutory language. Until that time, the footnote will direct readers to the correct subsection of Rule 41.

[2] Various technical changes were also made to the committee note, including reorganization to more closely parallel the text of the rule.

[3] Defense practitioners reported they sometimes received expert witness summaries a week or even the night before trial, which significantly impaired their ability to prepare for trial. They also said they do not receive disclosures in sufficient detail to prepare for cross-examination. They recounted several examples of this problem.

allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

The proposal preserves the reciprocal structure of the current rule. The government's obligation to disclose information about its experts is triggered only if the defendant requests that disclosure under (a)(1)(G). The defense is required to disclose information about its experts under (b)(1)(C) only if it has made that request and the government has complied. This sequencing remains unchanged by the draft amendment. Once triggered, the disclosure obligations of the prosecution and defense under (a)(1)(G) and (b)(1)(C) are generally parallel under the current rule, and the expanded discovery obligations required of the prosecution and defense under the draft amendment generally mirror one another.

The draft amendment achieved unanimous support because members agreed that serious problems can be addressed by amending the current rule; that the proposed changes would address those problems; and that the amendment constitutes a fair and workable compromise reflecting the needs of both the prosecution and the defense. The Advisory Committee believes that adding these provisions would be a significant improvement to the current rule.

A. The Timing of Disclosures

The Advisory Committee concluded that the amendments should include specific and enforceable provisions on the timing of disclosure. Although many members initially supported the inclusion of a default deadline for the disclosures (e.g., 45 days before trial for the government's disclosures), the Committee ultimately concluded that approach was unworkable. Given the enormous variation in the caseloads of different districts, as well as the circumstances in individual cases, a default deadline would inevitably generate a large number of requests for extensions of time, burdening both the parties and the courts. Members also noted that default deadlines might prove problematic—rather than helpful—to the defense because there are structural reasons that might delay its determination whether to use expert testimony. The Committee therefore chose to adopt a functional approach, focusing on the goal of providing specific and enforceable deadlines that would allow each party to prepare adequately for trial.

To ensure there are in fact enforceable deadlines in each case, subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) provide that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. These disclosure times, the amendment mandates, must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. The committee note provides additional guidance on the appropriate considerations for the deadlines. This portion of the note reflects information developed at the miniconference, the experience of Committee members, and comments received at the Standing Committee meeting in January. For example, the note states that a party may need to secure its own expert to respond to expert testimony disclosed before trial by the other party, and that deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. The note also reminds counsel and the courts that deadlines for disclosure must be sensitive to the requirements of the

Speedy Trial Act. Finally, it explains that, because caseloads vary among districts, the rule allows courts to tailor disclosure deadlines to local conditions or specific cases.

At the September meeting, members debated how best to word the requirement that the court set a date for these disclosures. That could be done by local rules, standing orders, or orders in individual cases—all of which, in a sense, are orders of the court. But the Committee chose to emphasize the possibility of setting a default deadline by local rulemaking. Accordingly, proposed (a)(1)(G)(ii) provides that "[t]he court, by order or local rule, must set a time for the government to make the disclosure." Subsection (b)(1)(C)(ii) contains a parallel provision for setting the time for the defendant's disclosures.

The amendment does not specify *when* the court must enter the order setting the deadline, leaving that decision to the discretion of the judge. To respond to concerns that courts (or parties) might mistakenly assume that these deadlines must be set very early in the prosecution, perhaps before the parties and the court have a sufficient understanding of the individual case, the Committee added language to the note emphasizing the court's discretion in deciding when to set—and if necessary alter—the deadlines for disclosure. The note states:

> Subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leaves to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

This portion of the note also draws attention to the connection between the timetable for disclosure and the requirement under new Rule 16.1 (which went into effect December 1, 2019), that the parties meet to "confer and try to agree on a timetable" for pretrial disclosures no later than 14 days after arraignment.

B. The Content of Disclosures

The current rule states that the parties have a duty to provide "a written summary." The Committee concluded that the word "summary" was responsible, at least in part, for the very cursory and incomplete information sometimes provided about expert testimony. To ensure that parties receive adequate information about the content of expert witness testimony and potential impeachment, the amendment deletes from (a)(1)(G) and (b)(1)(C) the phrase "written summary" and substitutes an itemized list of what a party must disclose.

Subsections (a)(1)(G)(iii) and (b)(1)(C)(iii) require that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate practice in civil cases, which of course differs in many ways from criminal cases. Like the existing provisions of Rule 16, the proposed amendment departs from Civil Rule 26 in important respects. For example, as noted above, the government's obligation to disclose expert witness information is triggered only by a defense request. And unlike Civil Rule 26, the rule does not create different classes of expert witnesses with different disclosure requirements. (Indeed, Mr. Goldsmith, the Department's National Criminal Discovery Coordinator, cautioned against any attempt to bifurcate experts in criminal cases into two distinct categories, citing concerns about the Department's ability to control certain government experts.)

The Department of Justice and several judges, including Judge Campbell, were concerned that the use of language drawn from Civil Rule 26 might suggest, erroneously, that the amendment is meant to incorporate civil practice concerning expert discovery. To address this concern, the note states (emphasis added):

> To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. <u>Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.</u>

The committee note also addresses two recurring situations in which more flexibility might be needed. The first involves experts who testify very frequently (such as local police or state forensic experts who may testify virtually every week in state court). Another situation—as noted by a member of the Standing Committee at the January meeting—is when a party knows the opinions it will elicit at trial, but not the identity of the expert who will offer them. For example, any number of experts within the ATF might opine on a particular issue, but the government does not know which ones will be available at the time of trial. At the May meeting, Committee members focused on the importance of determining on a case-by-case basis whether the opposing party (typically the defense) could prepare for trial with timely disclosure of only the expert opinion (and the bases and reasons for it), without knowing the expert's name and her prior testimony and publications.

To address both situations, the note draws attention to Rule 16(d), which allows the court "for good cause," to "deny, restrict, or defer discovery" on a case-by-case basis. The proposed note now provides:

> On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

In addition to addressing potential concerns from prosecutors, this part of the note guides litigants and the courts as to when to modify discovery under Rule 16(d), emphasizing the importance of the opposing party's ability to prepare for trial.

C. Exempting Previously Disclosed Information

In some situations, the amended provisions might require a party to disclose information already disclosed to the opposing party in a report of an examination or test under (a)(1)(F) or (b)(1)(B), or in materials accompanying those reports. The amendment states that such information need not be provided again in the expert disclosure. This exemption might be particularly important for disclosures regarding forensic experts, whose professional standards might require them to repeat time-consuming procedures for each new report.

Accordingly, subsections (iv) in both (a)(1)(G) and (b)(1)(C) state that, if a previously provided report of an examination or test already included information required under the proposed amendment, "that information may be referred to, rather than repeated, in the expert-witness disclosure." The requirement that the information be "referred to" ensures that the opposing party is made aware that the prior report contained this information, particularly where voluminous material has been provided under (F) or (B).

D. Preparing, Approving, and Signing Disclosures

The proposal distinguishes between the preparation, approval, and signing of expert witness disclosures. Unlike Civil Rule 26(a)(2)(B), the amendment does not require the witness to prepare the disclosure. The Committee concluded that in some circumstances it may be appropriate for the prosecutor or defense counsel to draft the disclosure. Disclosures drafted by counsel must, however, accurately portray the witness's testimony. Thus, with two exceptions, proposed (a)(1)(G)(v) and (b)(1)(C)(v) require the disclosure to be "approved and signed" by the expert.

The first exception to this requirement grew out of the Committee's recognition that in criminal cases (as in civil cases) some experts are not under the control of the party who will present their testimony. Examples could include a member of a local police department, a treating physician, or an accountant employed by a defendant but called by the government. Although these persons can be subpoenaed to testify, the party who will introduce their testimony might not be able to obtain the witness's signature on the pretrial disclosure. The first

bullet in subsection (a)(1)(G)(v) and (b)(1)(C)(v) therefore includes an exception to the approve-and-sign requirement when the party who will call the witness states in the disclosure "why [that party] could not obtain the witness's signature through reasonable efforts." The committee note explains:

> First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts.

The second exception to the approve-and-sign requirement dovetails with the provisions allowing information previously provided in an expert report to be referenced rather than repeated in a disclosure under (a)(1)(G)(i) and (b)(1)(C)(i). The second bullet in subsection (a)(1)(G)(v) and (b)(1)(C)(v) provides an exception from the signature requirement when the party "has previously provided under [the rule] a report, signed by the witness, that contains all of the opinions and the bases and reasons for them required by (iii)." The committee note explains:

> Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

E. Supplementing and Correcting Disclosures

To deal with the possibility that a party might decide to have the expert testify on additional, different, or fewer issues than those covered in the first disclosure, subsections (a)(1)(G)(vi) and (b)(1)(C)(vi) require that a party promptly supplement or correct each disclosure to the other party in accordance with Rule 16(c). As the committee note explains, this provision is meant to ensure that a party will receive prompt notice of any modification, expansion, or contraction of the opposing party's expert testimony, or any change in the identity of an expert, after the initial disclosure.

The Committee considered but decided to make no change to address a concern, raised at the Standing Committee meeting, that the supplementation requirement might encourage or permit gamesmanship or pro forma disclosures intended to prompt the other side to reveal its strategy. The supplementation requirement is already in the current rule and has not generated

these kinds of problems. But the Committee will be alert to this issue during the public-comment period.

F. Limiting the Disclosure Obligation of the Defense to Expert Testimony to be Presented in its "Case-in-Chief"; Clarifying Obligation Regarding Government Rebuttal Witnesses

The proposal makes an additional change to the current rule to ensure that the defendant's disclosure obligations remain no broader than those of the government. A close comparison of current (a)(1)(G) and (b)(1)(C) revealed one difference in the two provisions: subsection (a)(1)(G) requires the government to disclose testimony it intends to use in its "case-in-chief," whereas subsection (b)(1)(C) requires of the defendant to disclose any expert testimony it intends to use "as evidence at trial." The Reporters and the Rules Committee Staff were unable to find any explanation for this difference in the Committee's archives, and members were unable to identify any explanation for it. The Committee concluded that the defendant's disclosure should be no broader than the government's. Indeed, any rule requiring the defense to disclose more information than the government would likely be unconstitutional. *See Wardius v. Oregon*, 412 U.S. 470 (1973).

Subsection (b)(1)(C)(i) of the proposed amendment therefore requires the defense to disclose testimony it intends to use in its "case-in-chief[.]" This revision, as explained in the draft committee note, is not intended to require any change from current practice, which has treated the parties' disclosure obligations as identical.

The Committee revisited this issue in May, in response to Judge Campbell's comments at the Standing Committee meeting, in January. Judge Campbell suggested then that perhaps both parties should be required to disclose all the expert testimony they intend to use "at trial," rather than the testimony they intend to present in their "case-in-chief." The reporters noted, in their memorandum and at the May meeting, that the phrase "case-in-chief" was used throughout the remainder of Rule 16—specifically in the provisions governing pretrial disclosure of documents, objects, and reports of examinations and tests. Thus, any decision to substitute the phrase "evidence at trial" for "case-in-chief" might require revision of the other subsections of Rule 16. After considerable discussion, the Committee reaffirmed its decision to use the phrase "case-in-chief" to describe the scope of the defendant's disclosure obligation.

The Committee also decided to propose new text to deal directly with the issue of rebuttal expert witnesses. Specifically, in (a)(1)(G)(i), the Committee added language requiring the government to disclose not only testimony it intends to use in its case-in-chief, but also testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)."[4] The Committee concluded this change was needed to address the core challenge addressed by the proposal: providing adequate notice to the defendant of expert testimony that the government knew—before trial—that it would use at trial. Members agreed

[4] As discussed above, Rule 16(b)(1)(C), if amended as proposed, would require the defense to disclose by the deadline set "sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence."

that it would be unfair to require the defense to disclose its experts before trial and not require the government to disclose before trial the experts it knows it will use to rebut that testimony.

Committee members unanimously supported this change, so long as the obligation was limited to experts intended to rebut testimony the defendant had timely disclosed under (b)(1)(C). There was no support for requiring a defendant to disclose an expert the defendant would use to rebut a government's rebuttal expert. The government had not suggested that lack of notice regarding such surrebuttal experts was a problem, and members agreed that under the current rule district judges can manage that situation. As revised, (a)(1)(G)(i) requires the government to disclose:

> any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).

At the May meeting, a representative of the Department of Justice expressed concern that this language might prevent the government from introducing a rebuttal witness to respond to a defense expert whose testimony had not been disclosed before trial. Members carefully reviewed the amendment and concluded that it would not prevent the government from responding to a midtrial surprise defense expert. First, (a)(1)(G)(i) requires the government to disclose rebuttal witnesses *only* when it is responding to "testimony that *the defendant has timely disclosed* under (b)(1)(C)" (emphasis added). Timely disclosure is defined under (b)(1)(C)(ii) as disclosure "sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence." Unexpected expert testimony from the defense would not have been "timely disclosed" and thus would not trigger the government's disclosure obligation. The Reporters also noted that the committee note emphasizes that the disclosure deadlines should reflect "the time the government would need to find a witness to rebut an expert disclosure by the defense."

G. Constitutional Concerns

At the Standing Committee meeting, Judge Campbell also asked the Advisory Committee to address any constitutional issues that might be raised by the proposal, and other members expressed concern that requiring the defendant to provide expanded expert witness disclosures (or perhaps any disclosures of his defense) before trial would violate the defendant's constitutional rights.

Fifth Amendment objections to Rule 16 are governed by the Supreme Court's opinion in *Williams v. Florida*, 399 U.S. 78 (1970). Over a strong dissent by Justice Black, the Court upheld a Florida rule that required the defendant to provide pretrial notice that he intended to raise an alibi defense, and to disclose the witnesses he intended to call to make this defense. The Court held that the rule did not violate the privilege against compelled self-incrimination because it merely accelerated the choice the defendant would have to make at trial, avoiding the need for the court to grant a continuance.[5]

[5] The Court stated:

Similarly, Rule 16 leaves to the defendant the choice whether to present evidence or remain silent. But the rule requires the defendant to disclose certain evidence before trial, during reciprocal discovery. Under *Williams*, Rule 16's provisions requiring reciprocal discovery withstood any Fifth Amendment challenges. The proposal's codification of the need to set a time for disclosure and the minimum content required should not change that. Nor would restricting the scope of defense disclosure to witnesses to be presented in the defendant's case-in-chief.

II. Information Items

A. Implementing the CARES Act; Emergency Rules

Enacted in response to the COVID-19 emergency, the CARES Act directs the Judicial Conference to "consider rule amendments . . . that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act." Judge Kethledge has appointed a subcommittee, chaired by Judge Dever, to develop proposals for consideration at the Committee's fall meeting.

At the Advisory Committee's May meeting, Judge Campbell provided guidance to the Committee on two points. The first was an aspirational timeline for the Committee's work. He commented that given the legislative directive and the current situation, his goal was publication of proposed amendments in August 2021, revisions as needed in the spring of 2022, and transmittal to the Judicial Conference after the Standing Committee's meeting in June 2022.

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments.
>
> Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

399 U.S. at 834-85.

Following transmission to the Supreme Court and then Congress, the rules could go into effect December 1, 2023. That is fast by the normal standards of the Rules Enabling Act process, but slow in comparison to the legislative process. Judge Campbell also emphasized, however, that it was ultimately more important to be correct than to be quick. Second, he emphasized that the Committee's work need not be limited to national emergencies, but should anticipate the wide range of emergencies that federal courts might face at a local, regional, or national level.

Members identified several overriding issues and principles for consideration by the subcommittee. These included the need to allow for variation among districts facing different conditions, concerns about the heavy reliance on technology (which increases the vulnerability to hacking and exposes the limitations of the current platforms), the need for broad consultation including Criminal Justice Act attorneys, and the need to preserve public and media access and victims' rights. Members also began to identify particular rules for consideration, including Rule 53 (which prohibits broadcasting and thus restricts public access), filing deadlines in Rules 33 and 35, and the rules governing jury trials and grand jury proceedings.

One member proposed several issues to be considered by the subcommittee:

- How to define the kinds of circumstances that would give rise to the authority to vary the normal procedural rules? What conditions would impair the authority or ability of the courts to perform their constitutional functions?

- Who should decide if the triggering conditions are met? Which decision makers would be most apolitical and unbiased? (The Judicial Conference of the United States has authority under the CARES Act to terminate the emergency procedures.)

- Should there be different processes when the emergency is local or regional? (COVID-19 is national, but Hurricane Katrina and Superstorm Sandy were regional, and the Oklahoma City bombing was local.)

- What procedures not permitted by the existing rules should be authorized?

- How would the emergency authority be terminated?

The subcommittee will meet throughout the summer by teleconference, with the goal of having proposals for discussion at the Advisory Committee's fall meeting.

B. Rule 6(e); Grand Jury Secrecy

The Advisory Committee has received two formal suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy. In addition, two recent judicial decisions contain statements in support of considering an amendment to the secrecy provisions of Rule 6.

