April 11, 2022

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2021 report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2021 report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 25 and 42.

[*See infra* pp. ___ ___ ___.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2022, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

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 electronic 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.

* * * * *

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) **Stipulated Dismissal.** The circuit clerk 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.

(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, payment, or other consideration.

(d) **Criminal Cases.** A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 25 and 42 of the Federal Rules of Appellate Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the June 2021 report of the Advisory Committee on Appellate Rules.

Attachments

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; matter to be omitted is lined through.

case. The provisions on remote electronic 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 remote electronic access. The amendment extends those protections to Railroad Retirement cases.

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, payment, or other consideration.

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

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, payment, or other consideration. *See, e.g.*, Fed. R. Civ. P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond 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.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

Agenda E-19
Rules
September 2021

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:

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

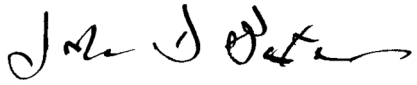
The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42 . . . and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Excerpt from the June 1, 2021 Report of the Advisory Committee on Appellate Rules

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

MEMORANDUM

TO: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: June 1, 2021

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 7, 2021, via Teams. The draft minutes from the meeting are attached to this report.

The Committee approved proposed amendments previously published for public comment for which it now seeks final approval. One is a proposed amendment to Rule 42, dealing with stipulated dismissals. A second is a proposed amendment to Rule 25, dealing with privacy protections in Railroad Retirement Act cases. (Part II of this report.)

* * * * *

II. Action Items for Final Approval After Public Comment

A. Rule 42—Voluntary Dismissal

The proposed amendment to Rule 42 was published for public comment in August 2019. At the June 2020 meeting of the Standing Committee, the Committee presented it for final approval. The Standing Committee was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

The Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent. The Committee added a sentence to guard against the risk that these local rules might be superseded by the proposed amendment, and now seeks final approval of the following:

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, payment, or other consideration.

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

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, 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 beyond 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.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

B. Rule 25—Railroad Retirement Act

The proposed amendment to Rule 25 was published for public comment in August 2020. It would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The Committee replaced both the phrase "remote access" in the text of the proposed amendment and the phrase "electronic access" in the Committee Note with the phrase "remote electronic access." With this change, the Committee seeks final approval of the following:

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 electronic 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 remote electronic access. The amendment extends those protections to Railroad Retirement cases.

* * * * *

April 11, 2022

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2021 report of the Advisory Committee on Bankruptcy Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2021 report of the Advisory Committee on Bankruptcy Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Bankruptcy Procedure are amended to include amendments to Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and to add new Rule 3017.2.

[*See infra* pp. __ __ __.]

2. The foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2022, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

* * * * *

(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. This duty to file a supplemental schedule continues even after the case is closed, except for property acquired after an order is entered:

(1) confirming a chapter 11 plan (other than one confirmed under § 1191(b)); or

(2) discharging the debtor in a chapter 12 case, a chapter 13 case, or a case under subchapter V of chapter 11 in which the plan is confirmed under § 1191(b).

* * * * *

Rule 1020. 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. 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.

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.

* * * * *

(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.

* * * * *

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.

* * * * *

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).

(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 subdivision (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.

(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.

(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.

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 the notice was insufficient under the

circumstances to give the creditor a reasonable time to file a proof of claim.

* * * * *

Rule 3010. Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13

* * * * *

(b) CASES UNDER SUBCHAPTER V OF CHAPTER 11, CHAPTER 12, AND CHAPTER 13. In a case under subchapter V of chapter 11, chapter 12, or chapter 13, 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.

Rule 3011. Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13

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.

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.

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.

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.

* * * * *

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.

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.

* * * * *

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.

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 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 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.

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.

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 under Rule 8023(a) or (b) beyond the 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.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, 3019, 5005, 7004, and 8023 of the Federal Rules of Bankruptcy Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2021 report of the Advisory Committee on Bankruptcy Rules.

Attachments

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

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

* * * * *

(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

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

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.

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.

* * * * *

(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.

* * * * *

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.

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).

(~~e~~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~~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~~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.

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 a reasonable time to file a proof of claim," the court may grant an extension.

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.

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.

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.

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 for Receiving Service of Process" (or other similar titles) is sufficient.

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 under Rule 8023(a) or (b) beyond the 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 Appellate Rule 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.

Agenda E-19
Rules
September 2021

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:

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: * * * (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019 (SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and * * *. The proposed amendments were published for public comment in August 2020. * * *

* * * * *

<u>The SBRA-related Rule Amendments</u>

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules

governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- 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 or in a Case Under Subchapter V of Chapter 11);
- 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).

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to

give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any

action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

* * * * *

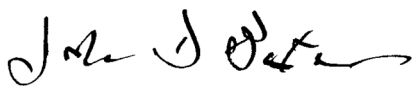
The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2 . . . and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Excerpt from the May 24, 2021 Report of the Advisory Committee on Bankruptcy Rules

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

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 24, 2021

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on April 8, 2021. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to rule and form amendments that were published for comment last August. They consist of amendments to * * * * * (2) thirteen rules * * * * * that would implement the Small Business Reorganization Act of 2019 ("SBRA"); and (3) four additional rules. * * * * *

Part II of this report presents those action items. They are organized as follows:

Excerpt from the May 24, 2021 Report of the Advisory Committee on Bankruptcy Rules

A. Items for Final Approval

Rules * * * * * published for comment in August 2020—

- * * * * *
- 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
- * * * * *.

* * * * *

II. Action Items

A. Items for Final Approval

The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for public comment in August 2020 and are discussed below. Bankruptcy Appendix A includes the rules and form that are in this group.

* * * * *

Action Item 2. SBRA Rules. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA form amendments.

The following rules were published:

- **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).