The proposal from Public Citizen Litigation Group and five associations of historians and archivists[6] (collectively, "Public Citizen") seeks a change in Rule 6 to allow disclosure of historical materials because of recent decisions holding that Rule 6 does not permit district courts to release such materials. Public Citizen argues that the recent decisions provide a basis for revisiting the Committee's decision in 2012 not to pursue Attorney General Eric Holder's proposal to authorize disclosure of historical materials under specified circumstances. Public Citizen notes that the circuits have conflicting decisions on this issue. Moreover, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer stated "the Rules Committee both can and should revisit" this issue. *Id.* at 598 (Breyer, J., concurring).

PCLG and the other groups propose two changes: an exception to the rule of secrecy for grand jury materials of "historical importance" and an explicit statement that "Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."

The Committee also received a suggestion from the Reporters Committee for Freedom of the Press and 30 additional media organizations. These groups urge that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The Reporters Committee and media organizations propose language that, in their view, "mirrors the flexible test that has been applied by courts in this context, [and] better balances the public's interest in obtaining access to grand jury materials of particular historical and public interest with the interests underlying grand jury secrecy." They support not only authority addressing materials of "historical or public interest," but also an explicit statement that "Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances."

The most recent judicial decision on the district court's authority, the Eleventh Circuit's en banc decision in *Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir. 2020), held that district courts have no inherent authority to authorize the release of grand jury materials not included in Rule 6(e)(3)'s enumerated exceptions. In a concurring opinion in *Pitch*, Judge Jordan urged the Committee to consider amending the rule.

> Although the Advisory Committee deemed Attorney General Holder's proposed amendment unnecessary, its determination implicitly contemplated that a historical importance exception might be ripe for consideration at some future date. Given the current circuit split and the Supreme Court's recent denial of certiorari on the issue, see *McKeever v. Barr*, —– U.S. ——–, 140 S. Ct. 597, 205 L.Ed.2d 529 (2020), it appears that day is upon us. *See id.* at 598 (Breyer, J., respecting the denial of certiorari) (noting that this is an "important question" that the Rules Committee "can and should revisit"). I therefore urge the Advisory Committee on Criminal

[6] The other groups supporting PCLG are the American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists.

> Rules to consider whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance and, if so, under what circumstances.

*Id***.** at 1250 (footnote omitted).

Members briefly discussed the proposals at the spring meeting. The Department of Justice expressed its continued support of some amendment that would authorize the release of historically important grand jury material and requested that any consideration of these proposals also include whether to authorize delayed disclosure of witnesses or material subpoenaed by the grand jury. The discussion also touched upon the challenges that any effort to address the scope of the courts' inherent authority to act outside the rule would encounter.

The Advisory Committee unanimously agreed that a subcommittee should be appointed to consider the proposals.

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APPENDIX

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

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(G) Expert witnesses.

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the government intends to use at trial under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ during its case-in-chief ~~at trial~~, or during its rebuttal to counter testimony that the

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

defendant has timely disclosed under (b)(1)(C). If the government requests discovery under ~~subdivision~~ (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ testimony that the government intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the government to make the disclosure. The time must be

sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure ~~summary provided under this subparagraph~~ must contain:

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for ~~those opinions~~ them; ~~and~~

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure in accordance with (c).

* * * * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(C) Expert witnesses.

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the defendant intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence~~ during the defendant's case-in-chief at trial, if:

~~(i)~~ ● the defendant requests disclosure under ~~subdivision~~ (a)(1)(G) and the government complies; or

~~(ii)~~ ● the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. ~~This~~The ~~summary~~ disclosure must contain:

● a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness in the defendant's case-in-chief;

- the bases and reasons for them~~those opinions~~; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

* * * * *

Committee Note

The amendment addresses two shortcomings of the prior provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) generally mirror one another. The amendment to (b)(1)(C) includes the limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the disclosure obligation to testimony the defendant will use in the defendant's "case-in-chief." Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C), this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current practice in this respect is intended.

The amendment to (a)(1)(G) also clarifies that the government's disclosure obligation includes not only the testimony it intends to use in its case-in-chief, but also testimony it intends to use to rebut testimony timely disclosed by the defense under (b)(1)(C).

To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (a)(1)(G)(ii) and

(b)(1)(C)(ii) provide that the court, by order or local rule, must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party. Deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order.

Subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leave to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Subparagraphs (a)(1)(G)(iv) and (b)(1)(C)(iv) also recognize that, in some situations, information that a party

must disclose about opinions and the bases and reasons for those opinions may have been provided previously in a report (including accompanying documents) of an examination or test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be repeated in the expert disclosure, if the expert disclosure clearly identifies the information and the prior report in which it was provided.

Subparagraphs (a)(1)(G)(v) and (b)(1)(C)(v) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize two exceptions to this requirement. First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts. Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications,

publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

Subparagraphs (a)(1)(G)(vi) and (b)(1)(C)(vi) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that, if there is any modification, expansion, or contraction of a party's expert testimony, or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that correction or modification.

TAB 6B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
May 5, 2020

Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met by video teleconference on May 5, 2020. The following members, liaison members, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge James C. Dever
Professor Roger A. Fairfax, Jr.
Judge Gary S. Feinerman
Judge Michael J. Garcia
Andrew Goldsmith, Esq.[1]
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Bruce McGivern
Judge Jacqueline H. Nguyen
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Standing Committee Reporter
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Allison Bruff, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center

Ms. Donna Elm, Esq., a former member, was in attendance. And the following attended as observers:

Patrick Eagan, from the American College of Trial Lawyers
Peter Goldberger, from the National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16

[1] Mr. Goldsmith and Mr. Wroblewski represented the Department of Justice.

Opening Business

Judge Kethledge observed that it was the first meeting for Judge Nguyen and Professor Fairfax, and he noted that this was Judge Campbell's last Criminal Rules meeting as chair of the Standing Committee. He thanked Judge Campbell for his outstanding contributions to the Advisory Committee's work, particularly his suggestion of the miniconferences that were critical to the development of the Rule 16 and 16.1 proposals. Judge Kethledge also noted that the terms of Judge Dever and Judge Feinerman were expiring, and he thanked them for their service.

Judge Kethledge thanked Ms. Elm for joining the meeting. After making significant contributions at the Committee's Rule 16.1 miniconference, Ms. Elm joined the Advisory Committee as the representative from the Federal Public Defender world. Although she retired from the committee after our fall meeting, Ms. Elm had been asked to continue in an informal capacity to provide her perspective until her replacement has been named.

Judge Kethledge presented the Rules Committee Staff report, referring members to the agenda book materials. He added that the Supreme Court transmitted newly adopted rules to Congress on April 27 (though there were no Criminal Rules included), and that the CARES Act (included in the legislation chart) would be discussed later in meeting.

The minutes were unanimously approved with two changes:

Page 36 – third bullet should read "defendant states" and not "government states"
Page 37 – fourth paragraph contains word "allegations" when it should read "obligations."

Rule 16

Judge Kethledge moved to item 2 on the agenda, the proposed amendment to Criminal Rule 16. After summarizing the history of the Advisory Committee's effort to amend the expert disclosure provisions of Rule 16, he turned to two concerns that were raised during the Standing Committee's discussion of the draft proposal at its January meeting.

Defendant's "case-in-chief"; government rebuttal witnesses. At the Standing Committee meeting, Judge Campbell asked the Advisory Committee to examine further its decision to change the scope of the defense disclosure from that in the current rule—testimony the defense intends to present as "evidence at trial"—to testimony it intends to present "in its case-in-chief." He suggested that if the rule should be reciprocal, perhaps each party should disclose expert testimony intended as "evidence at trial." The reporters examined this suggestion in their memorandum to the subcommittee (Tab 2B, p. 101 of the agenda book), and the subcommittee discussed it at length.

Ultimately, Judge Kethledge explained, the subcommittee decided to (1) retain the case-in-chief term for both the government and defense disclosures and (2) add new language

regarding the government's obligation to disclose certain rebuttal expert witnesses. The language, suggested by Judge Feinerman and approved unanimously by the subcommittee, appears on lines 12 through 14 of the proposed amendments to the rule, on page 131. It requires disclosure of evidence the government intends to use at trial "during its case in chief or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." In the subcommittee's view, this is a sensible addition and is needed to provide adequate notice to the defendant of expert testimony that the government knew—before trial—that it would be using at trial. But it was limited to government experts intended to rebut an expert the defendant had already disclosed in a timely manner prior to trial. To explain this addition, language in the note was added at lines 15-17 on p 125.

Mr. Wroblewski commented that he had concerns about how this process would actually work in practice, noting that in the Department's experience most of this happens very close to trial and not, as in civil cases, months and months before trial. The Department requested the language in the note that would alert the trial judge that there needs to be sufficient time between each of these disclosures to allow the other side time to respond, including allowing the government to respond to the defendant's disclosure. Despite the reservations, for the time being the Department supports it and thinks it is a sensible, orderly process, he said. He will circulate this proposal around the Department and might come back with some suggested changes later on.

Mr. Goldsmith agreed that this is a fair and reasonable solution, but he was concerned about what would occur when a defense expert pops up during or just before trial. He suggested the note could make it clearer that the government's obligation is not triggered unless the defense has done what it supposed to do under the Rules. In practice these rules most of the time are going to be applied against the government. Judges rarely preclude the defense from putting on an expert because of its failure to comply with Rule 16. This is potentially a trap for prosecutors if they attempt to have an expert respond to a defense expert that popped up at the last minute, since it requires an understanding that the government has a pretrial disclosure obligation only if it got the timely defense disclosure prior to trial. So this is a good solution, but he wondered if there were a way to make it clearer that when the defense has not made the required pretrial disclosure, the government's obligation does not kick in.

Judge Campbell said the additional language was a good change, and it addressed the issue he had raised. Mr. Goldsmith's concern is addressed to some degree by the language that will now be in 16(b)(1)(C)(ii), p. 136, lines 82-84, which says that the time for the defense disclosure must be sufficiently *before* trial to provide a fair opportunity for the government to meet the defendant's evidence. The way the government meets the defendant's evidence is with another expert. This is clearly required in the rule and seems fairly obvious. Judge Campbell also suggested adding something in the note that says the judge should keep in mind that the government may need to identify an expert after the defense disclosures and should take that into account in deciding when everybody's disclosures are due. When Professor King drew his attention to the note language on page 125 of the agenda book, line 26 ("Deadlines should

accommodate the time . . . the government would need to find a witness to rebut an expert disclosed by the defense"), Judge Campbell said that it addressed his concern.

Speaking to Mr. Goldsmith's concern, Professor Beale said she thought the rule was clear. It says in response to "timely disclosure" and specifies when the defense must disclose. If the defense makes an untimely disclosure, then presumably the judge is not going to penalize the government for its failure to disclose in response.

Mr. Goldsmith expressed concern that people would stop reading at line 17 of the note and not read the next paragraph. It would be helpful to have something on line 17 that refers to the language that follows. He also suggested that because government rebuttal witnesses are more likely to come up as a result of what happens at trial, rather than as a result of what happens pretrial, to make it clear that this is contemplated in the pretrial context, this could read disclosed "pretrial" under (b)(1)(C). Professor Beale asked how district judges' orders address something that pops up during the middle of trial.

Judge Campbell responded that he could not imagine a judge would preclude the government from using an expert who was only needed when after the trial began because the expert was not disclosed before trial. That's not going to happen. It is implicit in line 17 that we are talking about pretrial disclosures. He did not share the concern that the government will be trapped when the defense disclosure comes so late. Several other members expressed agreement with Judge Campbell's comments. One also pointed to subsection (b)(1)(C)(ii), which tells the court that it must set the time for the defendant to make a disclosure, and that time must be sufficiently "before trial" for the government to meet the defendant's evidence. Another explained that most district judges would consider whether the late defense disclosure was gamesmanship or was triggered by the way the government presented its case-in-chief, and that the word "timely" adequately protects the government.

Mr. Goldsmith said the language in (b)(1)(C)(ii) that the disclosure must be sufficiently before trial allayed his concern. He added that the concern is not only that a previously undisclosed expert appears. It is also when an expert takes the stand and strays into a different area. The concern is adequately addressed, and he appreciated the Committee's indulgence on this tangent.

Delayed disclosure of expert witness identity. Judge Kethledge noted that a second issue about the draft amendments, raised by Judge Furman at the Standing Committee meeting, concerned situations where the government knows it will put on an expert on a certain subject, but might not know in advance who that person will be. This might be, for example, a firearms forensic expert who would give a generic kind of testimony. Judge Furman had suggested adding something to the note to encourage district courts to have some flexibility with regard to the timing of the government's disclosure of the identity of such an expert. After discussion in its March call, the subcommittee decided to revise the note but not the rule.

The purpose of the amendment is to address the lack of a clear timeline for disclosures and the lack of specificity about what each party must disclose with respect to its experts, Judge

Kethledge explained. The subcommittee did not want to undermine the amendment by allowing parties to delay identifying their witness unless there is a very good reason for that delay. If the party receiving the disclosure doesn't know who the witness is, then it will not receive a lot of the information we are trying to convey. The subcommittee thought that we ought to retain as a default that the party wishing to put on an expert must disclose that expert's identity. If for some reason that presents a hardship, then the party should seek a modified deadline from the district court for the disclosure of the identity. The subcommittee added language in the note about the possibility that a party could change the identity, through a supplementation. Judge Kethledge stated that the government's feet would not be in cement with an expert it disclosed up front. It can supplement with the name of a different person. But the default is important, and it should apply to all experts unless somebody has a reason why they cannot reasonably give the identity first.

Judge Furman noted there are often experts who are generic, such as a firearms expert who testifies that DNA was not found on the gun. In such cases, the government can easily disclose, by whatever early deadline the court sets, that it anticipates presenting that testimony. But it is not in a position at that time to say who the examiner will be because it won't know when trial will be scheduled and who would be available. The concern was that there be enough flexibility that it wouldn't prevent the government from calling someone in those circumstances. He thought the committee went a good distance to address the concern in lines 75-78, p. 127, "or change in the identity of the expert." But this presumes that a person was identified in the first instance, and a judge could conceivably read this not to allow for partial disclosure of the early part and then later supplementation, which is routine when the identity of the person in those cases is not critical. He suggested adding another sentence like "It is also intended to address situations in which a party is able to make only a partial disclosure in the first instance, for example where a party intends to use expert testimony on a particular subject but is not in a position to identify the witness until closer to trial." He did not want to dilute the virtue of setting the early deadline, but was trying to find a way to leave room for flexibility.

Professor Beale said that when either party knows it is going to have an expert but doesn't know who that will be, that is a Rule 16(d) issue where you ask to delay the disclosure of the identity. If the testimony is generic and the defense is not concerned, then they won't object. But the defense may say, "No, this is important. We want to see if they have any publications. We think that you need to designate the identity and here's why we think it's important." The default ought to be that you get everything the rule requires, so that you can examine what the expert has done before, etc. There may be a class of cases where the government or the defendant can persuasively explain why there wouldn't be any detriment to the other side, and they will have plenty of chance to prepare. But if it is just the convenience of the government, that shouldn't outweigh an important interest of the defendant in getting the witness's name, prior testimony, and publications.

A member noted that ATF agents, or the gas chromatograph person, most of those things don't matter too much, and a lot of times the defense will stipulate. Often the defense has lived

just fine with knowing that somebody is going to come in and say that the gun was manufactured in another state. It is not a material issue. The only area where the defense tends to have a problem is the cop as expert, where they say we will have somebody come in and say this was a drug transaction. In that situation, the defense really needs to know the name and other information required by the amendment.

Judge Furman agreed that the key is to ferret these things out early so that if something is material defense counsel can ask the court to either order the government to disclose, or the parties can discuss it. His concern was the note, as written, does not reflect that. He asked that the note spell out that where the identity is not particularly critical and the government does not want to lock itself into to a particular expert, it can get either a protective order under 16(d), or disclose and the defense counsel can raise it with the judge if they need more information.

Professor Beale noted the language on lines 48-51 discusses a similar situation, so if it would be unduly burdensome to provide the name of a specific expert, under 16(d) the government should say, we can give you the substance but we want to give you the name of the person later. Any new language should go in that part of the note. It is the same idea that the court can modify these obligations if something is unduly burdensome.

Judge Furman said that the text of the rule and the note presume that a person is identified by the deadline and does not describe the scenario he was concerned about it. He suggested adding: "If the identity of the expert is not critical and it is not practicable to identify the expert early . . . ."

Judge Kethledge commented that this is something the government could talk about in the meet and confer, and the parties could get that sorted out before they come to the district judge and offer something that reflects a reasonable accommodation. He asked Judge Furman if he would accept that the court would have to take some action to allow the delay, and Judge Furman agreed.

Mr. Wroblewski said that the Department agreed that the rule ought to require that the substance of what the expert is going to testify about should be disclosed regardless of whether the identity of the actual human being who will testify can be identified. There is consensus on making sure the parties are informed as to what will be testified to and allowing the other party to prepare. He discussed this with some of the government's experts and AUSAs, and they read the language as requiring some placeholder name that could be changed later. That seems like an artificial way to deal with it, and it is not consistent with actual practice. So he supported the additional sentence that Judge Furman suggested. The substance must be disclosed ahead of time so that the other party has an opportunity to prepare, but if the offering party goes to the judge and says we are not going to be able to identify the actual human being for a while, that is contemplated and permissible. And the government was fine with a requirement that it must go to the court and ask for that.