No comments were submitted on the SBRA rules in response to publication, and the Advisory Committee gave final approval to the rules as published.

It should be noted that one of the interim SBRA rules, Rule 1020, was amended—also on an interim basis—in response to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which took effect on March 27, 2020. The CARES Act modified the definition of "debtor" in § 1182(1) of the Bankruptcy Code for determining eligibility to proceed under subchapter V of chapter 11. 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. These changes necessitated amending Interim Rule 1020 to add references to "a debtor as defined in § 1182(1) of the Code."

Under the CARES Act, the definition of "debtor" in § 1182(1) was to revert to its prior version one year after the effective date of the CARES Act, that is, on March 27, 2021. For that reason, the pre-CARES Act version of Interim Rule 1020 was published for comment. Congress acted in March of this year to extend the sunset date in the CARES Act to March 27, 2022. Nevertheless, the published version of Rule 1020 is still the appropriate one to be finally approved because by the time it goes into effect—December 1, 2022—the CARES Act definition will likely have expired.

Action Item 3. Rule 3002(c)(6) (Filing Proof of Claim or Interest). The amendments would make uniform the standard for seeking bar date extensions by both domestic and foreign creditors. In both situations, the court could grant an extension if it found that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim. There were no comments on the proposed amendments, and the Advisory Committee approved them as published.

Action Item 4. Rule 5005 (Filing and Transmittal of Papers). The amendments would allow papers required to be transmitted to the United States trustee to be sent electronically and would eliminate the requirement for filing a verified statement for papers transmitted other than electronically. The only comment submitted in response to publication was one that noted an error in the redlining of the published version, but it recognized that the Committee Note clarified the intended language. With that error corrected, the Advisory Committee approved the amendments.

Action Item 5. Rule 7004 (Process; Service of Summons, Complaint). The amendments add a new subdivision (*i*) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. No comments were submitted in response to publication of the proposed amendments. The Advisory Committee deleted one comma from the text of proposed Rule 7004(*i*) and made one modification to the Committee Note, changing the word "Agent" to "Agent for Receiving Service of Process," before approving the amendments.

Action Item 6. Rule 8023 (Voluntary Dismissal). Rule 8023 was proposed for amendment to conform to pending amendments to Fed. R. App. P. 42(b). The amendments are intended to clarify that a court order is required for any action other than a simple voluntary dismissal. No comments were submitted in response to publication of the proposed amendments, and the Advisory Committee approved them as published.

* * * * *

April 11, 2022

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I have the honor to submit to the Congress an amendment and an addition to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the March and September 2021 reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2020 and May 2021 reports of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress an amendment and an addition to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the March and September 2021 reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2020 and May 2021 reports of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Civil Procedure are amended to include Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) and an amendment to Rule 7.1.

[*See infra* pp. __ __ __.]

2. The foregoing amendment and addition to the Federal Rules of Civil Procedure shall take effect on December 1, 2022, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment and addition to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental Corporations.*** A nongovernmental corporate party or a 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. The

statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

* * * * *

SUPPLEMENTAL RULES FOR SOCIAL SECURITY ACTIONS UNDER 42 U.S.C. § 405(g)

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:

(A) state that the action is brought under § 405(g);

(B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;

(C) state the name and the county of residence of the person for whom benefits are claimed;

(D) name the person on whose wage record benefits are claimed; and

(E) state 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 entry of an order disposing of the last remaining motion 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.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration a proposed amendment to Civil Rule 7.1 and new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rule and new rules be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rule and new rules along with committee notes; (ii) excerpts from the March and September 2021 reports of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the December 2020 and May 2021 reports of the Advisory Committee on Civil Rules.

Attachments

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

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental Corporations.*** A nongovernmental corporate party or a 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.*** In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party

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

or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

* * * * *

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 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. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of 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. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-

matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

SUPPLEMENTAL RULES FOR SOCIAL SECURITY ACTIONS UNDER 42 U.S.C. § 405(g)

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:

(A) state that the action is brought under § 405(g);

(B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;

(C) state the name and the county of residence of the person for whom benefits are claimed;

(D) name the person on whose wage record benefits are claimed; and

(E) state 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 entry of an order disposing of the last remaining motion 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, including a single claim based on the wage record of one person for an award to be shared by more than one person. 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 Social Security Administration can ensure that the plaintiff is able to identify the administrative proceeding and record in a way that enables prompt response by providing an identifying designation with the final decision. In current practice, this designation is called the Beneficiary Notice Control Number. The elements of the claim for review are adequately pleaded under Rule 2(b)(1)(B), (C), (D), and (E). Failure to plead all the matters described in Rule 2(b)(1)(B), (C), (D), and (E), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff to plead more than Rule 2(b)(1) requires.

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 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 the briefs: 30 days after the answer is filed or 30 days after entry of an order disposing of the last remaining motion filed under

Rule 4(c) 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.

Agenda E-19
Rules
March 2021

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:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the

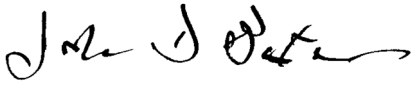
action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 . . . and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Richard P. Donoghue	William K. Kelley
Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Kosta Stojilkovic
William J. Kayatta Jr.	Jennifer G. Zipps
Peter D. Keisler	

Agenda E-19
Rules
September 2021

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:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various

stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through

8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

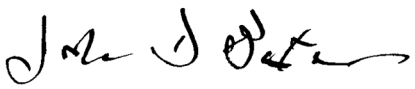
With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental

Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) . . . and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
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William K. Kelley	

Excerpt from the December 9, 2020 Report of the Advisory Committee on Civil Rules (revised January 5, 2021)

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2020 (revised January 5, 2021)

Introduction

The Advisory Committee on Civil Rules met on a teleconference platform that included public access on October 16, 2020. Draft minutes from the meeting are attached to this report.

Part I of this report presents three items for action. The first recommends approval for adoption of amendments to Rule 7.1 that were published for comment in August 2019.

* * * * *

Excerpt from the December 9, 2020 Report of the Advisory Committee on Civil Rules
(revised January 5, 2021)

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). The amendments were brought to the Standing Committee with a recommendation for adoption in June 2020. The topic was remanded for further consideration of the part of Rule 7.1(a)(2) that addresses the time of the citizenships that establish or defeat complete diversity. A revised version of that provision was developed after lengthy deliberation. The revised version is recommended for adoption, and is transmitted along with an alternative that takes the simpler approach of omitting any reference to the times of the citizenships.

The proposed amendment to Rule 7.1(a)(1) and the conforming amendment to Rule 7.1(b) are discussed first. They have not presented any difficulty, but the report that recommended them for adoption at the June meeting is presented again for convenience. The more complicated questions raised by Rule 7.1(a)(2) are discussed after that.

The proposed full rule text recommended for adoption, marked to show changes since publication by double underlining, is:

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.

(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 ~~at the time~~ when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

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, as revised to address the concerns raised in the Standing Committee discussion last June.

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 also seems to be well settled 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 and the court, 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. Summaries of the comments were attached to the June report.

The public comments indirectly illuminated the value of developing further the published rule text that identified the time that controls the existence of complete diversity as "the time the action is filed." 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 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.

Committee discussion of this question last April emphasized the rules that require complete diversity at some time other than

the original filing in federal court or removal to it. 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 the form presented to the Standing Committee last June, calling for disclosures of citizenships:

> (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.

Discussion in the Standing Committee focused on two perceived problems with this formulation.

The first problem arose from concern that the rule would be misread, taking it to address the time for filing the disclosure statement rather than the time of the citizenships that must be considered in determining diversity jurisdiction. That concern could be met by adding redundant but perhaps helpful words to the rule text: " * * * a party or intervenor must, unless the court orders otherwise, file <u>at the time set by Rule 7.1(b)</u> a disclosure statement * * *." But it is better met by substituting a new formula for "at the time" and "at another time" in the rule text. That change is shown in the revised rule text.

The second problem arose from concern that many parties would be confused by the reference to "another time that may be relevant to determining the court's jurisdiction." Diversity will be determined in most cases by the citizenships that exist at the time the action is initially filed in federal court, or at the time it is removed. But many lawyers know that the rules that govern diversity jurisdiction can be complicated, and fear that they must undertake time-consuming and costly research to be sure that their cases do not come within one of the variations on the basic rule. Some might be simply bewildered. The proposal was remanded for further consideration of this concern.

The Advisory Committee's deliberations on remand are summarized in the draft October Minutes. The Advisory Committee renewed its belief that it is useful to adopt rule text that directs attention to the problem that diversity jurisdiction is not

permanently fixed by the citizenships that exist at the time a case first comes to the federal court, whether by initial filing or removal. And it concluded that clear language can reduce, indeed virtually eliminate, the risk that lawyers will be driven to undertake unnecessary research into diversity jurisdiction doctrine. The recommended new language focuses on events subsequent to filing or removal, providing assurance by focusing directly on changes in the shape of the litigation. Substituting "when" for "at the time" also should address the concern about confusion between the time for making disclosure and the times of the citizenships to be disclosed:

> * * * must file a disclosure statement * * * when:
>
> (A) the action is filed in or removed to federal court, and
> (B) any subsequent event occurs that could affect the court's jurisdiction.

Although the Advisory Committee recommends this revised version for adoption, it offers an alternative recommendation for adoption in the event that the revised version does not assuage the concerns that led the Standing Committee to remand. The alternative would simply omit everything in subparagraphs (A) and (B) as shown above. The rule text would say nothing about the times of the citizenships that determine whether there is diversity jurisdiction. This version does what is required to establish a disclosure practice that will provide a secure foundation for prompt and accurate determinations of jurisdiction. That is the most important task set for the rule.

This alternative version also responds to the problem presented by any attempt to use rule text to remind the parties of the complexities that occasionally arise from the more esoteric corners of diversity jurisdiction requirements. No court rule can change those requirements. Any attempt to provide a comprehensive digest would inevitably be incomplete, and might well be inaccurate on one or another points. Referring to "another time that may be relevant" showed the risks of a simple reference. Referring to "any subsequent event" may not fully allay this concern. Rule 7.1(b) provides an indirect reminder of the need to supplement an earlier disclosure "if any required information changes." That includes a change in the information that is required as well as a change in the information itself. The committee note can point to the general issue, providing a rough guide of the need to remain alert for developments in the litigation that may call for additional disclosures.

Excerpt from the December 9, 2020 Report of the Advisory Committee on Civil Rules
(revised January 5, 2021)

Two additional paragraphs from the June report may be provided to fill out the reminder of other issues that have not been challenged in earlier discussions.

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 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 in one of the two forms advanced for discussion. The version that alerts the parties to the need to consider subsequent events that may change the calculus of diversity is the first recommendation. But if it still seems too risky, little is likely to be gained by considering still further variations on subparagraphs (A) and (B). The alternative recommendation is to forgo any attempt to allude to "subsequent events" in rule text by simply omitting subparagraphs (A) and (B) revised. 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.

Clean Rule Text[1]

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or a 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. The statement must name——and identify the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement * * *.

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 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

[1] Revised to reflect stylistic changes made during the January 5, 2021 meeting of the Committee on Rules of Practice and Procedure.

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. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of 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. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

* * * * *

Excerpt from the May 21, 2021 Report of the Advisory Committee on Civil Rules

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 21, 2021

Introduction

The Civil Rules Advisory Committee met on a teleconference platform that included public access on April 23, 2021. Draft minutes of the meeting are attached.