Mr. Goldsmith suggested that judicial approval need not be required if the parties agree. Most of the time this will be noncontroversial, and to have to run this through the district court seems like an unnecessary step.

Judge Kethledge commented that the note currently contemplates (lines 36-38) that the parties will meet and confer under Rule 16.1 and share the results of that meeting before the district court sets the deadline. His sense was that if the parties do agree that the government can disclose the identity of a government expert witness later than the timing of the other expert disclosures, then the district courts' timing order itself could reflect that.

Judge Kethledge said he would ask the reporters to work on Judge Furman's proposed addition to the note over a break.

Having covered the principle concerns raised in the Standing Committee's meeting, he asked for any other comments regarding the rule text. Although the members approved most of the text during the last meeting, Judge Kethledge asked if they had additional thoughts or comments. No one had anything to add.

Note language summary. Judge Kethledge then asked the reporters to review changes in the note since the last meeting. Professor Beale said the order of the paragraphs had been reorganized to follow the flow of the rule itself. There were no significant changes in the first paragraph. In the second paragraph there was some modification of the way in which the note refers to the various subsections of the rule.

Lines 9-12 include the reference to the defendant's "case-in-chief" that was discussed earlier. Judge Campbell and others suggested that it was very important for the note to give the history and the rationale for the change. As the reporters' memo explains, somewhere along the line the text was changed from "case-in-chief" to "evidence at trial," seeming to expand the scope of the defense obligation. How or why that language was added is still a mystery. Our memo notes that if the defense disclosure obligations were broader than the government's, we think that would be a constitutional problem. The subcommittee worked through this and did not believe it is a change in practice to use the term "case-in-chief."

We discussed earlier the new language on lines 15-17 that refers to the government's disclosure of particular rebuttal witnesses. This requires the government to disclose a rebuttal witness only if that witness is in response to a timely pretrial disclosure by the defense. As members noted, the timely disclosure is in time for the government to prepare for trial. This three-stage process is like the trial: government's witnesses, the defense case-in-chief, then government rebuttal.

Professor King added that because language about the disclosure of rebuttal witnesses was added to the government's disclosure provisions but no similar language about defense disclosure of rebuttal witnesses was added to (b)(1)(C), it was necessary to add the word "generally" before the words "mirror one another" on line 9.

In the fourth paragraph, she continued, the only new addition is on lines 26-27. The new clause reads "or the time the government would need to find a witness to rebut a disclosure by the defense." Judge Campbell and another member suggested the cross references here and elsewhere be more complete, and the reporters agreed to do so.

Professor Beale noted that in the next paragraph, at line 35, the subcommittee had unanimously approved a member's suggestion that because the Speedy Trial Act does not grant authority to change discovery deadlines, the note should read "discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines . . . ."

Professor King noted the language on lines 36-38 reflected the Committee's position at its last meeting that the judge should take into account the Rule 16.1 meeting in deciding when to set the disclosure deadlines. There was some concern that that the new rule could be read to require the judge to announce the deadlines at a particular time, and the note states the judge retains discretion and suggests only that the judge consider the parties' recommendations.

Professor Beale added that at the spring meeting the Committee recognized that the rule never set any timing requirements for announcing the deadlines, but there was concern that somehow people would read them in.

Professor King pointed out that two sentences had been removed from the end of the next paragraph. There was a concern at the last Committee meeting that practitioners and judges would read the new amendments as incorporating jot by jot all of Rule 26's requirements, so there was language about this added to the note. The subcommittee decided, however, that the added language was more trouble than it is worth and recommended it be deleted. The language that was removed is in the reporters' memo on page 97 of the agenda book. It had appeared after the sentence that read "Although the language of some of these provisions . . . . Which differ in many cases."

Lines 48-51 of the draft note contain the language discussed earlier, stating a party could seek a modification under Rule 16(d) should there be an expert who testifies so often that is too burdensome to catalogue all of that person's prior testimony. Professor Beale noted that this is the place where we may decide to put new language that will address the situation in which identifying the person who will testify might be too burdensome.

Professor King moved to lines 52-57, which refer to the situation where a party may have disclosed a report that already included much of the information that would be required in the expert witness disclosure. The one change that was made to this paragraph after the Committee's earlier meeting is the parenthetical on line 54 "(including accompanying documents)." The Department of Justice was concerned that some people may think that the report does not include those accompanying documents, and suggested this addition, which the subcommittee approved.

The last paragraph on page 126 concerns the signature requirement. The amended provisions recognize two exceptions. The first is when a party cannot obtain the signature despite reasonable efforts to do so; it gives an example of a witness who is not retained or employed

specifically to give the testimony. The second exception is on page 127. No signature is required if "a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided" to the defendant. This essentially carves the disclosure into two pieces as far as the signature is concerned. One piece that definitely has to be signed by the expert is the opinions, bases, and reasons. In the specific situation where a report has already provided this information, there is no need for the expert to sign the representation of publications, qualifications, and prior testimony. It is enough if that information comes from the attorney, when all of the opinions and the bases and reasons for those opinions were set forth in a report that was signed by the expert and disclosed to the defense.

Professor Beale said that second exception was intended to respond to the government's concern that under the new protocols many of its experts must abide by, if they had to sign anything more than the report they'd already produced, they would have to run everything through the review process again. It would be difficult to get them to do that, and provide no real value. You might think it wouldn't be that hard to get an expert to sign something saying these are my credentials, my publications, and my prior testimony and everything else is in my report. But for some experts, the Department told us, that would trigger the requirement to run the whole thing back again through their review process. This is an effort to make the process work better for certain experts.

The reporters also noted that the last paragraph of the note on supplementation and correction has the added language about change in identity mentioned before.

Judge Kethledge solicited comments or questions on the note language.

Distinguishing Civil Rule 26. Judge Campbell expressed continued concern about the issue at lines 45-47. The note says that we are not intending to replicate all aspects of the civil rule but does not say which we are and which we aren't. He was concerned that we are adding language taken verbatim from Civil Rule 26 into Rule 16, requiring that the disclosure "must contain a complete statement of all opinions." As he had mentioned before, the Committee Note to Rule 26 says that the expert "must prepare a detailed complete written report stating the testimony the witness is expected to present during direct examination," and many trial judges, himself included, really hold parties to that. It has to be almost a verbatim statement of the testimony that is going to be given in a civil trial. Part of the intent of the 1993 amendment to the Civil Rules was to eliminate the need to depose experts because you know everything that they are going to say. Since we are carrying over the exact same wording ("a complete statement of all opinions"), a judge reading the language on lines 45-47 would think obviously one thing the Committee did intend to bring over is the requirement that this be a verbatim statement of the opinions. He did not think that is what this Committee intended. If it is, fine. But if it is not, he suggested two possible changes.

The first was to change the use of the word "testimony" in the note, lines 4 and 5. Replacing "testimony" with "opinions," not intended to be an actual statement of the "opinions,"

might help. There are about ten places in the note where it says testimony. That would help. The second change would be to add a sentence at line 47 that addresses this head on, and says "The amendment requires a complete statement of all the opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial." This would make it clear we are not carrying over that obligation of the civil rules even though it is a more robust disclosure than we had before.

Judge Kethledge said this was helpful and asked for reactions to those suggestions.

One member said that as a defender she liked the word "testimony." She thought the word "opinions" is looser, "testimony" is more specific. The defense sometimes gets very vague, nebulous notice, and the word "testimony" tends to pin that down. Perhaps a compromise would be adding Judge Campbell's language to the end of that paragraph without changing the word "testimony" throughout.

Another member stated he thought Judge Campbell had put his finger on something important, and he supported the suggestion. When asked about whether to cure this by an express statement at the end of line 47 that the disclosure need not be a verbatim recitation of the testimony as opposed to change "testimony" to "opinions" elsewhere, this member expressed the view that "testimony" is more nebulous than "opinions." "Opinions" gives the defense a better position than it has under "testimony." He commented that it would never occur to him that it is necessary to have a report that states *in haec verba* everything the witness is going to say.

Judge Campbell stated that he was not concerned about changing the word "testimony" to "opinions" if we do have that clear statement that we are not carrying over that concept from the Civil Rules, assuming it is not the Committee's intent to carry over that concept.

Mr. Wroblewski said that the Committee and the subcommittee agree that the complete statement is of the opinions. The rule itself says complete statement of "opinions," not "testimony," and the added sentence that Judge Campbell suggested would be well advised.

Judge Kethledge agreed that unless someone has a specific, concrete reasons to change from "testimony" to "opinions" throughout, then we ought to go with the narrower cure, so we don't inadvertently change something with a broader approach. The language that we have now has been vetted repeatedly. Judge Campbell's suggestion to go just with the sentence is the narrower way to do this.

Professor Beale agreed that the targeted sentence seems to do the job without making other changes that might set off broader consequences.

A member moved that the Committee adopt only the sentence Judge Campbell suggested: "The amendment requires a complete statement of all opinions the expert will provide, but does not require verbatim recitation of the testimony the expert will give at trial." The motion was seconded and passed unanimously by voice vote.

A member returned to the language at lines 45-47 and asked what it adds. Couldn't that be omitted? Professor Beale explained that that sentence was a first step in responding to Judge Campbell's concern that there would be an assumption that everything would be carried over from Civil Rule 26, even if it didn't fit criminal practice. She was inclined to leave it in, particularly along with the new sentence which is the sharpest point of departure from civil practice. It was the judges and the Department that raised this issue because they see many civil cases. Noting that she had never been a civil litigator, she was not sure what all the differences are that would spring to the judicial mind. We certainly don't intend to bring over everything. The sentence at least gives courts a signal that you need to tailor this to fit criminal practice. It is not specific, but Judge Campbell's new sentence would make that one particular point more definite. Are there other specific things we would not want carried over? If not, then the new sentence is enough.

Judge Campbell explained that district judges spend a fair amount of time dealing with expert witnesses in civil cases, addressing it in every case management conference, policing it during pretrial issues, dealing with *Daubert* motions, setting strict rules about what can be done at trial. We live in that world, and this is an important signal that that world is not being carried over. The biggest concern was the notion of the verbatim statement, but there are other practices as well that judges adopt in their own case management orders for civil experts, and we still need to signal that we are not making this a Criminal Rule 26. It is a full disclosure requirement, but it is not intended to pull over all of that other stuff, and we cannot anticipate all of what that might be. Because judges live in that world with their civil practice it is an important signal to send.

Mr. Wroblewski agreed and added that this effort began when Judges Rakoff and Grimm in separate proposals both suggested bringing over all of Civil Rule 26 and the Committee quickly realized that was not a good idea. Without that sentence, especially in light of the legislative history of where this began, there will be confusion. We had very long discussions about this because Civil Rule 26 doesn't only require the verbatim disclosure, it has a whole structure that we are not bringing in, which differentiates between retained witnesses with verbatim testimony and witnesses who are not retained—who must provide a summary. This rule is different. We are not going to have the word summary in there, but we are not going to bring in the verbatim requirement. This sentence is important along with Judge Campbell's additional sentence to make the Committee's intent clear.

Judge Kethledge agreed that this sentence arises from a context where judges are inhabiting one world of civil expert disclosure, and it reminds them they can't bring all of those assumptions over. He asked the member if this discussion addresses her concerns and she said yes, noting that as a criminal practitioner, she is not familiar with that Rule 26 world. This could be a signal for people who are.

Publications. Judge Campbell asked the Department of Justice representatives if there was any ambiguity as to the word "publications." Many witnesses who testify may have created reports and papers for Department purposes. Is "publications" clear that it will not include those things? Or maybe it is intended to include those.

Mr. Wroblewski responded that there was no sense of ambiguity about the word "publications" when the language was circulated earlier. Most people thought they understood what it did and didn't mean. But after the rule is published for public comment the Department will bring this to the attention to both its forensic folks and its AUSAs to see if they have any concerns.

Returning to note language about delayed disclosure of identity. With no more comments on the text or note language, Judge Kethledge recessed the meeting for a break while he and the reporters worked with Judge Furman's proposed note language regarding delaying the disclosure of the identity of the expert.

After the break, Professor Beale reported that the draft language, to be inserted on line 29 of the note after the sentence that started "On occasion," currently read as follows: "Alternatively, it may be possible to provide a complete statement of an expert's opinions, the bases and reasons for them, but not practicable to identify the proposed witness until closer to trial, and the identity of the witness may not be critical to provide the other party with a fair opportunity to meet the evidence." That ensures, she said, that the complete statement of opinions, basis and reasons for them are provided on time. Even if you can't give prior testimony and publications of the expert, it is important to give the substance. It also has the idea that it is not critical to know the identity in the case. Under those circumstances it says a party may go to the judge to modify or delay discovery for that witness.

Judge Campbell asked whether it needed to say this was a narrow window, adding "in limited circumstances," or "in rare circumstances." Professor Beale responded this had been debated earlier in the Committee. The initial language was "In rare cases." We changed it in response to the Department's concerns to "On occasion." That suggests this is not a giant loophole that everyone can drive through, but there are cases where this is needed. It would be common as to certain types of testimony. Judge Furman added that the concern is handled by Rule 16(d) requiring good cause.[2]

The reporters' redrafted insert was shared on the screen: "Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial."

Judge Furman agreed this did the job.

Delayed identification and the signature requirement. A member asked how this provision correlates with the signature requirement. If there is no named expert there can't be a signature for the opinion. Professor Beale said that there is an exception to the signature

[2] After members offered several different suggestions for modifying the draft sentence, Judge Kethledge moved on to other items on the agenda while the reporters worked further on the language. The Committee's discussion of these agenda items appears below following the discussion regarding Rule 16.

requirement if obtaining the signature was not possible with reasonable efforts; then the party could ask for a modification. That would be the case when they don't know who the witness is. The member was concerned that to say in some situations the identity of the witness is not critical may undermine the need for the signature. Judge Kethledge said he didn't think either the court or the opposing party is going to adopt lightly the idea that the witnesses' identity is not critical or is not important. As to the signature requirement itself, he said it has an impeachment purpose not a disclosure purpose, and it seems that so long as the witness signs the disclosure before trial, that purpose is served. If there is a delayed identification, it will not impair any interest served by the signature provision. The member reiterated she didn't want to water down the signature requirement by saying two different things.

Procuring an order modifying discovery. Several members were concerned about the language following the proposed insert: "In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d)."One member said the language is contrary to what we've been doing with the electronically stored information protocol, which is that you don't go in to seek an order if you can work it out individually. She suggested adding "unless the parties have agreed to delay identification of the testifying expert," to that sentence so we don't have to go to the court when everybody agrees. Professor Beale pointed out that the sentence about seeking an order applies to both delayed identification and the situation where the expert is not under the party's control, so you can't limit it to only one of the two. Judge Kethledge added the delayed identification might also be captured in the first instance after the Rule 16.1 meet and confer, so that it is in the initial timing order.

Another member observed that in his district the parties would write up their agreement into a stipulation submitted for the judge's signature and that would be an order modifying discovery. Yet another member asked if the language, "at any scheduling conference or by motion," is necessary. It doesn't matter how you seek the order. Are we limiting it to scheduling conference or a motion? Professor Beale said that clause was requested by the Department of Justice because they were concerned that their prosecutors wouldn't know that they could raise it early and would not have to file a separate motion. Mr. Goldsmith agreed that the clause was intended to convey that it would not require some formal filing of a motion, and a party could raise it verbally during the conference. It is helpful to signal that it doesn't have to be quite as formal as a motion. When a member protested that the language would seem to preclude the parties from jointly signing a stipulation and sending it to chambers for signature, Judge Kethledge agreed it may be too prescriptive, stating we ought to trust the common sense of the parties and the court so they can do this when both parties have agreed. There was a motion to delete the clause within commas, so that it reads "In such circumstances, the party who wishes to call the expert may~~, at any scheduling conference or by motion,~~ seek an order modifying discovery under Rule 16(d)." The motion was seconded and passed unanimously by voice vote.

Motions to approve the proposed text amendments to Rule 16 and the note, as revised, and to transmit them to the Standing Committee were seconded and passed unanimously by voice vote.

Judge Kethledge thanked the members of the Committee, and he thanked Judge Campbell for his leadership and guidance which had been essential to getting to this point. He also expressed his appreciation to the Department of Justice for its good faith and reasonableness in considering this proposal, and also to the defense side in being measured and reasonable regarding what they were willing to agree to in this rule as well.

Erroneous Statutory Reference to Rule 41

Judge Kethledge turned to the suggestion by Judge Barksdale to amend the committee note to Rule 41 (Tab 4). She observed that 18 U.S.C. § 981(b)(3) includes a now-mistaken reference to Rule 41. It refers to 41(a) but the rule was amended and the provision is now in Rule 41(b). Judge Barksdale suggested that the Committee add language to the committee note that would alert the reader to the fact that the statutory reference is misplaced. Unfortunately, we are unable to do that. We can only add language to the note when we amend the rule. Here there is no reason to amend the rule, and we can't change the statute.

We learned from the Office of the Law Revision Counsel for the House of Representatives that when this sort of thing happens, they add a footnote to the code provision stating that there is a mistaken reference and pointing readers to the correct part of the criminal rule. So there is something they can do on the legislative side to fix this, as opposed to us doing something.