Part I of this report presents three items for action. The first recommends approval for adoption of Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g).

* * * * *

Social Security Rules (for Final Approval)

The Rules. The Advisory Committee recommends adoption of the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) that were published for comment in August 2020.

Excerpt from the May 21, 2021 Report of the Advisory Committee on Civil Rules

* * * * *

As compared to many published proposals to amend one of the general Civil Rules, there were only a modest number of comments, and only two witnesses at a single hearing. Most of the comments and testimony reiterated themes made familiar during the conferences held by the Social Security Review Subcommittee and in its many exchanges with interested organizations and practitioners through the formal conferences and less formal exchanges. Those who participated included the Administrative Conference of the United States, which initially proposed that special social security rules be adopted; the Social Security Administration (SSA); the National Organization of Social Security Claimants' Representatives; the American Association for Justice; federal district judges and magistrate judges; individual claimants' attorneys; and academics, including one of the coauthors of the exhaustive survey of current practices that stimulated the Administrative Conference to propose new rules. Two changes were made in the published rules texts, as noted below. Summaries of the comments and testimony are attached.

Much of what emerged from the comments and testimony was anticipated in discussion at the Standing Committee meeting on June 23, 2020, that approved publication. There is widespread, essentially universal agreement that the rules themselves establish an effective and nationally uniform procedure for these cases. They are appeals on an administrative record, little suited for disposition under civil rules designed for cases that are shaped for trial through motions to dismiss, scheduling orders, discovery, motions for summary judgment, and occasionally for actual trial on the merits. The extensive and painstaking work that developed these rules has produced a procedure as good as can be developed.

This approval of the rules themselves led to widespread support for their adoption. District judges and the Federal Magistrate Judges Association support adoption, including the chief judges of two districts that are among the three districts that entertain the greatest number of social security review actions. These two districts already follow local procedures similar to the proposed national rules, as do several others that have become dissatisfied with attempts to provide an efficient review procedure under the general civil rules. Support is provided by other organizations, including vigorous support grounded on the belief that these rules will be a great help to pro se claimants.

Despite agreement on the quality of the proposed rules, some opposition remains. Claimants' representatives are comfortable with the widely diverse range of practices they confront now. Even those who practice across two or more districts say they can comfortably conform to local differences. They think there is no pressing need to establish a uniform national practice. And they fear that judges who now provide efficient review under accustomed local procedures will not be as efficient if forced to conform to a different national procedure. Some also predict that the effort to achieve uniformity will be thwarted by the insistence of some judges on adhering to their own preferred practices.

A distinctive ground of opposition has been offered by the Department of Justice. Although the Department has promoted adoption of a model local rule drawn along lines proposed by earlier drafts of the supplemental rules, it fears that adopting a set of supplemental rules for these cases will encourage efforts to promote distinctive rules for other substantive areas and for purposes less

aligned with the public interest. That concern ties to the broader questions about adopting transsubstantive rules that are discussed below.

Given the general agreement that the proposed rules are well suited to the task, they can be summarized briefly.

Supplemental Rule 1(a) defines the scope of the rules. They apply to § 405(g) actions brought against the Commissioner of Social Security for review on the administrative record of an individual claim. More complicated actions are governed only by the general Civil Rules. Supplemental Rule 1(b) confirms that the general Civil Rules also apply, "except to the extent that they are inconsistent with these rules."

Supplemental Rule 2(a) provides for commencing the action by filing a complaint. Supplemental Rule 2(b)(1) provides the elements that must be stated in the complaint: identifying the action as a § 405(g) action and the final decision to be reviewed, the person for whom benefits are claimed, the person on whose wage record benefits are claimed, and the type of benefits claimed. Subdivisions (b)(1)(B) and (C) are one of the parts of the rules modified in response to public comment and testimony. As published, they required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. This feature drew steady fire during the period leading up to publication and after publication, but was retained because the SSA maintained that it resolves so many claims that often it could not identify the administrative proceeding and record by name alone. The comments and testimony revealed that the SSA is in the process of implementing a practice of assigning a unique 13-character alphanumeric identification, now called the Beneficiary Notice Control Number, for each notice it sends. This process is expected to be adopted for all proceedings by the time the Supplemental Rules could become effective. The amended rule text requires the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." The final part of Supplemental Rule 2, subdivision (b)(2), permits – but does not require – the plaintiff to add a short and plain statement of the grounds for relief. One of the reasons this provision is supported by claimants' representatives is that it can be used to inform the SSA of reasons that may lead it to request a voluntary remand.

Supplemental Rule 3 dispenses with service of summons and complaint under Civil Rule 4. Instead, the court is directed to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate SSA office and to the United States Attorney for the district. This rule is modeled on practices established in a few districts. It has been welcomed on all sides.

Supplemental Rule 4(a) and (b) set the time to answer and provide that the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c). "Civil Rule 8(b) does not apply," leaving the Commissioner free to decide whether to respond to the allegations in the complaint. Claimants' representatives would prefer that Rule 8(b) apply, but framing the dispute through the briefs is more in keeping with the appellate nature of these actions. Supplemental Rule 4(c) and (d) address motions, incorporating Civil Rule 12 as a convenient cross-reference for the parties.

Supplemental Rule 5 is the heart of the new procedure. "The action is presented for decision by the parties' briefs," which must support assertions of fact by citations to particular parts of the record. Briefs establish a suitable procedure for appellate review on a closed administrative record.

Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for a reply brief by the plaintiff. Supplemental Rule 6 includes the other change made in response to a comment, incorporating language making it clear that the 30 days for the plaintiff's brief run from entry of an order disposing of the last remaining motion filed under Rule 4(c) if that is later than 30 days from filing the answer. From the beginning, these periods have been challenged as too short. Administrative records are long, and plaintiffs' attorneys often practice in small firms without the resources to manage occasional excessive workloads. The SSA attorneys also may be overburdened. Experience in courts that set similarly tight times for briefs shows that extensions are regularly requested and routinely granted. Why not, it is urged, set the periods at 60 days, 60 days, and 21 days? The Advisory Committee has resisted these arguments, believing that shorter times can be met in many cases, and that setting them in the rule will encourage prompt briefing, and perhaps prompt decision. Claimants commonly have had to engage with the administrative process for at least a few years, and often are in urgent need of benefits. The Civil Rule 6(b)(1) authority to extend time remains available.

Transsubstantivity Widespread agreement that the Supplemental Rules establish a strong, sensible, and nationally uniform procedure for resolving appeals on the administrative record moves the question to concerns about adopting rules for a specific substantive subject. These concerns have accompanied the project from the beginning. They were discussed during the June 23, 2020, Standing Committee meeting that approved publication. The discussion is summarized at pages 20-22 of the meeting minutes, pages 48-50 of the agenda materials for the January 5, 2021 meeting. The discussion was valuable, but the vote to approve publication was not intended to conclude the matter. "Transsubstantivity" remains to be considered as the only ground for reluctance to recommend the rules for adoption.

The discussion last June, and at earlier meetings, has made the issues familiar. The theoretical issues may be summarized first, followed by an evaluation of the more pragmatic and more difficult issues.

The theoretical issue is regularly framed around the word in the Rules Enabling Act, 28 U.S.C. § 2072(a), that authorizes the Supreme Court to prescribe "general" rules of practice and procedure. It is common ground that the Civil Rules must be general in the sense that they apply to all district courts. At the same time, multiple familiar examples demonstrate the adoption of rules that address specific subject matter. Rule 71.1(a) directs that "These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Rule A(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions directs that "The Federal Rules of Civil Procedure also apply * * * except to the extent that they are inconsistent with these Supplemental Rules." Rule G of those rules, adopted at the urgent request of the Department of Justice, focuses only on "a forfeiture action in rem arising under a federal statute." Special rules have been adopted for § 2254 proceedings, and for § 2255 proceedings as well; each of those sets of rules concludes with a similar Rule 12, applying the

Civil Rules – and for the § 2255 rules the Criminal Rules as well – "to the extent that they are not inconsistent with any statutory provisions or these rules." Civil Rule 65(f) provides a much more focused example: "This rule applies to copyright impoundment proceedings." The 2001 committee note explains that this rule was adopted in tandem with "abrogation of the antiquated Copyright Rules of Practice for proceedings under the 1909 Copyright Act." An even more modest illustration is provided by Appellate Rule 15.1, which supplements the general Appellate Rule 15 procedures for petitions to review agency orders by setting the order of briefing and argument in an enforcement or review proceeding that involves the National Labor Relations Board. The 1986 committee note explains that the rule "simply confirms the existing practice in most circuits."

These examples provide powerful support for the proposition that rules aimed at a specific subject matter come within the authority to prescribe "general" rules of practice and procedure.

Powerful support also exists in the pragmatic grounds for adopting the Supplemental Rules for Review of Social Security Decisions under 42 U.S.C. § 405(g). They began, not with a suggestion advanced to promote private interests, however worthy, but with a suggestion advanced by the United States Administrative Conference and based on a comprehensive survey performed by two prominent law professors that showed wide and often deep differences in practice in different districts. This suggestion, advanced to promote a view of the public interest formed by a body deeply immersed in the relationships between administrative agencies and the courts, has been enthusiastically embraced by the Social Security Administration, support that has been strongly maintained even as the drafting process continually whittled away more detailed versions proposed by the Administration.

The opportunity to improve the procedures for review in these actions is particularly attractive because they are brought in great numbers. For several years, the annual average has run from 17,000 to 18,000 review actions, and more recently has surpassed 19,000 actions. Much can be gained by a nationally uniform and good procedure adapted to the needs of appeals to the district courts that raise only questions of law and review for substantial evidence to support the Commissioner's final decision. As noted earlier, the district judges and magistrate judges who explored and commented on these rules became strong supporters.

The initial drafting stages considered the possibility of moving away from this specific subject matter to draft a more general rule for actions brought in a district court for review of other kinds of administrative action. The possibility was put aside. A major problem is presented by the wide variety of actions that challenge administrative action. Some prove, either in theory or in application, to be equally pure examples of review on a closed administrative record. Others, however, provide reasons to resort to ordinary civil procedure, including discovery and perhaps summary judgment. And it likely would prove difficult to establish an appropriate scope for any such rule, drawing lines to exclude actions aimed at executive actions that follow procedures perhaps more, and perhaps less, like administrative procedure. Even if a workable scope provision could be adopted, developing a suitable procedure for all these actions would be truly difficult. Nor is there any reason to suppose that the total number of actions that might be reached would approach the number of social security review actions.

Several concerns have been advanced to counter these favorable considerations, drawing not from these specific rules but from more general issues that surround subject-specific rules. They deserve consideration, even if they do not prove persuasive.

One concern is that subject-specific rules may favor plaintiffs or defendants on a regular basis. The social security rules were developed in close consultation with claimants' representatives as well as with the SSA. Many proposals by the SSA were rejected, and many suggestions by claimants were adopted. Comments and testimony after publication recognize these elements of neutrality. The rules, as a whole, are designed to advance alike the interests of claimants, the SSA, and the courts. They offer no sound ground even for a perception that they favor the SSA, despite some lingering protests on that score, including a perception that the rules are designed to reduce burdens on the SSA staff attorneys as they work to comply with different local procedures.