Judge Kethledge stated that he shared to reporters' recommendation that we not convene a subcommittee or take any action on this. There was no disagreement.

Waiver in Rules 49.1 and 59

Judge Kethledge moved to the suggestion by Judge Chagares under Tab 6 regarding the use of the term "waiver" in Rules 49.1 and 59. Judge Chagares pointed out that appellate courts have emphasized a distinction between waiver and forfeiture. Waiver is a voluntary relinquishment. It is not an oversight, but rather a decision to abandon a certain right or position in a case. Forfeiture occurs when you don't raise something in a timely fashion, typically it is more of an omission. On appeal, the courts can review forfeited issues for plain error, whereas when a party has affirmatively waived the question or the argument there will be no review. Judge Chagares observed that these two criminal rules use the term "waive" or "waiver," but might more accurately say "forfeit" or "forfeiture" instead.

The reporters recommended that we not take up this issue at the present time. The terms "waive" or "waiver" appear in additional places in the Criminal Rules and in other rules as well. So if we are going to change it here, we are going to have to change it in many places. Also, this would require action by the other advisory committees, because the relevant Criminal Rules have parallel provisions. "Waiver" has a broader usage and may be accurate in some contexts but not

in others. It is almost a term of art in some narrow contexts. This would be a broad scale project, and Judge Kethledge was inclined to think it is not substantively necessary. Professor Beale added that the reporters are very concerned about opening this up.

Judge Kethledge asked if anyone wanted to take up the suggestion. When no one indicated they did, he said he would convey the Committee's decision to Judge Chagares.

Permanent Rules for Emergencies

Judge Kethledge introduced agenda item 3, Permanent Rules for Emergencies. The CARES Act included provisions that allowed various events to take place by video and telephone conference, upon findings being made by the Joint Conference, by the chief district judge, and—with respect to sentencing—by the sentencing judge. The Act asks us to consider rules changes that would address future emergency situations. Judge Campbell worked extremely hard on the legislation, spent a great deal of time working with members of Congress and the staff, some of the judiciary committees. It was a very, very busy week or ten days for many of us, but especially so for Judge Campbell. He asked Judge Campbell if he had any remarks before we get into the project they have given us.

Judge Campbell said he wanted to thank Judge Kethledge, the reporters, Judge Furman, Judge Kaplan, and many others who contributed to what went into the legislation. In his district, the provisions in the CARES Act are working well. Defendants are consenting to video and teleconference where appropriate. Important sentencings are being put off if they are going to be more than time served so they can eventually be in person. But it has been a great relief for his court (and he thought for most courts) to be able to do things remotely rather than to simply postpone them.

As we look at this directive from Congress, Judge Campbell said, the final statute left out something Judge Kaplan had recommended. Instead of saying that the committee should study what rules should be adopted if a national emergency is declared, it should be written more broadly to refer to rules for any future emergency situations. Judge Campbell expressed the view that the statute does not preclude this Committee from writing whatever proposed amendments would be appropriate for whatever emergency situations might call for them. There was a collaborative effort that seemed to have been helpful during this emergency, and now the issue is what should become a permanent part of the rules.

Judge Kethledge emphasized that the legislative process was unavoidably rushed, and the provisions in the CARES Act were not adopted in the manner that the Rules Committees adopt amendments to rules. Our Committee has a bottom-up process where we gather data from the people who are involved in the particular issue on the ground. We have seen that most fruitfully in the miniconferences we had for the Rule 16 amendments. So rather than dictate from the top down what a rule should be, we try to get the input of people who are actually dealing with that issue, then build up from that input. And as our discussion of the one sentence in the note for Rule 16 illustrates, ours is a very deliberative process. The rules process is slow and deliberate, but that is part of the reason it has been so successful and part of the reason the rules have stood

the test of time. Another reason that the rules have stood the test of time is that they have enough flexibility to allow district judges and lawyers to adapt to most circumstances within the confines of those rules without us having to change things. He was not questioning the need for different procedures for emergencies, but he was saying that the rules have shown a resilience as a result of the parties' ability to adapt to the particular circumstances that they face, which may not be the same in every district.

Because of the nature of the legislative process, particularly a rushed process like we had, our Committee was not able to provide its advice in the way it normally would. It is important for our Committee to approach this project with a clean slate. What we hear about how the CARES Act is doing in the field is very useful data. But, he suggested, we should not regard the CARES Act as a default position or a presumptive answer to some of these problems. Our committee should bring its own independent judgment through that bottom-up process and see where we get with that. There are many other bodies in the process that would consider our advice. His point was that we need to give our advice, and we have not had a chance to do that yet, unavoidably, because of the press of this particular emergency. A subcommittee for this project will be chaired by Judge Dever, with members Judge Kaplan, Judge McGiverin, Ms. Recker, Ms. Elm on an interim basis, and Mr. Wroblewski. Judge Kethledge and the reporters will also participate.

Judge Dever commented that the Committee had a great example of the bottom-up process in committee that Judge Kaplan ultimately chaired in connection with cooperator issues. There we systematically looked at the rules, received a lot of information about cooperator issues, and thought critically about how they potentially affected each rule. We'll have an opportunity to do that in connection with this mandate, and he looked forward to working on this project with the members of the subcommittee.

Judge Kethledge said the first thing we need to do is identify the issues and the rules that our committee and the subcommittee need to think about with respect to whether they should be changed or addressed in the event of an emergency. We also need to think about the different kinds of emergencies that might arise. We are dealing with a national emergency now, and we need to consider other kinds of national emergencies. There may also be emergencies that are more local or regional. It will be necessary to hold at least one miniconference, maybe by video. And then we need to hammer out actual concrete proposals, with the idea of coming to the full Committee in our October meeting with proposed emergency procedures that would be adopted as part of the Criminal Rules. He asked Judge Campbell to share the timeline he proposed for the process.

Judge Campbell prefaced his comments by emphasizing that if this schedule turns out to be too compressed to get the job done, then we should extend it. Congress has told us do this, and they will be watching what we do. If we were to have a set of proposed rules for discussion in October, they could be reworked and considered by this Committee in the spring of 2021. Then those rules could be considered for publication by the Standing Committee in the summer of 2021, and the publication process would end in February of 2022. This Committee in its

spring meeting of 2022 could make a final decision on rules. Any rules that were approved by the Standing Committee in the early summer of 2022 could go to the Judicial Conference in September of 2022, to the Supreme Court in the fall of 2022, to Congress in May of 2023, and then become law in December of 2023. So if the Committee is able to develop draft rules in two meetings before publication, they wouldn't go into effect until December of 2023. That's fast by Rules Committee standards, but he thought it would look very, very slow from the perspective of Congress and others. We should to try to meet that schedule if we can. It would still give us an opportunity for full public comment but would condense our work in getting these rules ready for publication to two meetings, this fall and the following spring. That is an aspirational schedule. The other committees have been asked to do the same thing. But he concluded by saying Judge Kethledge is right: this needs to be done correctly, rather than quickly, and if it turns out that is too quick, we deal with it as we go forward.

Judge Kethledge said the Committee would make every effort to work on the schedule Judge Campbell proposed, and he opened discussion.

A member asked the Committee to consider adjusting Rule 53. She noted we have the ability to have really good public access, as we've seen in the Ninth Circuit. If she had been able to relax Rule 53, people could have had public access that is not very dissimilar to what they would have had by coming into a courtroom on a day-to-day basis. Providing some authority to relax a rule while we were in a crisis that would have been very helpful. They would have relaxed Rule 53, and then returned to the rule when deemed appropriate. The member wanted to consider whether there are rules that could be relaxed for a period of time then brought back on when it is important—particularly those that deal with what happens when courthouses have to be closed down, and especially with respect to criminal defendants. We have technology that easily helps us, but we can't use it because of Rule 53. This member also asked if that the Committee could consider if there is an even more aggressive timeline to use for amendments, even if temporarily, if this virus strikes again next year. Some reports are that this virus is going to hit again next fall, or next spring, and when it does we still won't necessarily have the capability to adjust the rules that we now see could be changed to more effectively deal with the public and their access to the courts. We know what would work better, and we might as well go ahead and attempt to have that happen in some way. Is there anything that can hasten us addressing this before 2023?

Judge Kethledge said the Rule 53 point is very well taken. It is something we will be looking at because public access must continue constitutionally.

Judge Kaplan said it was a privilege to have a small part helping Judge Campbell, Judge Kethledge, Judge Furman, and others involved in the CARES Act legislation. It was a fantastic performance and has worked wonderfully so far. He identified four questions that the subcommittee needs to approach.

First, how should we define the kinds of circumstances that would give some person or entity the ability to vary the normal rules? Initially, we have two fundamental obligations. One is

to ensure the ability of the courts to continue operations no matter what happens, and to do so independently. The scope of the kinds of impactful emergencies is very broad. We are dealing with this infectious disease now, and we all have that in mind. But in the past, we've had Hurricane Sandy, 9/11 (which shut down two districts in New York 20 years ago for quite some time), Hurricane Katrina (which shut down EDLA and other places). We've had floods, disease, and an external attack on the country. We can imagine circumstances where one or more courthouses could be put out of action by domestic strife. We had that in Oklahoma City years ago when the courthouse was blown up. He noted he was probably just touching the surface. Emergency ought to be defined in relation to the impairment of the ability of the courts to perform their constitutional functions. Not something else.

Second is a whole complex of issues about who decides. The CARES Act had a formulation that he was pretty comfortable with, the Judicial Conference of the United States. That happened overnight, and now we ought to think about it and make sure whatever we come up with is as apolitical and as unbiased as it can be.

Third, and reflected to some degree in the CARES Act, is we have to consider that what could trigger some relaxation might be quite local or regional. We have to determine whether the decision-making process is different in those kinds of situations.

And finally, once we've decided what is an emergency, who decides that, and how extensive it is, we must consider what does it authorize and how do we turn it off when the emergency ends?

Mr. Wroblewski agreed that the CARES Act really was a wonderful collaboration among all three branches of government and both houses of Congress. It was terrific work and a great collaboration. He stated that collaboration is continuing. There were a number of issues not resolved by the CARES Act. In addition to an issue mentioned earlier, there is the grand jury and how long the grand jury can be suspended. The Department has had a number of discussions with folks at the Administrative Office of the U.S. Courts, and with a special COVID-19 task force that the Judiciary has put together. It has made some suggestions about how grand juries may be reconstituted, and he knew that Director Duff has issued some guidance. The Department appreciates the opportunity to make suggestions. The U.S. Attorneys are working with their chief judges around the country in many districts to try to find ways to safely reconvene grand juries at some point. They are being reconvened in some districts, not in a majority of them. In addition, there is already work beginning on how to reconvene jury trials. He knew there was some thinking about that going on in the Southern District of New York and on the COVID-19 task force, and they have started work within the Department to examine a variety of issues. To the comment that jury trials remain public, he noted that the Third Circuit District Court in Michigan issued an order that they are going to broadcast trials on YouTube. He was not sure that is exactly what we want to do, but that is one of the issues we will have to look at.

Over the course of the last seven or eight weeks the Department has found a lot of wonderful expertise and a lot of serious and rigorous thinking out in the field. Some of that is

being funneled into the Judiciary's COVID-19 task force. Some he learned from talking to different judges. For example, Judge Lee Rosenthal, former chair of the Standing Committee, shared a number of orders and scripts they are using there on the border. He would highly recommended that all kinds of judges be brought into the process to share their experiences because there is no one size that fits all. Local courts must have authority to address the particular problems in the particular way that is appropriate for that locality. He added we are so blessed to have Judge Kaplan as part of the subcommittee. He's already developed the framework.

A member added that when she heard that the Third Judicial Circuit Court in Michigan was putting their proceedings on YouTube she called to ask if she could borrow their technology, and if they could tell her how to get it done. The county courts deserve thanks because they have all let us use their platforms to get in. But they don't have Rule 53. The judges in her district could just push a button and create public access, but they are prohibited from doing so because there is no relaxation of Rule 53. Technology by 2023 will be far beyond what we know now. We have to be prepared for what the future might offer us and how we might provide access to all the people.

A member said he agreed with what Mr. Wroblewski said about trials. In the member's district, (and he was sure it's the same in many districts), they have been able to handle initial appearances, custody hearings, and changes of plea when necessary and consistent with the CARES Act, and sentencings. But they have been unable to do jury trials. Because the latest order in the member's district put a pause on jury trials through the end of June, they are considering resuming trials in early July at the earliest. With guidance from the administrative office, his district imposed a blanket exclusion of time under the Speedy Trial Act through the end of June. That is not ideal, particularly for the criminal defendants who have asked to be released, have not been released, and would have gone to trial but for the pandemic. The member had not seen yet an argument from one of these defendants that the Constitution's Speedy Trial Clause provides protections that are greater than the Speedy Trial Act. Perhaps this is a problem that just can't get fixed, particularly in a pandemic-like situation. And how do you get 12 people in a building and 35-40 people for voir dire at a time like this? Maybe it can't be fixed, but hopefully it is something you can look at and try to crack that nut.

Professor Coquillette said that universities are doing a great deal of work that could be helpful to the courts. Often law school classes are close to 35 or 40 people, and we are trying to find rooms where people could be socially distanced, but still be accommodated. For example, we have learned that a group of 35-40 could gather in a room that accommodates 135 and still have reasonable safety. Some of this may help with jury trials.

A member commented that now a defendant has only one shot at bond, at release. If there is going to be a delay in trials, she suggested that there should be a second shot at release pending trials.

Judge Campbell added that in the process of looking at a number of issues the members will undoubtedly will come across some that cannot be solved by a rule amendment, and he suggested that the subcommittee maintain a separate list of potential recommendations that could be given to the Administrative Office, to the Department of Justice—and perhaps even to Congress or the Judicial Conference—of other steps to address emergencies that we ought to consider. This Committee may end up conducting the most thorough examination of these issues, and it may be very valuable for it to keep a list of things that might help.

Mr. Wroblewski followed up by stating that if anything comes up that needs the Department's attention now, you can send it along to the Department now. We are meeting every other week with the Criminal Law Committee of the Judicial Conference. He is meeting with representative from the Deputy Attorney General's office, the General Counsel for the Bureau of Prisons (BOP), and other officials from the BOP. So if issues do arise, members should feel free to email them to him or to Judge Martinez, who chairs the Criminal Law Committee. Other people including Judge St. Eve from the Standing Committee are on that call every other week, along with the BOP, probation, and a COVID-task force representative. So if any emergency situation comes up, people should feel free to contact them, because there are efforts being made now. There are enormous numbers of technical, legal, and other problems that need to be addressed sooner rather than later.

Judge Kethledge urged Mr. Wroblewski to solicit the input of his colleagues post haste, in terms of what the Department would be worried about in these situations, what changes would it want to have, so that the government would not seek changes on a midnight basis. He asked Mr. Wroblewski to do everything he could to get as much information from the Department as possible on the front end so that we can process and address those concerns, and share them with the defense bar as we go forward.

A member noted from the perspective of the Criminal Justice Act (CJA) panel attorneys there has been a tremendous response from the courts over the past 6-8 weeks, but it has been different from jurisdiction to jurisdiction. And panel representatives are not always included in many of the decisions about how to conduct the hearings and how to represent incarcerated clients you can't get in to see. You can consent to having proceedings occur by video, but how do you contact and get in to see your client and have those communications with clients to even inform them as to their options? These problems might not be addressed by amendments to the rules. But it will be great to have some uniformity, and also to understand that each jurisdiction has different capabilities and different technology. So it varies from jurisdiction to jurisdiction how much CJA panel attorneys can do on behalf of their clients.

Another member said she hoped the subcommittee will bring in expertise that is not just legal. The more we become dependent on technology to fill the gaps when courtrooms can't be open, the more vulnerable we are to cyberattack or other malfunctions of what we are all relying on now for communication. Judge Kethledge agreed technology does create some vulnerability.

Mr. Hatten observed that often the execution of these changes creates difficulties. What the CARES Act provided for our judges really facilitated operations. But some of the platforms available to conduct those proceedings, and the infrastructure that the BOP has available to facilitate appearances, those things all cramped what could have been a better experience. In addition to rules as to what's going to be allowed, it is also important to address the infrastructure that is necessary to facilitate those. He witnessed test after test of Skype conferencing, and knows a lot of courts are fond of Zoom because of better functionality. But Zoom doesn't appear to be accepted by the Judicial Conference. Paying attention to the means we'll be using to execute these other procedures would be helpful.

Mr. Goldsmith said the Department has the expectation that these are not going to be one-size-fits-all fixes. What might be a concentration of issues from the pandemic in the Southern District of New York or the Eastern District of Michigan is not necessarily the same kind of crisis we are seeing in other parts of the country. The Department is approaching everything with the expectation that U.S. Attorneys' Offices will have some amount of latitude. Given the structure of the Justice Department is if anything more top down than the courts, that's probably an important perspective for this effort.

Judge Dever said everyone has their own terrific network, and he asked that members share whatever information they have gathered or receive in the future. He would appreciate learning from everyone about what part of the CARES Act is working, what is not, and what other rules come into play. Judge Campbell's point about other stakeholders is important; even if it is something our committee or subcommittee can't address; it is an opportunity to give voice to the judiciary's perspective on this fundamental idea of keeping our independent judiciary operating whatever the crisis might be.

Judge Campbell said collecting information may best be done through Rebecca Womeldorf and her office, but the one other judicial conference committee that is doing as much thinking and working as criminal rules has done and will do is the CACM committee. The chair, Judge Audrey Fleissig, has been very involved with the legislative issues and the issues that followed. CACM has had a broad look at problems all around the country, and it might be helpful to ask the CACM staff or Judge Fleissig to put together a list of issues the Committee might consider.

Another member said he hoped the subcommittee would be looking at the time for filing issues, noting the deadlines for Rule 33 motions for a new trial, and the one-year deadline for Rule 35 substantial assistance motions. Would any of these emergency situations consider tolling for those sorts of motions?

Judges Kethledge and Dever thanked participants for the helpful suggestions.

Rule 6

Turning to grand jury secrecy, Item 5 on the agenda, Judge Kethledge noted that the Committee received two suggestions to modify amend Rule 6 to allow for greater disclosure of

grand jury material. Rule 6 has a detailed enumeration of circumstances under which the district court can allow disclosure of grand jury material. The default is that grand jury material is confidential. In 2012 the attorney general suggested amending the rule to allow district courts to have greater authority to disclose grand jury material. The Committee concluded at that time there was no need to act upon that suggestion because district courts were already in essence doing what the suggested amendment would permit. Now we have circuit cases saying that district court can't make those disclosures. The D.C. Circuit says that enumeration is exclusive, and the district court does not have inherent authority to order disclosure of grand jury material for reasons other than those enumerated in the rule. The Eleventh Circuit en banc held the same way. We received two proposals to amend Rule 6 to allow district courts to exercise some authority to disclose grand jury material beyond what now is described in the rule. One is from the Public Citizen Litigation Group and the other is from the Reporters Committee for Freedom of the Press and other media groups. The two proposals are different. Public Citizen's has language that requires the district court to find certain pretty concrete criteria before the court could allow disclosure of the information. The other proposal has nine non-exhaustive factors that the district court would need to consider.

Professor Beale added that we also have had two recent judicial invitations to take this issue up. One is from Justice Breyer in a statement regarding denial of certiorari from the D.C. Circuit decision. The Department of Justice's brief in opposition in that case said that there was no reason to take that case because the issue could be solved by Congress or by the Rules Committees. The same suggestion was made in the Eleventh Circuit case, and these judicial suggestions were highlighted in the two proposals.

Judge Campbell added that Chief Judge Srinivasan had also raised this issue and thought it would be an important one for the committee to address. Chief Judge Srinivasan was forthright, saying he was in the majority on the panel that was reversed by the D.C. Circuit. There is now a lot of judicial attention on the issue, and a clear split in the circuits, which typically has been a situation where we have felt we ought to act. This is about as clear an invitation as we could have.

Judge Kethledge said it seemed pretty clear we ought to appoint a subcommittee, but he welcomed thoughts on that as well as on things that we ought to be considering with respect to this project.

Mr. Wroblewski said he had been dealing this issue for ten years, and Betsy Shapiro has as well for a long time. The Department of Justice has consistently taken the position in courts around the country that the list of exceptions to secrecy in Rule 6 is exclusive, and that remains its position. The Department supports having a subcommittee consider the proposal. Under Attorney General Holder the Department supported a proposal to authorize release of historically important grand jury material, and it is prepared to support a proposal now to authorize the release of historically important grand jury material. But Mr. Wroblewski noted that the Department has some differences with both the Holder proposal and with the two current proposals.

Mr. Wroblewski asked that the subcommittee also consider an additional issue: the courts' authority to authorize delayed disclosure orders through the grand jury. For many years, judges have authorized delayed disclosure of subpoenas ordering grand jury witnesses to testify or produce material. Recently in light of the decisions in the D.C. and Eleventh Circuits, some district judges have said that they have no inherent authority to issue such delayed disclosure orders. The Department hopes the committee could consider whether there ought to be an amendment as well to address those. These orders, which are very important, are authorized as part of the Stored Communications Act. The Department thinks some language addressing that particular issue would be important and should be considered by the subcommittee.

Judge Campbell identified a third issue for the subcommittee: whether the courts have inherent authority to release grand jury materials in situations that are not enumerated in Rule 6. That is a tricky issue, in part because in 2012 this Committee took no action on the Holder proposal, noting that judges have the inherent authority to deal with the historical records suggestion. At least in that respect it appears that the Committee has already taken the position that Rule 6 does not limit a judges' inherent authority. But he raised the question whether the Criminal Rules Committee has the power to foreclose inherent authority with a rule. The Rules Enabling Act says that rules adopted through its procedures have the force of law of a statute. There is an argument that this permits the rules to foreclose inherent authority. Judge Campbell described the one other time that we tried to do that in the 2015 amendment to the Civil Rule 37(e), a pretty comprehensive rule for dealing with the spoliation of electronically stored information. The courts were adopting a wide variety of approaches, and the Civil Rules Committee intended to bring national uniformity for spoliation sanctions. The committee note stated that it was intended to foreclose resort to inherent authority. This was a very deliberate effort by the Civil Rules Committee to say we are making this exclusive. The very first district court to address Rule 37(e) considered that committee note and concluded that the Committee has no power to limit the court's inherent authority. If this Committee is going to come to the view that it wants to limit inherent authority, that's a question that will take some careful study and careful consideration of both whether it can be done and how it can be done to be most effective.

Judge Kethledge agreed that is a really interesting and important point. He expressed doubt that it was within the Committee's purview under the Rules Enabling Act as to offer an opinion as to the scope of a district court's inherent authority, but noted he would not be held to that view. We are talking about Article III. Even if we are able to comment on it, there is the separate question about what the scope of the court's authority *should* be. One possibility would be to take no position on whether the court has inherent authority, and leave that to the Article III metaphysicians. He expressed confidence that our Committee will give it very careful thought.

Judge Kethledge concluded that a subcommittee was clearly needed, and he would appoint one in the near future to begin work on this project.

Closing Remarks

Judge Kethledge said that the next Committee meeting is scheduled for October 6, 2020, in New Orleans, and hopefully we will be able to travel there. He thanked everyone for their patience with the video platform, and particularly thanked the Administrative Office staff – Shelly Cox, Brittany Bunting, and Kenneth [] – for their excellent assistance in ensuring the meeting went well. He also expressed his appreciation for everyone's help, particularly on the Rule 16 issue.

TAB 7

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MEMORANDUM

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

FROM: Honorable Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

DATE: June 1, 2020

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") did not hold a Spring 2020 meeting.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee has been considering whether Rule 106 — the rule of completeness — should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Committee is continuing to consider various alternatives for an amendment to Rule 106. One option is to clarify that the completing statement should be admissible for the non-hearsay purpose of providing context to the initially proffered statement. Another option is to state that completion, where necessary, is admissible over a hearsay objection, because the proponent of the misleading portion forfeits the right to object to the necessary completion. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

One of the complicating factors for the Committee is to consider and work out the relationship between Rule 106 and the common law rule of completeness. The Supreme Court has stated that Rule 106 is a "partial" codification of the common law — leaving lawyers and judges to determine where the common law rule ends and Rule 106 begins. This is not a user-friendly system and the Committee is considering what if anything can be done to clarify the relationship between Rule 106 and the common law.

The Committee plans to consider the issues raised by Rule 106 again at its Fall meeting.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony?

Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that

the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts.

At this point, the Committee has resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. The Committee has also considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

The Committee plans to consider the issues raised by Rule 615 again at its Fall meeting.

C. Forensic Expert Testimony, Rule 702, and *Daubert*

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October 2017. A subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The subcommittee, after extensive discussion, recommended against certain courses of action. The subcommittee found that: 1) it would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) it would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony — the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions, especially directed toward forensic experts. The current draft being considered provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." This language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded in a numerical probability — such as an electrician testifying that "the house was not properly wired."

Finally, the Committee is considering how to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) — that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology — are questions of weight and not admissibility. These statements can be read to misstate Rule 702, because all its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that many of these broad statements made by courts, while unfortunate, have not led to rulings in which the requirements of Rule 702 have been undermined. But the Committee has also concluded that in a number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

So far, the Committee has been reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. Also, the Committee is wary about changing a rule in a way that essentially says, "apply the rule the way it was written."

While a textual change to Rule 702 to emphasize the preponderance of the evidence remains under consideration, the Committee is also considering an alternative: language in the committee note addressing the issue, if the text of the rule is to be amended to address the problem of overstatement, discussed above.

The Committee plans to consider the issues raised by Rule 702 again at its Fall meeting.

D. *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 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 — as it did previously with the 2013 amendment to Rule 803(10).

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Legislation that Directly or Effectively Amends the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	· 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	· 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security · 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: the Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	· 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsors:* Booker (D-NJ) Cornyn (R-TX) Durbin (D-IL) Lee (R-UT) Paul (R-KY) Whitehouse (D-RI)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	· 5/8/19: Introduced in the Senate; referred to Judiciary Committee · 5/20/20: Discharged from Judiciary Committee and passed Senate without amendment by unanimous consent · 5/22/20: Received in the House · 5/28/20: Letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	· 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/15/19: Introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	· 12/11/19: introduced in House; referred to Judiciary Committee · 1/30/20: referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf *See* pp. 247-50 **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	· 3/27/20: Became Public Law No. 116-136 · Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations

TAB 8B

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United States Court of Appeals
Fifth Judicial Circuit
Tom Stagg United States Court House
300 Fannin Street, Suite 5226
Shreveport, Louisiana 71101-3074

Chambers of
CARL E. STEWART
Circuit Judge

Telephone: (318) 676-3765
Facsimile: (318) 676-3768

May 21, 2020

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: Carl E. Stewart, Judiciary Planning Coordinator
Chair, Ad Hoc Strategic Planning Group

RE: Draft Update to the *Strategic Plan for the Federal Judiciary* for 2020-2025
(ACTION REQUESTED)

RESPONSE DUE DATE: By June 26, 2020, or one week after Judicial Conference Committee Meetings

As you know, an Ad Hoc Strategic Planning Group (Planning Group) was formed to develop a draft update to the *Strategic Plan for the Federal Judiciary (Plan).* The Planning Group appreciated and benefited greatly from the input of Conference committees following their reviews of the current 2015 *Plan* during their winter sessions. The thoughts and ideas from those reviews seeded the discussions of committee chairs at the March 2020 Long-Range Planning meeting, and thereafter, the deliberations of the Planning Group as it worked to update the *Plan* for the period 2020-2025.

For your review, the Planning Group has prepared the attached draft *Plan* for 2020-2025, showing changes from the current *Plan*. At your 2020 spring/summer meetings, please review this draft and let me know if your committee has any suggestions to add before Judicial Conference consideration in September 2020. A "clean" copy of the draft is also attached to facilitate your review. As you review this draft, I encourage you to look beyond your committee's immediate issues and across jurisdictions for a more holistic perspective. With committee input, the Planning Group will finalize the draft *Plan* for Executive Committee consideration at its August 11-12, 2020 meeting.

The draft updated *Plan* retains the Mission, Core Values and scope of the 2010 and 2015 versions of the *Plan*, while adding a Core Value titled "Diversity and Respect." Other additions reflect the areas of concern most often cited by Conference committees in their recommended changes to the *Plan*. With a view to preserving the strategic nature of the document, the Planning Group did not add any recommended descriptions of specific projects or programs to

the *Plan*. This approach avoids dating the language in the *Plan*, and provides appropriate flexibility to committees in their policy deliberations.

Working within the constraints of the COVID-19 environment, the Planning Group has endeavored to develop the draft *Plan* to reflect normalcy -- and to account for changed circumstances. As you review this draft, please consider whether it reflects the exigencies of recent times, or whether more is needed in the *Plan* to address the ability of the judiciary to function for an extended period in crisis mode.

Thank you in advance for your review. I look forward to reading your comments.

cc: Executive Committee
Ad Hoc Strategic Planning Group
Committee Staff

Attachments:
1. Draft Redline 2020 Update of the *Strategic Plan for the Federal Judiciary*
2. Draft "Clean" 2020 Update of the *Strategic Plan for the Federal Judiciary*

Strategic Plan for the Federal Judiciary

September ~~2015~~2020

Judicial Conference of the United States

Strategic Plan for the Federal Judiciary

September ~~2015~~2020

Judicial Conference of the United States
James C. Duff, Secretary
Administrative Office of the U.S. Courts
Washington, DC 20544
202-502-1300

www.uscourts.gov

Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law.

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect.

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management.

Diversity and Respect:[1] a workforce of judges and employees that reflects the diversity of the public it serves; an exemplary workplace in which everyone is treated with dignity and respect.[2]

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and ~~staff~~employees; commitment to innovative management and administration; availability of sufficient financial and other resources.

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner.

[1] Adding a new core value on diversity was endorsed by the Ad Hoc Strategic Planning Group on April 1, 2020.
[2] The title and language for this new core value were endorsed by the Ad Hoc Strategic Planning Group's Diversity Drafting Team, led by Judge Raymond J. Lohier, Jr., and endorsed by the Ad Hoc Strategic Planning Group on May 6, 2020.

The Plan in Brief[3]

The *Strategic Plan for the Federal Judiciary*, updated in ~~2015~~2020, continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, ~~the~~ this plan recognizes that the future may provide tremendous opportunities for improving the delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency; attracts to judicial service the nation's finest legal talent; is an employer of choice providing an exemplary workplace for a diverse group of highly qualified judges ~~executives~~ and employees ~~support staff~~; works effectively with the other branches of government; and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, ~~the~~ this plan focuses on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in ~~the~~ this plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes: the delivery of justice; the public's trust and confidence in, and understanding of, the federal courts; a diverse workforce; an exemplary workplace; the effective and efficient management of resources; ~~the workforce of the future,~~ technology's potential; access to justice and the judicial process; and relations with the other branches of government~~, and the public's level of understanding, trust, and confidence in federal courts~~.

[3] Edits were endorsed by the Ad Hoc Strategic Planning Group on May 6 and May 13, 2020.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues— fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Providing Justice
Issue 2: Preserving Public Trust, Confidence, and Understanding[4]
Issue 3: The Effective and Efficient Management of Public Resources
Issue 4: The Judiciary Workforce and Workplace[5]
Issue 5: Harnessing Technology's Potential
Issue 6: Enhancing Access to Justice and the Judicial Process[6]
Issue 7: The Judiciary's Relationships with the Other Branches of Government

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Providing Justice[7]

How can the judiciary provide justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality ~~staff~~employees, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues, are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in the law, challenge the federal judiciary's effective and prompt delivery of justice. ~~To address this issue, this~~ This plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the effective administration of justice:

Pursue improvements in the delivery of justice on a nationwide basis. (Strategy 1.1)

Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.2)

Strengthen the protection of judges, court ~~staff~~employees, and the public at court facilities, and of judges and their families at other locations. (Strategy 1.~~2~~3)

~~Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.3)~~

[4] Retitling and renumbering this issue were endorsed by the Ad Hoc Strategic Planning Group on April 8, 2020 and May 6, 2020.
[5] Retitling this issue was endorsed by the Ad Hoc Strategic Planning Group on April 1, 2020.
[6] Retitling this issue was endorsed by the Ad Hoc Strategic Planning Group on May 6, 2020.
[7] Edits to the content of Issue 1 were endorsed by the Ad Hoc Strategic Planning Group on April 22, April 29, and May 13, 2020.

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of civil case management, and has a number of mechanisms to identify and assist ~~congested~~ stressed courts. These mechanisms include biannual reports of pending civil cases and motions required under the Civil Justice Reform Act of 1990, and identifying stressed courts and the categories of cases with the longest disposition times.

National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, some pockets of case delays and backlogs persist in the courts. ~~With the understanding that s~~Some delays are due to external forces beyond the judiciary's control, cannot be avoided, and do not reflect upon a court's case management practices. With this understanding, this plan calls for ~~a concerted and collaborative effort among~~ the courts, Judicial Conference committees, and circuit judicial councils to undertake reasonable, concerted, and collaborative efforts to reduce ~~make measurable progress in reducing~~ the number and length of ~~cases that are unduly delayed, and the number of courts with persistent and significant~~ preventable case delays and backlogs ~~that may be unwarranted~~.

The delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 6~~5~~. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to ~~reduce~~ avoid unnecessary costs ~~as well as~~and delay.

This strategy also includes a goal to ensure that persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions.

In addition, ~~the~~ this plan includes a goal to enhance the management ~~supervision~~ of ~~offenders and defendants~~ persons under supervision. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the management ~~supervision~~ of ~~offenders and defendants~~ persons

under supervision.

Other efforts to improve the delivery of justice ~~should~~ must continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services offices has also been enhanced through the use of applications that integrate data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Goal 1.1a: Reduce delay through the dissemination of effective case management methods and the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Avoid ~~Reduce~~ unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.

Goal 1.1d: Enhance the management of ~~supervision~~ of ~~offenders and defendants~~ persons under supervision ~~in order~~ to reduce recidivism and improve public safety.