Another concern is that subject-specific rules can be developed only on the basis of deep familiarity with the realities of litigating the subject. That is a serious concern. The years of work undertaken by the subcommittee in collaboration with experts on all sides of social security review appeals, however, have supported development of rules that all agree are well shaped for these actions.

Perhaps the most serious concern might be described as the weakened levee concern. The fear is that adding one more substance-specific set of rules to those that have already been adopted will undercut resistance to self-interested pleas and pressure to develop still more substance-specific rules. Little optimism is needed to predict that the several entities engaged in the Rules Enabling Act process will resist such pressures, supporting subject-specific rules only when strongly justified. There may be better reason to fear that advocates in Congress will argue that their favorite procedures can be adopted because the Supreme Court has prescribed other subject-specific rules and Congress has accepted them. That fear must be considered, but it should not deter adoption of good rules that will improve litigation practices, and at times improve outcomes, to the benefit of claimants, the SSA, and the courts themselves.

The draft minutes of the April 23, 2021, Civil Rules Committee meeting describe the deliberations that led the Advisory Committee to recommend adoption, with one member abstaining because absent from the meeting up to the moment of the vote, and over the dissent of the Department of Justice based on the fear of reducing the ability to resist pressures to adopt other and less well executed and designed substance-specific rules. The Advisory Committee has debated the Department's concern repeatedly during the years-long development of these rules. The concern has been recognized as valid, but the conclusion is that these Supplemental Rules serve party-neutral and important purposes so well that they should be adopted.

* * * * *

April 11, 2022

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I have the honor to submit to the Congress an amendment to the Federal Rules of Criminal Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rule with committee note; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2021 report of the Advisory Committee on Criminal Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress an amendment to the Federal Rules of Criminal Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rule with committee note; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2021 report of the Advisory Committee on Criminal Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure are amended to include an amendment to Rule 16.

[*See infra* pp. __ __ __.]

2. That the foregoing amendment to the Federal Rules of Criminal Procedure shall take effect on December 1, 2022, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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 disclose to the defendant, in writing, the information required by (iii) for 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). If the government requests discovery under the second bullet

point in (b)(1)(C)(i) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required by (iii) for testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 on the issue of the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. 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 for each expert witness must contain:

- a complete statement of all 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 them;
- 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 a Disclosure. The government must supplement or correct its disclosures 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, the defendant must disclose to the government, in

writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or
- 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 Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. 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. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;
- the bases and reasons for them;
- 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 a Disclosure. The defendant must supplement or correct the defendant's disclosures in accordance with (c).

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration a proposed amendment to Rule 16 of the Federal Rules of Criminal Procedure, which has been approved by the Judicial Conference. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting (i) clean and blackline copies of the amended rule along with committee note; (ii) an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the June 2021 report of the Advisory Committee on Criminal Rules.

Attachments

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

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

testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under the second bullet point in ~~subdivision~~ (b)(1)(C)(~~i~~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 at trial 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 Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. 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 for each expert witness ~~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 a Disclosure. The government must supplement or correct its disclosures 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 Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. 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. The disclosure for each expert witness ~~This summary~~ 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 a Disclosure. The defendant must

supplement or correct the defendant's disclosures 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's disclosure) and (b)(1)(C) (defendant's 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, items (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 disclosures of expert testimony to the defendant, and for the defense to make its disclosures 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.

Items (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, items (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, and a list of other cases in which the witness has testified in the past 4 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).

Items (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.

Items (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.

Items (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 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 modification or correction.

Agenda E-19
Rules
September 2021

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:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

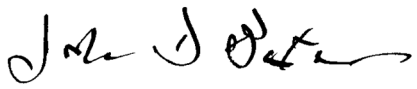
After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16 . . . and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Excerpt from the June 1, 2021 Report of the Advisory Committee on Criminal Rules

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: June 1, 2021

I. Introduction

The Advisory Committee on Criminal Rules (Advisory Committee) met on a videoconference platform that included public access on May 11, 2021. Draft minutes of the meeting are attached.

* * * * *

In this report, the Advisory Committee seeks final approval for a proposed amendment to Rule 16 previously published for public comment.

* * * * *

II. Action Item for Final Approval After Public Comment: Rule 16

The proposed amendments to this rule arose from three suggestions that the Advisory Committee consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). With the aid of an extensive briefing session presented by the Department of Justice (DOJ) and a miniconference bringing together experienced prosecutors and defense lawyers, the Advisory Committee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) 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 meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Because the Advisory Committee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Advisory Committee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended subsections (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) generally mirror one another.

A. The Public Comments

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes in the text and the committee note. As described more fully below, after considering these suggestions, the Advisory Committee decided against adopting any of them.

1. Setting a Default Time for Disclosures

Many commenters focused on the amendment's timing for disclosures, which was an issue that the Advisory Committee considered at length during the drafting process. Rather than setting a default date for disclosures, (a)(1)(G)(ii) and (b)(1)(C)(ii) specify that the disclosure must be made "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Although the California Lawyers Association supported this approach, the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the New York City Bar Association (NYC Bar) all urged the Advisory Committee to include a default deadline, though they did not agree on what that deadline should be.

The NYC Bar did not specify a preferred deadline. Noting the variety of deadlines set in other jurisdictions (ranging from 60 days to 21 days before trial), it urged that setting some default date would provide helpful certainty to the parties while allowing the courts discretion to increase or decrease the time period on particular cases. It added that some members took the view that default dates should not be set "too far in advance of trial," so that the government would not have to undertake such discovery in smaller cases that were unlikely to go to trial.

The FMJA commented that busy trial judges contending with large caseloads and the demands of the Speedy Trial Act would "appreciate the guidance" of a default deadline, and they suggested a default of 21 days before trial, as well as a requirement that rebuttal experts be disclosed 7 days before trial. Finally, the FMJA commented that some (though not all) of its members expressed concern about allowing deadlines to be set by local rules, which could be a trap for defense lawyers unfamiliar with the local rule.

NACDL agreed that the rule should set a default date for expert disclosures, but it supported earlier default deadlines: no later than 30 days before trial for the initial disclosures, and 14 days before trial for reciprocal disclosures. It argued these earlier deadlines are needed "to minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare." Further, NACDL argued that the rule should require the court to set a case-specific deadline in writing, in order to minimize any risk of confusion or misunderstanding.

During the drafting process, the Advisory Committee carefully considered whether to include a default deadline—and declined to do so. The draft amendment seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule *must* set a specific time for each party to make its disclosures of expert testimony to the other party. These disclosure deadlines, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Because caseloads vary from district to district, the amended rule 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. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Finally, under the new Rule 16.1, the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures should consider the parties' recommendations.

Many members initially favored a specific deadline as the best way to ensure that the parties have sufficient time to prepare for trial. After extensive consideration and discussion, however, the Advisory Committee was unable to come up with specific times that would fit every case and comply with the Speedy Trial Act. Given the enormous variation in cases and caseloads, the Advisory Committee decided unanimously to adopt a flexible and functional standard focused on the ultimate goal of ensuring that the parties have adequate time to prepare. Although some defense members had initially pressed for default deadlines, they came to the view that the defense might be benefited by this flexible approach. Some members also suggested that the functional approach would be more efficient since it would avoid the need for motions to adjust the default deadlines in individual cases. Finally, there was significant support for recognizing in the text that individual districts might adopt local rules setting default deadlines.

After considering the NYC Bar, FMJA, and NACDL comments, the Advisory Committee rejected the suggestion that it set a default deadline and reaffirmed its support for the amendment's

flexible and functional approach. Responding to the concern expressed by some FMJA members and NACDL that local rules setting disclosure deadlines would create unnecessary confusion or be an unfair trap for unwary counsel, the Advisory Committee concluded it was reasonable to expect counsel to consult the local rules. Indeed, the amendment itself puts readers on notice that they should check the local rules. Proposed (a)(1)(G)(ii) and (b)(1)(C)(ii) state "The court, by order *or local rule*, must set a time [to make] disclosures." (emphasis added).

2. Deleting the Requirement that the Parties Disclose a "Complete" Statement of the Expert's Opinions

The parallel requirements of (a)(1)(G)(iii) and (b)(1)(C)(iii) require the parties to provide "a complete statement of all opinions" the party will elicit from any expert in its case in chief. In order to underscore the difference between this requirement and that imposed by Civil Rule 26, the California Lawyers Association urged the Advisory Committee to remove the word "complete."

The requirement that a party's statement of its expert's opinions be "complete" goes to the heart of the amendment. The Advisory Committee extensively discussed the requirement of a "complete statement" at its fall meeting in 2019. After discussing the possibility that district judges would mistakenly assume that the amended rule in all respects adopts Civil Rule 26, the Advisory Committee decided to retain the phrase "complete statement" as well as the current statement in the note.

The amendment remedies the problem of insufficient pretrial disclosure of expert witnesses. In doing so it moves criminal discovery closer to civil discovery, though without replicating civil discovery in all respects. On this point, as published, the amended rule reflects a number of delicate compromises that allowed the proposal to receive unanimous support. First, the amendment requires a "complete statement" of the expert's opinions in order to clearly signal the need for more complete disclosures. The Advisory Committee also decided not to require a "report," which some members felt would suggest an unduly onerous requirement. Rather than put a label on the disclosures, the amendment allows the specific requirements set forth in (a)(1)(G)(iii) and (b)(1)(C)(iii) to speak for themselves. Finally, the committee note states that the amendment does not "replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases."

In sum, the requirement for disclosure of a "complete" statement is critical to addressing the problem of insufficiently complete disclosures under the current rule. The Advisory Committee therefore declined to remove it.

3. Enlarging the Required Disclosures

NACDL urged that the Advisory Committee expand the required disclosures to include two additional elements:

- transcripts in the party's possession of any testimony by the witness in the past four years; and

- any information in the government's possession favorable to the defense on the subject of the expert's testimony or opinion or any information casting doubt on the opinion or conclusions.

NACDL also urged that the proposal be amended to require the same disclosures to other stages in the proceedings, including preliminary matters and sentencing.

The Advisory Committee rejected these suggestions for two main reasons. First, the inclusion of some or all of these proposed changes would require further study and republication to obtain public comments, slowing the process by at least one year. Some elements of the proposal would likely be controversial.[1] Second, expanding the scope of the amendment by including additional elements might imperil the consensus enjoyed by the current narrowly targeted proposal.

4. Additional Note Language

Three comments suggested changes in the committee note. The Advisory Committee decided against making them.

a) The FMJA Proposal

The FMJA urged the addition of note language. It expressed concern that the specific limitations for government disclosures in (a)(1)(G)(iii) concerning publications within the past 10 years and testimony within the past 4 years "could be misconstrued as defining the scope of disclosures required by the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland,* 373 U.S. 83 (1963)."

The Advisory Committee concluded that these concerns did not warrant revisions to the committee note. Members viewed it as unlikely that readers would mistakenly believe that the amendment sought to govern the constitutional obligation imposed by *Brady v. Maryland*, or to define the scope of disclosures required by the Jencks Act, now supplemented by Rule 26.2. Indeed, Rule 26.2, which governs *midtrial* disclosures after a witness has testified, includes in subdivision (f) a detailed description of a statement *for purposes of that rule*.

b) The NACDL Proposal

On pages 2-3 of its comments, NACDL described a Tenth Circuit decision, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), ruling that a defendant's expert disclosure must, on its face, be sufficient to withstand a *Daubert/Kumho Tire* challenge. NACDL proposed language stating that the amendment:

> should not be read as a requiring that the disclosure must itself be sufficient to allow the expert's option to pass muster under [*Daubert* and/or *Kumho Tire*] or otherwise

[1] Indeed, NACDL implicitly recognizes that its proposal would be in conflict with 18 U.S.C. § 3500 and Rule 26.2, and specifies that the proposed disclosure would be required notwithstanding Rule 26.2 and any contrary statute.

> conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see*, *e.g.*, *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert's opinion, so as to permit that party to file an appropriate motion, if it so chooses.

For a variety of reasons the Advisory Committee chose not to include this language in the note. First, the Advisory Committee previously decided not to detail the differences between civil and criminal discovery in the committee note. Second, as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended. Finally, the reporters expressed concern that the *Nacchio* case was not in fact on point, and they urged the subcommittee not to include this citation.

c) The Department of Justice

Mr. Wroblewski relayed a concern from the Drug Enforcement Administration (DEA) regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The DEA expressed concern that this language might be interpreted "to require the government to identify every publication, regardless of relevance, including sensitive intelligence documents published within a law enforcement component, within the DOJ or within the executive branch, for example even classified scientific papers provided to the White House or the CIA could conceivably be included." In research to explore this concern, Mr. Wroblewski found little case law defining the term "publication" under the Civil or Criminal Rules. The few cases that did address the definition of "publication" focused on disclosure of the information to the public, and the common meaning of the term "publication" seems to exclude internal materials not available to the public.[2]

The DEA's concerns arose from the common use of the term "publication" to refer to the circulation of internal documents within the executive branch. Mr. Wroblewski suggested the adding language to the committee note to reassure government entities that use of the term "publication" does not include internal circulation.

Although the subcommittee recommended note language to address the DEA's concern, the Advisory Committee decided against including it. For two reasons, members concluded that note language carving out "internal government documents" was neither necessary nor desirable. First, nobody thought that the courts would construe the amended rule to include internal government documents. The term "publication" has long been included in Civil Rule 26, and no one knew of any case in which it had been applied to internal government documents. Second, the inclusion of a carve-out would wrongly imply that absent this limitation the term "publication" was broad enough to include internal documents that had never been released publicly. After discussion, the DOJ's representatives declined to press for the change, noting that the concerns cited by various members were legitimate.

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[2] *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "publication" as "the act of declaring or announcing to the public," and in the context of copyright law "offering or distributing copies of a work to the public").

[B.] Clarifying Changes Made During and After the Meeting

In response to issues raised at the meeting, the Advisory Committee made several clarifying changes. Most were made during the meeting, but one set of issues was set aside for further consultation with the style consultants.

[1.] Changes in (a)(1)(G)

On lines 18-19, the Advisory Committee corrected a cross reference to a request for discovery "under the second bullet point in subdivision (b)(1)(C)(ii)." The style consultants were helpful in determining how the bullet could be cited.

On lines 25-28, the Advisory Committee moved the phrase "at trial" to parallel its placement on line 11, so that both refer to "use at trial." On lines 27-28 it deleted as superfluous the phrase "as evidence," since use under Federal Rule of Evidence 702, 703, or 705 would necessarily be as evidence.

The Advisory Committee considered at length the remaining differences between the first and second sentences in this subsection, and it found no reason to make additional changes. The first sentence currently limits the government's general disclosure obligation to expert testimony it intends to use in its "case-in-chief." The amendment adds the requirement that the government also disclose expert testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." The addition of a requirement that the government disclose this specified rebuttal evidence responded to one of the major concerns practitioners raised at the miniconference. The second sentence, which governs disclosure of expert testimony concerning the defendant's mental condition, fits into a specialized disclosure regime under Rule 12.2. Because the government would not necessarily address a potential insanity defense in its case-in-chief, the current text refers to testimony the government intends to use "at trial." During the process of studying the proposed amendments, the Advisory Committee received no comments that there were any problems with pretrial disclosure in the cases governed by this sentence, and it concluded that the best course was to leave that language unchanged.

[2.] Clarifying Changes to Distinguish Between General Disclosure Obligations and Disclosures Regarding Specific Expert Witnesses

At the meeting, Judge Bates raised a concern about potential confusion from the use of the word "disclosure" in a collective sense (a disclosure that itself includes multiple disclosures regarding individual witnesses) as well as to refer to a disclosure for a particular witness. As he noted, the government may have multiple witnesses, with separate disclosures for each. In addition, disclosures for some government experts must be made at a different time than disclosures for others. A disclosure for a rebuttal witness is required only after the defendant makes a disclosure under (b)(1)(C) (which will be after the government has made its disclosure of evidence it intends to use in its case-in-chief). Finally, disclosure of mental health witnesses may take place at a separate time, potentially creating a third different disclosure deadline (although it will often be the same time as government rebuttal witnesses). Similarly, the defense may have multiple experts, and may make disclosures at different times.

Whether this language needed revision was unclear at the meeting. No comments during the process leading up to publication or received during the comment period raised this issue, and the context seemed to make it clear that (a)(1)(G)(ii) referred to all of the witness disclosures, while (a)(1)(G)(iii), (iv), (v), and (vi) referred to the required disclosures regarding individual witnesses. For example, one witness could not be expected to sign a disclosure that includes information about the statements to be made by other witnesses.

After consultation with the style consultants, however, clarifying language was developed to address Judge Bates's concern. The changes distinguish the parties' general disclosure obligations—in parallel items (i), (ii) and (vi)—from the requirements for a disclosure for a particular expert witness—in items (iii), (iv), and (v). Although the changes were intended to be stylistic only, they were circulated to the Advisory Committee by email asking members to raise any concerns or objections. None were raised.

* * * * *