Strategy 1.2~~3~~. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. The judiciary is ~~likely to face~~facing an uncertain federal budget environment, with likely constraints on the ability of congressional appropriations committees to meet judiciary funding requirements. Multiweek government shutdowns have happened twice in the recent past (2013 and 2018/2019). The judiciary was able to remain open through reliance on fees, but judges, judicial employees, the bar and the public were impacted by the shutdown of many executive branch agencies and operations, by limits on normal court operations, and by time and resources being diverted to manage the effects of the funding lapse. Uncertainty and shortfalls, when they occur, present particular challenges to clerks offices, probation and pretrial services offices, and federal defender organizations in ensuring that operations are adequately staffed.

Another key challenge for the judiciary is to address critical longer term resource needs. Many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Resources are also needed for jurors. Compensation for jurors is still limited, with inadequate compensation creating a financial hardship for many jurors. And, while the judiciary has made progress in securing needed space -- including the construction of new courthouses and annexes --

some court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality. The judiciary will need to continue apportioning resources based on priorities determined by the consistent application of policies across the courthouse portfolio.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must continue to work with these agencies to ensure that the judiciary's resource needs are met.

The ability to secure adequate resources serves as the foundation for a vast majority of the judiciary's plans and strategies. For example, to ensure the well qualified representation of criminal defendants (Goal 1.1c), the defender services program requires funding sufficient to accomplish its mission. Additionally, to enhance the management of persons under supervision to reduce recidivism and improve public safety (Goal 1.1d), probation and pretrial services offices require sufficient funding. Strategy 4.4~~3.2~~ and its associated goals focus on the importance of attracting, recruiting, developing and retaining the ~~staff~~ competent employees that are required for the effective performance of the judiciary's mission, and ~~will be~~ critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 5.1~~4.1~~ urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Goal 1.2~~3~~a: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.2~~3~~b: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

Goal 1.2~~3~~c: Secure adequate compensation for jurors.

Goal 1.2d: Secure adequate resources to provide the judiciary with ~~staff~~employees and resources necessary to meet workload demands.

Strategy 1.3~~2~~. Strengthen the protection of judges, court ~~staff~~employees, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody. Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, assisting

judges in taking steps to protect themselves while away from court facilities, and educating judges on how they can minimize the availability of personal information on the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.2~~3~~ includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 5.1~~4.1~~ includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.3~~2~~a: Improve the protection of judges, court employees, and the public in all court facilities, and the protection of judges in off-site judicial locations.

Goal 1.3~~2~~b: ~~Provide increased training to raise the awareness of judges and judiciary.~~ Improve the protection of judges and their families at home and in non-judicial locations.

Goal 1.3~~2~~c: Provide continued ~~increased~~ training to raise the awareness of judges and judiciary employees on a broad range of security topics.

Goal 1.3~~2~~d: Improve the interior and exterior security of court facilities through the collaborative efforts of the judiciary, the U.S. Marshals Service, the Federal Protective Service, and the General Services Administration~~, including perimeter security at primary court facilities~~.

Goal 1.3~~2~~e: Work with the U.S. Marshals Service and others to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Issue ~~7~~2. Preserving Public Trust, ~~and~~ Confidence, and Understanding ~~Enhancing Public Understanding, Trust, and Confidence~~ [8] [9] [10]

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary ~~system~~. In large part, the judiciary earns that trust and confidence by faithfully performing its duties, adhering to ethical standards, and effectively carrying out internal oversight, review, and governance responsibilities. These responsibilities include accountability for the scrupulous adherence to ethical standards. The surest way to lose trust and confidence is failure to live up to established ethical standards and to fail to hold accountable those who violate them. Consistent with the law and legitimate privacy interests, making public as much information as possible about the enforcement of ethical standards helps foster public trust and confidence.

~~However, p~~Public perceptions of the judiciary are ~~also~~ often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate.

Changes in social media ~~networking~~ and communication will continue to play a key role in how the judiciary is portrayed to, and viewed by, members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. For the judiciary, this challenge is ~~an~~ especially difficult ~~one~~ because judges are constrained in their ability to participate in public discourse. This plan includes ~~two~~ five strategies to enhance public ~~understanding,~~ trust and confidence in, and understanding of, ~~in~~ the judiciary:

> Assure high standards of conduct and integrity for judges and employees ~~staff~~. (Strategy 2.1~~7.1~~)
>
> Hold judges and judiciary personnel who violate ethical standards accountable. (Strategy 2.2)
>
> procedures and results. (Strategy 2.3)
>
> Improve the sharing and delivery of information about the judiciary. (Strategy 2.4~~7.2~~)
>
> Encourage involvement in civic education activities by judges and judiciary employees. (Strategy 2.5)

[8] Edits to this issue, proposed by the Federal Judicial Center, were endorsed by the Ad Hoc Strategic Planning Group subject to clearance by Chief Judge Rodney W. Sippel. On April 24, 2020, Chief Judge Sippel cleared the language via email with some additional edits.
[9] The Ad Hoc Strategic Planning Group's Workplace Conduct Drafting Team, led by Chief Judge Jeffrey R. Howard, reviewed this issue insofar as it impacts workplace conduct, endorsing it via email on May 2, 2020, with some additional edits.
[10] Further edits were endorsed by the Ad Hoc Strategic Planning Group on May 13, 2020.

Strategy 2.1~~7.1~~. Assure high standards of conduct and integrity for judges and employees ~~staff~~.

Background and Commentary. Judges and judiciary employees ~~staff~~ are guided by codes of conduct, internal control policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include informal actions, such as counseling, as well as more formal procedures, such as complaint and dispute resolution processes, audits, ~~and~~ program reviews of judiciary operations, internal control and information technology self-assessments, and workplace conduct oversight and response processes. The judiciary has adopted several measures, described in Issue 4 of this plan, to ensure an exemplary workplace in which all employees are treated with dignity and respect.

Accountability mechanisms must address critical risks, ~~and~~ keep pace with changes in regulations and business practices, and respond to public and government interest in more comprehensive and accessible information about the judiciary. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and employees ~~staff~~, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical integrated internal controls~~;~~, governance of judiciary financial information; audit, investigation, and discipline functions; risk management practices; and self-assessment programs.

Goal 2~~7~~.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, ~~and~~ accountability, and workplace conduct.

Goal 2~~7~~.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

~~**Goal 7.1c:** Perform investigative, disciplinary, and other critical self-governance responsibilities to achieve appropriate accountability.~~

Strategy 2.2. Hold judges and judiciary personnel who violate ethical standards accountable.

Background and Commentary. Accountability starts with openness to receiving concerns and complaints raising possible ethical violations and a demonstrated willingness to act on them. In all cases in which there is a credible allegation of misconduct, responsible officials must examine any allegation seriously, investigate thoroughly, and take appropriate corrective or punitive action when warranted. Persons who experience or witness possible ethical violations should feel free to bring them to the attention of an appropriate official without fear of retaliation or adverse consequence. The judiciary's Judicial Conduct and Disability Rules and Model Employment Dispute Resolution Plan were updated in 2019 to reinforce these principles.

Goal 2.2a. Ensure avenues for seeking advice, obtaining redress, or filing a complaint are well known to all.

Goal 2.2b. Ensure that action is taken on all credible allegations of misconduct according to established procedures.

Goal 2.2c. When the evidence supports it, ensure appropriate corrective or punitive action is taken.

Goal 2.2d. Conduct systemic reviews when appropriate.

Strategy 2.3. Be transparent, consistent with the law and legitimate privacy interests, about accountability procedures and results.

Background and Commentary. The law and legitimate privacy interests of victims, witnesses, and alleged offenders may limit what information can be made public. To the greatest extent feasible, the judiciary should make public information about its investigative and accountability procedures, including results in individual cases.

Goal 2.3a. Ensure each circuit's website prominently displays actions taken under Judicial Conduct and Disability Rules, and summaries of other records or reports of workplace conduct issues.

Goal 2.3b. Collect and publish, in summarized form, records of reports and inquiries about workplace conduct violations made to the Judicial Integrity Office.

Strategy 2.4~~7.2~~. Improve the sharing and delivery of information about the judiciary generally.

Background and Commentary. Sources of news, analysis and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and the justice system ~~its work~~. Enhanced communication between the judiciary and the media is one way to help increase the accuracy of stories about the justice system and public understanding of the courts. Since the media is a significant way in which the public learns about the judiciary, helping reporters understand court processes is one way to improve the public understanding of the justice system. Judges can undertake these efforts within the parameters of the Code of Conduct and while avoiding discussion of any specific cases.

~~At the same time, it~~ It is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

~~Voluntary public outreach and civic education efforts by judges and court staff take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civic education organizations. Resources to help judges and court staff participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.~~

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The executive branch, in carrying out its foreign relations duties, often requests the assistance of federal judges in communicating with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 2.4~~7.2~~a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications and the ability of federal judges and employees to communicate directly with the public.

Goal ~~2~~7.~~4~~2b: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary and its accountability and oversight mechanisms and external financial reporting.

Goal 2.4c: Develop or increase communications and relationships between judges and journalists, ~~(~~consistent with the Code of Conduct and not specific to any case,~~)~~ to foster increased understanding of the judiciary.

~~**Goal 7.2c:** Facilitate the voluntary participation by judges and court staff in public outreach and civic education programs.~~

Goal 2.4~~7.2~~d: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategy 2.5. Encourage involvement in civics education activities by judges and judiciary employees.

Background and Commentary. The federal judiciary relies on public respect, understanding, and acceptance. The lack of civics knowledge can have an adverse effect on the branch. A civically informed public also will be better inoculated against attempts to undermine trust in the justice system. As noted by the Chief Justice of the United States in his 2019 Year End Report on the Federal Judiciary, "[t]he judiciary has an important role to play in civic education...." Reinforcing the perspective of the Chief Justice, at its March 2020 session, the Judicial Conference of the United States "affirmed that civics education is a core component of judicial service; endorsed regularly-held conferences to share and promote best practices of civics education; and encouraged circuits to coordinate and promote education programs."

Public outreach and civic education efforts by judges and judiciary employees take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civic education organizations. Resources to help judges and judiciary employees participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

Goal 2.5a: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Goal 2.5b: Facilitate participation by judges and court employees in public outreach and civic education programs.

Goal 2.5c: Support education about the defense function and the critical role it plays in ensuring fair trials and proceedings, as well as in maintaining public confidence in the justice system.

Issue 32. The Effective and Efficient Management of Public Resources[11]

How can the judiciary provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The judiciary's pursuit of cost-containment initiatives has helped to reduce current and future costs for rent, information technology, ~~bankruptcy and magistrate judges,~~ the compensation of court ~~staff~~ employees and law clerks, and other areas. ~~They~~ These initiatives have also improved resource allocation within the bankruptcy judges system, as well as the prudent allocation and management of resources within the magistrate judges system, and ~~.~~ ~~These initiatives~~ have helped the judiciary operate under difficult financial constraints. Cost-containment efforts have also helped the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.2~~3~~).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, ~~staff~~employees, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices ~~should~~ must be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide. This plan includes a single strategy to address this issue.

Strategy 3.1~~2.1~~. Allocate and manage resources more efficiently and effectively.

> **Background and Commentary.** The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.
>
> For example, over the past several years, court units throughout the judiciary have developed and implemented alternative approaches for carrying out their operational and administrative functions. These approaches have helped courts maintain the level and quality of services they deliver, and in many instances, have increased efficiencies and controlled costs associated with providing those services.
>
> This strategy also includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and ~~staff~~ court employees to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations when disaster strikes.

[11] Edits to this issue were endorsed by the Ad Hoc Strategic Planning Group on April 22, 2020.

Goal 3.1~~2.1~~a: Make more effective use of judges to relieve overburdened and congested courts, including expanding ways to provide both short- and long-term assistance to districts with demonstrated needs for additional resources, and ensuring the effective utilization of magistrate judge resources.

Goal 3.1~~2.1~~b: Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational ~~staff~~ employees but do not jeopardize public safety or negatively impact outcomes or mission.

Goal 3.1~~2.1~~c: Manage the judiciary's infrastructure in a manner that supports effective and efficient operations, and provides for a secure environment.

Goal 3.1~~2.1~~d: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue ~~4~~3. The Judiciary Workforce and Workplace ~~for the Future~~[12]

How can the judiciary ~~continue to~~ attract, develop, and retain a highly diverse and competent ~~and diverse~~ complement of judges, ~~and~~ employees, ~~staff~~ and Criminal Justice Act (CJA) attorneys,[13] and ensure an exemplary workplace in which everyone is treated with dignity and respect ~~while meeting future workforce requirements and accommodating changes in career expectations~~?

Issue Description. The judiciary can retain public trust and confidence and meet workload demands only if it is comprised of a diverse complement of highly competent judges ~~and~~, employees, and CJA attorneys. It cannot attract and retain the most capable people from all parts of society, nor can it keep the public's trust and confidence, unless it maintains a diverse and exemplary workplace in which all are treated with dignity and respect and are valued for their contributions regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability. Attracting and retaining highly capable and diverse judges, ~~and~~ employees, and CJA attorneys, ~~staff~~ will require fair and competitive compensation and benefit packages. The judiciary must abide by and enhance, where appropriate, its standards and procedures to assure proper workplace conduct, and must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Four ~~Two~~ strategies to address this issue follow:

Seek a talented, dedicated, and diverse workforce. (Strategy 4.1)

Ensure an exemplary workplace free from discrimination, harassment, and abusive conduct. (Strategy 4.2)

Support a lifetime of service for federal judges. (Strategy 4.3~~3.1~~)

Recruit, develop, and retain highly competent employees ~~staff~~ while defining the judiciary's future workforce requirements. (Strategy 4.4~~3.2~~)

Strategy 4.1. Seek a talented, dedicated, and diverse workforce.

Background and Commentary. Public trust and confidence are enhanced when the judiciary's workforce – judges, ~~and~~ employees, and CJA attorneys – broadly reflects the diversity of the public it serves. While it has no control over the appointment of Article III judges, the judiciary can and should strive for diversity in all other positions, particularly bankruptcy judges, magistrate judges, ~~and~~ federal defenders, and CJA panel attorneys, all of whom occupy positions highly visible to the public. The judiciary must continue to pursue initiatives to attract future judges, such as the "Roadways to the Bench" programs, that are designed to secure a wide and diverse pool of

[12] Edits to this issue were proposed by the Federal Judicial Center and endorsed, with additional edits, by the Ad Hoc Strategic Planning Group's Diversity Drafting Team (April 23, 2020) and Workplace Conduct Drafting Team (May 2, 2020), led by Judge Raymond J. Lohier, Jr., and Chief Judge Jeffrey R. Howard, respectively. Edits to this issue also include revised language (Strategy 4.4) provided by Chief Judge Ricardo S. Martinez, Chair, Criminal Law Committee, on May 1, 2020. All edits to this issue were endorsed by the Ad Hoc Strategic Planning Group on May 6 and May 13, 2020. The AO's Office of General Counsel also commented on this issue (May 20, 2020).

[13] The added reference to Criminal Justice Act attorneys, to ensure full coverage of the judiciary's workforce with respect to the need to increase diversity, was endorsed by the Ad Hoc Strategic Planning Group on May 6, 2020.

applicants for every position, and ensure diversity among members of screening and selection committees. Judges must be encouraged to give special attention to diversity in their law clerk hiring practices.

Goal 4.1a: Establish, maintain and expand outreach efforts and procedures to make diverse audiences aware of employment opportunities in the judiciary, including as judicial officers.

Goal 4.1b: Ensure all recruitments are designed to attract and consider a diverse pool of applicants.

Goal 4.1c: Ensure screening and hiring committees consist of diverse members.

Goal 4.1d: Provide mentoring and career advancement opportunities to employees regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.

Strategy 4.2. Ensure an exemplary workplace free from discrimination, harassment, and abuse.

Background and Commentary. Public trust and confidence and workforce morale and productivity are enhanced when the judiciary provides an exemplary workplace for everyone. As a result of efforts by the judiciary's Workplace Conduct Working Group – which recommended more than thirty measures to enhance the judiciary's workplace policies and procedures – the judiciary has adopted amendments to the applicable codes of conduct and rules for judicial conduct and disability proceedings to expressly state that sexual and other harassment, abusive conduct, and retaliation are misconduct. In addition, the judiciary has adopted an improved Model Employment Dispute Resolution Plan to clearly describe prohibited conduct and provide simplified and effective redress, has established a Judicial Integrity Office and regional workplace conduct committees and workplace relations directors, and has undertaken extensive training on workplace civility and preventing harassment and other forms of discrimination. Beyond these and other measures already taken, more remains to be done. The judiciary must diligently continue to work to ensure that it provides an exemplary workplace for all of its employees.

Goal 4.2a: Educate all judges and employees on standards of appropriate and inappropriate conduct, with continuing education on a regular basis.

Goal 4.2b: Educate all judges and employees about the obligation to take appropriate action when they have reliable information about misconduct by a judge or other person.

Goal 4.2c: Educate all judges and employees about the options available for reporting misconduct and for seeking advice about possible courses of action when they experience or are aware of possible misconduct.

Goal 4.2d: Ensure accountability and redress through vigilant enforcement of the codes of conduct, and effective redress through universal adoption and conscientious application of the Model Employment Dispute Resolution Plan.

Goal 4.2e: Consistent with the law, related judiciary policy, and legitimate privacy interests, make public as much information as possible about the execution of Judicial Conduct and Disability proceedings and other workplace conduct actions.

Goal 4.2f: Provide a workplace conduct coordinator, at least as a part-time position, in each circuit.

Goal 4.2g: Conduct periodic systemic reviews and assessments of workplace conduct issues at the circuit and district level.

Goal 4.2h: Systematically evaluate how guidance and procedures designed to foster an exemplary workplace are working and whether additional action may be needed.

Strategy 4.3~~3.1~~. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges. In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. ~~Technology training, for example, is moving away from a focus on software applications toward an emphasis on the tasks and functions that judges perform.~~ Training and education programs, and other services that enhance the well being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 4.3~~3.1~~a: Strengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement ~~should~~ must be provided the support necessary for them to fully discharge their duties.

Goal 4.3~~3.1~~b: Seek the views of judges on practices that support their development, retention, and morale.

Goal 4.3~~3.1~~c: Evolve and adapt education, training, and orientation programs to meet the needs of judges.

Goal 4.3d: Encourage circuits to develop circuit-wide Health and Wellness Committees to promote health and wellness programs, policies, and practices that provide a supportive environment for the maintenance or restoration of health and wellness in support of a lifetime of service for judges.

Strategy 4.4~~3.2~~. Recruit, develop, and retain highly competent employees ~~staff~~ while defining the judiciary's future workforce requirements.

Background and Commentary. The judiciary continues to be an attractive employer, and employee ~~staff~~ turnover is relatively low. Employees are committed to the judiciary's mission, and the judicial branch provides employees ~~staff~~ with many resources and services, including training and education programs. To remain competitive, especially with hard-to-fill occupations, the judiciary must have a strong program to attract, recruit, develop, and retain the most qualified people.

~~Nonetheless, o~~Ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career and work-life expectations, and the unique challenges faced by probation and pretrial services offices in recruiting, retaining, training, and ensuring the physical and mental well-being of officers. C~~c~~hanges in how employees ~~staff~~ communicate and interact,~~.~~ and ~~Changes~~ in how and where work is performed, are related to Strategy 3.1~~2.1~~, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment. The judiciary must continue to invest in technology and explore changes to policy and procedures that allow for an effective remote and mobile workforce.

The judiciary must also develop the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The most qualified candidates often come from within the system since the judiciary's management model is not currently replicated in other government systems. To ensure a sufficient internal supply of qualified candidates, the judiciary ~~should~~ must maintain ~~initiate~~ a meaningful leadership and executive development training program ~~along with the creation of~~and create executive relocation programs to widen the pool of qualified internal applicants.

Goal 4.4~~3.2~~a: Attract, recruit, develop, and retain the most qualified people to serve the public in the federal judiciary, emphasizing a commitment to ~~nondiscrimination~~ diversity, equity, and inclusion~~both~~ in hiring and in developing ~~grooming~~ the next generation of judiciary executives and senior leaders.

Goal 4.4~~3.2~~b: Identify current and future workforce challenges and develop and evaluate strategies to enhance the ~~programs and special initiatives that will allow the judiciary to remain~~judiciary's standing as an employer of choice while enabling employees to ~~strive to~~ reach their full potential.

Goal 4.4~~3.2~~c: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead employees ~~staff~~.

Goal 4.4~~3.4~~d: Strengthen the judiciary's commitment to workforce diversity, equity, and inclusion ~~through expansion of~~by expanding diversity program recruitment, education, and training, and identifying barriers to recruitment of a diverse workforce.

Goal 4.4e: Provide resources and develop Health and Wellness Committees to examine policy, practices, and programs that provide a supportive and healthy work environment for the maintenance or restoration of judiciary employees to promote health and competence throughout their career and beyond.

Issue 54. Harnessing Technology's Potential[14]

How can the judiciary develop, operate, and secure cost-effective national and local ~~technology~~ systems and infrastructure that meet the needs of court users and the public for information, service, and access to the courts ~~while fostering the development of creative approaches and solutions at the local level~~?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, ~~staff~~judiciary employees, and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build, ~~and~~ maintain, and continuously enhance effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

Responsibility for developing major national IT systems is shared by several Administrative Office divisions and Judicial Conference committees, and many additional applications are developed locally. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides a great deal of flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge will be to balance the economies of scale that may be achieved through operating as an enterprise ~~certain judiciary-wide approaches~~ with the creative solutions that may result from allowing and fostering a more distributed model of IT development and administration. The judiciary's strategy for addressing this issue follows.

Strategy 5.14.1. Harness the potential of technology to identify and meet the needs of judiciary ~~court~~ users and the public for information, service, and access to the courts.

> **Background and Commentary.** The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. Next-generation case management ~~and financial administration~~ systems are being developed, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology. In addition, technology is allowing for exponentially more data to be created, stored, and managed. The effective use of data tools supports evidence-based decision making.
>
> The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective ~~to~~ for the development of certain systems. Another goal in this section focuses on the security of judiciary-related records and information.

[14] Edits to this issue were endorsed by the Ad Hoc Strategic Planning Group on April 15 and May 13, 2020.

The effective use of technology is critical to furthering other strategies in this plan. In particular, the effective use of technology is critical to judiciary efforts to contain costs, and to effectively allocate and manage resources (Strategy 3.1~~2.1~~). Technology also supports improvements in the delivery of justice (Strategy 1.1); efforts to strengthen judicial security (Strategy 1.2); the delivery of training and remote access capabilities (Strategies 4.3~~3.1~~ and 4.4~~3.2~~); the accessibility of the judiciary for litigants and the public (Strategies 6.1~~5.1~~ and 6.2~~5.2~~); and judiciary accountability mechanisms (Strategies~~y~~ 2.1~~7.1~~, 2.2, and 2.3).

Likewise, an effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, ~~is it~~it is critical that the judiciary succeed in recruiting, developing, and retaining highly competent ~~staff~~ employees (Strategy 4.4~~3.2~~). ~~And, i~~Investments in technology also require adequate funding (Strategy 1.2~~3~~).

Goal 5.1~~4.1~~a: Continue to build, ~~and~~ maintain, and continuously enhance robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, public access, case management, and administrative support.

Goal 5.1~~4.1~~b: Coordinate and integrate national IT systems and applications from a judiciary-wide perspective, continue to utilize local initiatives to improve services, and leverage judiciary data to facilitate decision-making ~~and more fully utilize local initiatives to improve services~~.

Goal 5.1~~4.1~~c: Develop system-wide approaches to the utilization of technology to achieve enhanced performance and cost savings.

Goal 5.1~~4.1~~d: Continuously improve ~~Refine and update~~ security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.

Issue 6~~5~~. Enhancing Access to Justice and the Judicial Process[15]

How can the judiciary ensure that justice in the federal courts is fair, impartial, and accessible to all, regardless of wealth or status, and that the courts remain comprehensible, accessible, and affordable for people who participate in the judicial process ~~while responding to demographic and socioeconomic changes~~?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. In the criminal context, where the vast majority of federal criminal defendants are eligible for the appointment of counsel, the judiciary must ensure that the needs of appointed counsel and the clients they represent are met. This plan includes ~~two~~three strategies that focus on identifying unnecessary barriers to justice and court access, and taking steps to eliminate them.

> Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 6.1~~5.1~~)
>
> Ensure that the federal judiciary is open and accessible to those who participate in the judicial process. (Strategy 6.2~~5.2~~)
>
> Promote effective administration of the criminal defense function in the federal courts. (Strategy 6.3)

~~The views of participants — including parties, lawyers and jurors — should be solicited as a first step in implementing these strategies.~~

Strategy 6.1~~5.1~~. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

> **Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood.
>
> To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement

[15] Edits to this issue, including the change to the title, were proposed by Judge Raymond J. Lohier, Jr. and endorsed, with additional edits, by the Ad Hoc Strategic Planning Group on May 6 and May 13, 2020.

conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.

To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:

Goal 6~~5~~.1a: Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

Goal 6~~5~~.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Strategy 6~~5~~.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, witnesses, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants. Continued efforts are needed, and this strategy sets forth four goals to make courts more accessible for jurors, litigants, witnesses, and others.

Goal 6~~5~~.2a: Provide jurors, litigants, witnesses, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 6~~5~~.2b: Reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petit jurors.

Goal 65.2c: Improve the extent to which juries are representative of the communities in which they serve.

Goal 65.2d: Develop best practices for handling claims of pro se litigants in civil and bankruptcy cases.

Strategy 65.3. Promote effective administration of the criminal defense function in the federal courts.

Background and Commentary. In the criminal context, access to justice is supported by appointing counsel to represent defendants who cannot afford to pay for their own counsel or other services necessary for their defense. Under the Criminal Justice Act (CJA), the judiciary oversees the provision of these defense services to eligible criminal defendants. In exercising this role, consistent with the Sixth Amendment, judges, acting as neutral arbiters in individual cases, must fairly and reasonably determine the resources available to the defense in any given case involving appointed counsel. To ensure the effective operation of the adversarial system and access to effective and conflict-free representation, the judiciary must strive to ensure that CJA practitioners can mount a skilled and vigorous defense of their clients so that the rights of individual defendants are safeguarded and enforced.

Consistent with the recommendations of the Judicial Conference's Ad Hoc Committee to Review the Criminal Justice Act Program, the judiciary must continue to consider improvements to the national administration of the defender services program.

This strategy supports the judiciary's efforts to pursue improvements in the delivery of justice (Strategy 1.1) and promotes public trust and confidence in the justice system by ensuring fair trials and proceedings (Issue 2), through three goals:

Goal 6.3a: Encourage districts to adopt and implement CJA plans based on the judiciary's model CJA plan to ensure compliance with relevant Judicial Conference policies.

Goal 6.3b: Ensure that CJA practitioners have the resources to provide effective and conflict-free representation.

Goal 6.3c: Provide training regarding best practices for criminal defense representation.

Issue 76. The Judiciary's Relationships with the Other Branches of Government[16]

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. The judiciary is an independent branch of government with the solemn responsibility of safeguarding the constitutional rights and liberties of the nation's citizens, not simply a line item in the non-defense discretionary portion of the federal budget. ~~Increasingly, the judicial branch's ability to deliver justice in a manner consistent with its core values is dependent upon its relationships with the other two branches of the federal government.~~

An effective relationship with Congress is critical to success in securing adequate resources. In addition, the judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review which ensures the integrity of financial information, provides comprehensive financial reporting, and builds upon its foundation of internal controls to prevent and detect fraud, waste, and abuse.

The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as reporting on annual government-wide financial activity, judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

> Develop and implement a comprehensive approach to enhancing relations between the judiciary and ~~the~~ Congress. (Strategy 7.1~~6.1~~)
>
> Strengthen the judiciary's relations with the executive branch. (Strategy 7 . 2 ~~6.2~~)

Strategy 7.1~~6.1~~. Develop and implement a comprehensive approach to enhancing relations between the judiciary and ~~the~~ Congress.

> **Background and Commentary.** This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to

[16] Edits to this issue were endorsed by the Ad Hoc Strategic Planning Group, subject to final review and clearance by Chief Judge Rodney W. Sippel. On April 13, 2020, Chief Judge Sippel cleared the changes via email, with some additional edits.

report measurable progress in meeting goals may bring dividends. Congressional awareness of the judiciary's ongoing efforts to strengthen its financial oversight and reporting -- building upon its existing foundation of internal controls designed to prevent and detect fraud, waste and abuse -- is critical to assure oversight bodies, as well as the public, that the judiciary has a robust program of oversight and effective controls in place.

Goal 7.16.1a: Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Goal 7.16.1b: Implement effective approaches, including partnerships with ~~the~~ legal, academic, and private sector organizations, to achieve the judiciary's legislative goals.

Goal 7.1c: Encourage judges to engage with members of their local congressional delegation to foster mutual understanding and respect, and to establish lines of communication between the two branches.

Strategy 7.26.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. The executive branch is also a source of financial reporting requirements for government-wide financial activity. The judiciary's ongoing efforts to transform financial reporting, enhance the judiciary's internal controls programs, and strengthen the integrity of judiciary financial data provide tangible assurance to judiciary officials, oversight bodies, taxpayers, and others for whom the judiciary holds money in trust. This strategy focuses on enhancing the ability of the judiciary to provide input and information to its executive branch partners ~~the Department of Justice and others regarding proposed actions and policies that affect the administration of justice~~.

Goal 7.26.2a: Improve communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs, and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved a number of enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies issues, strategies, or goals to receive priority attention every two years.

Integration: The committees of the Judicial Conference integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy ~~development~~ activities, including through the development and implementation of committee strategic initiatives – projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan.*[17]

Assessment of Progress: For every goal in the *Strategic Plan*, mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the *Strategic Plan for the Federal Judiciary* require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the *Strategic Plan for the Federal Judiciary* supersede previous long-range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts.*

[17] Edits were endorsed by the Ad Hoc Strategic Planning Group on May 13, 2020.

Acknowledgements

On the recommendation of its Executive Committee, the ~~2015~~ 2020 edition of the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference of the United States on September ~~17~~15, ~~2015~~2020. This edition was prepared following an assessment of the implementation of the ~~2010~~ 2015 *Strategic Plan*, an analysis of issues and trends likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

CHAIRS, COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
SEPTEMBER ~~2015~~2020

AD HOC STRATEGIC PLANNING GROUP
SEPTEMBER ~~2015~~2020

EXECUTIVE COMMITTEE
JUDICIAL CONFERENCE OF THE UNITED STATES
SEPTEMBER ~~2015~~2020

JUDICIAL CONFERENCE OF THE UNITED STATES

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June 2020

JUDICIARY RESPONSE TO COVID-19

Issue

The purpose of this agenda item is to provide the Committee with an overview of the judiciary's response to the Coronavirus Disease (COVID-19) pandemic, including several actions taken by the Judicial Conference related to the pandemic. Because this issue is evolving, this item serves only as a "snapshot" in time.

Background

Pandemic planning guidance has been a part of the judiciary's emergency management program for approximately 15 years. The AO created pandemic planning templates and instructional materials in 2005 as part of a larger Pandemic Influenza Guidance package offered to courts for incorporation into their local Continuity of Operations (COOP) plans.

The emergency management staff at the AO has held multiple training sessions for courts to assist them in the development of their COOP plans, and exercises to test them. Business continuity is the heart of any COOP plan or response to a pandemic or other event that causes a courthouse to suspend in person operations. Courts across the country were in various states of readiness with their COOP plans as the pandemic hit.

Discussion

AO and COVID-19 Task Force Efforts

The AO has been providing support and guidance to the judiciary on COVID-19 since the end of January 2020. In late January 2020, the AO created a COVID-19 webpage on the JNet to serve as a clearinghouse for information regarding the pandemic and assist with assessing risks and implementing exposure control actions. The webpage, which is updated regularly, offers, among other things, Frequently Asked Questions (FAQs) across a range of COVID-impacted areas (discussed more fully below), public health notices concerning potential COVID-19 exposure and travel risks; a near real-time dashboard with a map of confirmed COVID-19 cases provided by state, county, and judicial district; information about courts' operational status; and quick reference checklists regarding exposure control measures/actions, building closures, and operational planning. It also includes a collection of court orders and practices implemented (i.e. court access, security restrictions, filing procedures, etc.) in local districts throughout the country, for other courts' awareness as they consider what approaches to take in their own districts.

The AO has taken steps to strengthen and expand capacity for the judiciary's IT infrastructure to address the increased use of telework across the country. The AO's Department of Technology Services is watching connectivity closely and has been steadily seeing approximately 20,000 simultaneous connections through judiciary VPN services. Overall, the systems are performing

well given the unprecedented number of remote workers and intermittent local access provider issues being experienced.

On February 18, 2020, the AO Director formed a COVID-19 Task Force to advise on and address emerging issues throughout this emergency, including staff from AO program offices and several chief judges and court unit executives from across the country as well as representatives from the General Services Administration (GSA), Architect of the Capitol, U.S. Marshals Service (USMS), Federal Protective Service, Department of Justice (DOJ), and DOJ's Executive Office for U.S. Attorneys. Unlike the Judiciary Emergency Response Team (JERT), which is stood up during a natural disaster that impacts select courts, the COVID-19 Task Force is handling both the response to the national pandemic for the courts and the response for the AO. The purpose of the Task Force is to facilitate coordination among the court units, the AO, and other federal agencies in clarifying policy, developing and implementing practices to address specific COVID-19 related issues, and ensuring consistency across the various courts, offices, and agencies. The Task Force, and the small subgroup of the judges and court unit executives, has been meeting weekly, and the AO Director recently formed a subgroup of chief judges, court unit executives, a United States Attorney, and a Federal Public Defender, to develop protocols on when and how to safely resume grand and petit jury proceedings.

The AO COVID-19 Task Force has facilitated the issuance of over 300 guidance and policy FAQs to address a wide array of court unit and AO policies and procedures. More than 40 national memoranda have been published to provide action recommendations and clarify issues relating to courthouse facility operations, finance and budget, safety and health, technology performance, and remote access to court proceedings. These documents have served to clarify policy, update court units on GSA and USMS procedural changes, and help standardize judiciary approaches to coping with COVID-19 related operational issues.

On April 24, 2020, the AO Director disseminated a memorandum on reconstitution of operations that provided courts with a starting reference for when they are ready to prepare for reconstituting. The Federal Judiciary COVID-19 Recovery Guidelines are the resource that court units are using to make certain recovery risk assessments based on state and local stay-at-home orders and public safety guidelines and the number of COVID-19 cases in their local communities and courthouses. The expectation is that recovery times will vary by geographic area/district based on local COVID-19 hazards and public safety guidelines.

More specific guidance on several significant issues that remain under review is in development, including but not limited to resuming grand jury and petit jury proceedings; the potential use of COVID-19 screening measures for employees and the public prior to entering judiciary facilities; and potential requirements for using face coverings or masks and practicing social distancing in our buildings. The AO COVID-19 Task Force is currently preparing recovery planning tools for the AO.

Judicial Conference Actions Related to COVID-19

Summarized below are actions taken to date by the Judicial Conference and its committees, and the Executive Committee acting on an expedited basis on behalf of the full Conference, related to COVID-19.

1. Use of Video and Telephone Conferencing for Certain Criminal Proceedings

On March 27, 2020, Congress passed, and the President signed into law, the "Coronavirus Aid, Relief, and Economic Security Act" (CARES Act), Pub. L. No. 116-136. The CARES Act authorized the use of video and telephone conferencing, when authorized by the chief judge of a district or a designee, under certain circumstances and with the consent of the defendant after consultation with counsel, for various criminal events during the course of the COVID-19 emergency, contingent upon a finding by the Judicial Conference that emergency conditions exist that materially affect either the federal courts generally or a particular district court of the United States. The authority would end upon the earlier of (a) 30 days after the date on which the national emergency declared by the President ends or (b) when the Judicial Conference finds that the federal courts are no longer materially affected.

On March 29, 2020, on the joint recommendation of the chairs of the Committee on Court Administration and Case Management and the Committee on Rules of Practice and Procedure, the Judicial Conference found, pursuant to the CARES Act, that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601 et seq.) with respect to COVID-19 have materially affected and will materially affect the functioning of the federal courts generally.

2. Use of Telephone Conferencing to Provide Public and Media Access to Court Proceedings

Judicial Conference policy generally prohibits the broadcasting of proceedings in federal trial courts. (JCUS-SEP 94, pp. 46-47; *Guide to Judiciary Policy*, Vol. 10, Ch. 4). On recommendation of the Committee on Court Administration and Case Management, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on March 29, 2020, approved a temporary exception to the September 1994 policy to allow a judge to authorize the use of telephone conference technology to provide the public and the media audio access to court proceedings while public access to federal courthouses generally, or with respect to a particular district, is restricted due to health and safety concerns during the COVID-19 pandemic. This authorization will expire upon a finding by the Judicial Conference that the emergency conditions due to the emergency declared by the President with respect to COVID-19 are no longer materially affecting the functioning of the federal courts generally or a particular district.

3. Extension of Reporting Deadlines

a. CJRA Report

The Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650, requires the Director of the AO to prepare a semiannual report, available to the public, that discloses for each district judge and magistrate judge the number of motions pending more than six months, bench trials submitted more than six months, and civil cases pending more than three years. 28 U.S.C. § 476. The Judicial Conference established semiannual reporting periods as the six-month periods ending on September 30 and March 31 of each year. *See* JCUS-SEP 91, p. 45; JCUS-SEP 18, pp. 17-18. On recommendation of the Committee on Court Administration and Case Management, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on March 23, 2020, extended the March 31, 2020 CJRA reporting period to June 1, 2020, to account for disruptions to court operations and judicial administration caused by the COVID-19 pandemic.

b. Governance and Education Travel Report

At its September 1999 session, the Judicial Conference approved amendments to the Travel Regulations for United States Justices and Judges that substantially incorporated, for the purpose of reporting a judge's non-case related travel, the travel reporting requirements for members of the United States Senate. *See* JCUS-SEP 99, p. 66; *Guide*, Volume 19, Chapter 2, § 270. Pursuant to the regulations, judges must file their non-case related travel reports, now known as the Governance and Education Travel Report, with their respective chief judge by May 15 of each year. *Id.* § 270.10.20. In turn, chief judges are required to report their own information and send the reports of the judges of their courts to the AO by June 1 of each year. *Id.* § 270.10.30. On recommendation of the Committee on the Judicial Branch, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 3, 2020, extended the 2020 reporting deadline for the Governance and Education Travel Report for all judges from May 15, 2020 to October 15, 2020, and the deadline for chief judges from June 1, 2020 to November 1, 2020, to account for disruptions to court operations and judicial administration caused by the COVID-19 pandemic.

c. Financial Disclosure Report

The Ethics in Government Act of 1978, as amended (5 U.S.C. app. §§ 101-111) requires judicial officers and certain judicial employees to file annual financial disclosure reports by May 15 of each year. The Committee on Financial Disclosure acknowledged the potential difficulties that filers may face in meeting the May 15, 2020 deadline due to the COVID-19 pandemic and noted that filers may request an extension of time of up to 90 days to file their reports. Acknowledging its authority to waive late filing fees assessed on filings submitted more than 30 days after they were due for extraordinary circumstances, the Committee noted that impacts of COVID-19 would be considered extraordinary circumstances in its consideration of individual requests. On March 26, 2020, the Director of the AO disseminated a memorandum providing guidance on financial disclosure reporting deadlines during the pandemic which noted a filer's ability to request an extension of time and a waiver of a late filing fee.

4. Administration of the Criminal Justice System

a. Obligation of the U.S. Probation System to Assist Inmates on Prerelease Custody

Three statutory provisions require the U.S. probation system to supervise inmates in the custody of the Bureau of Prisons (BOP) who have been placed on different types of prerelease custody, which each differ in the degree of assistance required. If an individual is released to home confinement under 18 U.S.C. § 3624(c), the probation system must offer assistance "to the extent practicable"; if an individual is released pursuant to the BOP's risk and needs assessment system under 18 U.S.C. § 3624(g), the probation system must offer assistance "to the greatest extent practicable"; and if an individual is released pursuant to the BOP's elderly home confinement program under 34 U.S.C. § 60541(g), the probation system must offer "such assistance . . . as the Attorney General may request." On recommendation of the Committee on Criminal Law, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference on April 19, 2020, approved seeking legislation amending 18 U.S.C. § 3624(g) and 34 U.S.C. § 60541(g) to track the requirement in 18 U.S.C. § 3624(c) for the U.S. probation system to provide assistance to inmates on prerelease custody only "to the extent practicable."

b. Early Termination of Supervised Release

On recommendation of the Committee on Criminal Law, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference on April 19, 2020, approved expanding the Conference's September 2013 position to persons who have served a period of prerelease custody under either 34 U.S.C. § 60541(g), 18 U.S.C. § 3624(c), or 18 U.S.C. § 3624(g), as follows (new language underlined):

> Seek legislation that permits the early termination of supervision terms, without regard to the limitations in 18 U.S.C. § 3583(e)(1), for an inmate who is released from prison under sections 3582(c), 3624(c), or 3624(g) of that title or under 34 U.S.C. § 60541(g).

c. Access to BOP Medical Records for Compassionate Release Motions

On recommendation of the Committee on Criminal Law, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference on April 19, 2020, approved seeking legislation amending 18 U.S.C. § 3582(c)(1)(A) to add that if a motion for reduction of the imprisonment term includes as a basis for relief that the defendant's medical condition warrants a reduction, the BOP shall promptly produce the defendant's BOP medical records to the court, the probation office, the attorney for the government, and the attorney for the inmate. If additional time is required by the BOP to produce such records, they shall be produced in a time frame ordered by the court.

d. Filing of Compassionate Release Motions

On recommendation of the Committee on Defender Services, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference on April 21, 2020, approved seeking legislation that would be effective during the national emergency declared by the President under

the National Emergencies Act (50 U.S.C. § 1601 et seq.) with respect to COVID-19 and end 30 days after the national emergency terminates, amending 18 U.S.C. § 3582 to allow a defendant, once he or she has filed a request for compassionate release relief with the BOP, to file a motion for compassionate release directly in the district court before 30 days have lapsed if the exhaustion of administrative remedies would be futile or the 30-day lapse would cause serious harm to the defendant's health due to the COVID-19 pandemic.

5. Administration of the Bankruptcy System

a. Interim Bankruptcy Rules

Section 113 of the CARES Act made several temporary changes to the Bankruptcy Code to provide financial assistance during the COVID-19 crisis. These changes require temporary revisions to interim Bankruptcy Rule 1020, an interim procedural rule for small business Chapter 11 reorganization cases that the Executive Committee in December 2019, acting on an expedited basis on behalf of the Judicial Conference, authorized to be distributed to the courts for local adoption to facilitate implementation of the Small Business Reorganization Act of 2019 (Pub. L. No. 116-54) until the Federal Rules of Bankruptcy Procedure could be revised in accordance with the Rules Enabling Act. On recommendation of the Committee on Rules of Practice and Procedure, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference on April 14, 2020, authorized the distribution of revised interim Bankruptcy Rule 1020 to the district and bankruptcy courts for adoption, in order to conform to the CARES Act.

b. Extension of Bankruptcy Statutory Deadlines

On recommendation of the Committee on the Administration of the Bankruptcy System, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 20, 2020, approved a legislative proposal to provide bankruptcy courts with authority to extend statutory deadlines under title 11 and chapter 6 of title 28 of the United States Code during the COVID-19 national emergency, upon a finding that the emergency conditions materially affect the functioning of a particular bankruptcy court of the United States. This authorization would expire 30 days after the date that the COVID-19 national emergency declaration terminates, or upon a finding that emergency conditions no longer materially affect the functioning of that particular bankruptcy court, whichever is earlier.

c. Bankruptcy Judgeships

On recommendation of the Committee on the Administration of the Bankruptcy System, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 23, 2020, approved seeking for inclusion in COVID-19 stimulus legislation the conversion of four additional judgeships from temporary to permanent status, in addition to the ten conversions sought in the March 2019 Judicial Conference position, as follows: two in the District of Delaware and one each in the Middle District of Florida and the Eastern District of Michigan.

6. Temporary Exceptions to HR Policies

a. Time Limits for Term and Temporary Appointments

Judicial Conference policy limits all term and temporary appointments to a maximum duration of four years. JCUS-SEP 07, p. 26; JCUS-MAR 11, pp. 24-25; *Guide*, Vol. 12, § 510.50. On recommendation of the Committee on Judicial Resources, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 28, 2020, authorized a waiver of the four-year limitation on term and temporary appointments under September 2007 and March 2011 Judicial Conference policy for employees whose appointments have expired or will expire during the pandemic, to allow extensions of their term or temporary appointments not to exceed December 31, 2020, upon a finding by the appointing officer that hiring a replacement prior to this date is not feasible due to COVID-19.

b. Mandatory Background Checks

All newly appointed and transferring employees in courts and federal public defender organizations are appointed contingent upon a satisfactory suitability determination based on, at minimum, a mandatory background check. *Guide*, Vol. 12, § 570.50.10(a)(1). Judicial Conference policy requires that all background checks for "sensitive" positions include a Federal Bureau of Investigation (FBI) fingerprint check, which consists of a fingerprint search of the FBI's national database of criminal history records (JCUS-SEP 02, pp. 52-53). On recommendation of the Judicial Resources Committee, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 28, 2020, authorized the use of FBI National Crime Information Center (NCIC) checks in lieu of fingerprint checks when conducting a background check for new and transferring employees for sensitive positions under September 2002 Judicial Conference policy, through December 31, 2020, due to health and safety concerns resulting from COVID-19. In making its recommendation, the Judicial Resources Committee noted that the NCIC checks provide all the same data that FBI fingerprint checks do, with the exception of some state misdemeanor arrests, which generally would not prohibit employment.

c. Limitation on Law Enforcement Officer Reemployed Annuitants

Pursuant to Judicial Conference policy, a retired law enforcement officer may be reappointed as a reemployed annuitant for a single period of 18 months when one of the following two criteria is satisfied: (1) well-qualified candidates other than the retired law enforcement officer are not available (as evidenced by the results of a vacancy announcement); or (2) the experience, knowledge, or competencies of the retired law enforcement officer are critical to the court's ability to respond to an emergency. JCUS-MAR 09, p. 26. On recommendation of the Judicial Resources Committee, the Executive Committee, acting on behalf of the Judicial Conference on an expedited basis on April 28, 2020, authorized an additional one-year reemployment period for law enforcement officers serving as reemployed annuitants under the March 2009 Judicial Conference policy whose appointment expires on or before December 31, 2020, upon a finding by the chief district judge that a robust recruitment process cannot be conducted due to COVID-19.

Funding and Legislative Proposals for Inclusion in COVID-19 Relief Legislation

CARES Act

As noted above, Congress passed the CARES Act on March 27, 2020. This legislation provided $2 trillion in emergency assistance and health care response for state and local governments, individuals, families, and businesses affected by the 2020 COVID-19 pandemic. The CARES Act also provided emergency supplemental funding for some federal entities, including the $7.5 million the judiciary sought in emergency funding for immediate COVID-19 needs, including $5.0 million for probation and pretrial services for increased drug and mental health treatment costs and drug testing costs, and $2.5 million to expand network capacity and enhanced telework capabilities.

The $7.5 million requested from Congress was an initial determination based on information and conditions that were known as of March 13, 2020, when the House and Senate Appropriations Committees asked the AO to identify COVID-19 funding requirements.

As discussed above, the CARES Act also authorized the use of video and telephone conferencing, when authorized by the chief judge of a district or a designee, under certain circumstances and with the consent of the defendant after consultation with counsel, for various criminal events during the course of the COVID-19 emergency, contingent upon a finding by the Judicial Conference that emergency conditions exist that materially affect either the federal courts generally or a particular district court of the United States.

Request for Additional Supplemental Funding and Legislative Proposals

Subsequent to enactment of the CARES Act, the AO worked closely with courts and federal defender organizations nationwide and identified additional requirements associated with COVID-19 pandemic prevention, preparedness, and response. On April 21, 2020, the AO's Financial Liaison and Analysis Staff submitted to the House and Senate Committees on Appropriations a net supplemental appropriations request of $36.6 million associated with the judiciary's response to the COVID-19 pandemic.

The $36.6 million the judiciary is seeking is to address emergent needs such as enhanced cleaning of court facilities, health screening at courthouse entrances, information technology hardware and infrastructure costs associated with expanded telework and video conferencing, costs associated with probation and pretrial services supervision of offenders released from prison and defendants on pretrial release, and security related costs.

On April 23, 2020, the AO's Office of Legislative Affairs submitted to House and Senate Judiciary Committee staff a legislative package consisting of 17 legislative provisions to be considered for inclusion in supplemental legislation to respond to the COVID-19 pandemic and an informational copy of the $36.6 million appropriations request. On April 28, 2020 the proposals were formally delivered to the House and Senate Appropriations Committees, with copies to the House and Senate Committees on the Judiciary.

A description of each legislative proposal with proposed bill text is posted on the JNet at https://jnet.ao.dcn/sites/default/files/COVID-19_Judicial_Conference_Legislative_Proposals_4.23.20.pdf.

The package included several existing Judicial Conference-approved legislative proposals, six new proposals from various Conference committees that were approved between April 19-23 by the Executive Committee acting on an expedited basis on behalf of the Judicial Conference (see items 4(a)-(d) and 5(b)-(c) in section above), and two new proposals suggested by AO program offices in consultation with other judiciary stakeholders that did not require Judicial Conference approval. Some existing Conference positions were combined with or supplemented by new positions, resulting in 17 proposals that were sent to Congress.

HEROES Act

The "Health and Economic Recovery Omnibus Emergency Solutions Act" (HEROES Act), H.R. 6800, was passed by the House of Representatives on May 15, 2020. This $3 trillion emergency relief bill represented the House's views on an additional congressional response to the COVID-19 pandemic and provided a wide variety of additional emergency assistance for state and local governments, individuals, and businesses affected by COVID-19. The HEROES Act also provided emergency supplemental funding for some federal entities. The $36.6 million request for additional supplemental appropriations to support the branch's resource needs in responding to the COVID-19 pandemic, however, was not included. Furthermore, none of the legislative requests made by the judiciary were included in the HEROES Act passed by the House. The HEROES Act did include a number of legislative items of interest to the judiciary, but which were not requested by the judiciary. The Senate is unlikely to adopt the HEROES Act, as written, and substantial changes may occur between now and the eventual negotiation of a final, compromise bill. At this time, there is no timetable for Senate action on follow-on COVID-19 response legislation.

Legislative items of interest to the judiciary include

- Employee Benefit Provisions – Sections 70301-70404
- Family Medical Leave Provisions – Sections 120102-120103
- Pandemic Duty Pay Differential authority – Section 170202
- Bankruptcy Code amendments – Section 110203
- Criminal Justice Provisions – Sections 191102-191107, 200007:

A more complete description of the bill was provided in a Memorandum and Legislative Summary which are posted on the JNet COVID-19 page.