

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Washington, DC
May 29-30, 2014**

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Washington, DC
May 29-30, 2014

I. Welcome and Opening Business

- A. Welcome and opening remarks by Judge Jeffrey S. Sutton
- B. Report on March 2014 Judicial Conference session
- C. Transmission of Supreme Court-approved proposed rules amendments to Congress
- D. **ACTION:** Approving Minutes of the January 2014 Committee Meeting

II. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

Items for Final Approval

- A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
 - 1. Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37: Duke Civil Litigation Conference Rules Package
 - 2. Rule 37(e): Failure to Preserve ESI
 - 3. Rule 84 and the Appendix of Forms, Rule 4, and Forms 5 and 6: Abrogation of Civil Forms
 - 4. Rule 6(d): “Being Served”
 - 5. Rule 55(c): “Final” Default Judgment

Items for Publication

- B. **ACTION:** Approving publishing for public comment proposed amendments to:
 - 1. Rule 6(d): Elimination of Electronic Service from 3-Day Rule
 - 2. Rule 82: Conform to Admiralty Venue
 - 3. Rule 4(m): Serving a Corporation Abroad

III. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares

- A. **ACTION:** “3-Day Rule” Package

IV. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

Items for Publication

- A. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rule 4: Service of Summons on Organizational Defendants
2. Rule 41: Venue for Approval of Warrant for Certain Remote Electronic Searches
3. Rule 45: Elimination of Electronic Service from 3-Day Rule

V. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

Items for Publication

- A. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rules 4(c) and 25(a)(2)(C), Forms 1 and 5, and new Form 7: Inmate-Filing Rule
2. Rule 4(a)(4): “Timely” Tolling Motions
3. Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6: Length Limits
4. Rule 29: Amicus Briefs on Rehearing
5. Rule 26(c): Elimination of Electronic Service from 3-Day Rule

VI. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater

VII. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff

Items for Final Approval

- A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rule 9006(f)
2. Official Forms 17A, 17B, and 17C (December 1, 2014 effective date)
3. Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 (December 1, 2014 effective date)
4. Official Forms 3A and 3B (December 1, 2014 effective date)
5. Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 (December 1, 2015 or later effective date)

Items for Republication

- B. **ACTION:** Approving republishing for public comment proposed amendments to:
1. Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009
 2. Official Form 113

Items for Publication

- C. **ACTION:** Approving publishing for public comment proposed amendments to:
1. Rules 1010, 1011, 2002, and new Rule 1012
 2. Rule 3002.1
 3. Rule 9006(f): Elimination of Electronic Service from 3-day Rule
 4. Official Form 401
 5. Official Form 410A
 6. Official Forms 11A (Abrogated), 11B (Abrogated), 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions

VIII. Report of the Administrative Office

IX. Next meeting in Phoenix, Arizona on January 8-9, 2015

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CHAIRS and REPORTERS

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Committee on Rules of Practice and Procedure

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

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2015
James M. Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2014
Richard C. Wesley	C	Second Circuit	2011	2014
Jack Zouhary	D	Ohio (Northern)	2012	2015
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open
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Liaison for the Advisory Committee on Appellate Rules	Gregory G. Garre, Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Appellate Rules	Judge Adalberto Jordan <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Roy T. Englert, Jr., Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Civil Rules	Judge Arthur I. Harris <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Civil Rules	Judge Neil M. Gorsuch <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Judith H. Wizmur <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Paul S. Diamond <i>(Civil)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge John F. Keenan <i>(Criminal)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Richard C. Wesley <i>(Standing)</i>

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TAB 1

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

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

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Steven M. Colloton, Chair
 - Professor Catherine T. Struve, Reporter (by telephone)
- Advisory Committee on Bankruptcy Rules —
 - Judge Eugene R. Wedoff, Chair
 - Professor S. Elizabeth Gibson, Reporter (by telephone)
 - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
 - Judge David G. Campbell, Chair
 - Professor Edward H. Cooper, Reporter
 - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
 - Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline" The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules"

FED. R. APP. P. 4(c)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistance in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court’s subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, “saving to suitors in all cases all other remedies to which they are otherwise entitled.” By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing “consent” from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member’s point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee’s plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that “[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

*Amendment for Final Approval***FED. R. CRIM. P. 12**

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of “good cause” for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring “good cause” alone in (A) and “prejudice” alone in (B), the implication was that there was no requirement of showing “prejudice” in (A). That is not what the committee intended. On the other hand, by requiring “good cause” in (A), and only “prejudice” in (B), the committee had intended the negative implication to be that there was no requirement of showing “cause” under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — “good cause,” the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than “good cause.” That is why the advisory committee eventually decided to use just “prejudice” for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that “good cause” would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee’s view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a “good cause” standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that “good cause” is “a flexible standard that requires consideration of all interests in the particular case.” She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words “cause and prejudice” were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that “good cause” is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year’s rulemaking cycle. She said it was the Standing Committee’s decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case.” The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that “good cause” is a “flexible standard” makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that “good cause” suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the “good cause” standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].” He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the “CM/ECF Next Gen” was being overseen by that committee and it would clearly have implications for the subcommittee’s work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee’s work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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TAB 2

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

**TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure**

**FROM: Hon. David G. Campbell
Advisory Committee on Civil Rules**

RE: Report of Advisory Committee on Civil Rules

DATE: May 2, 2014

Introduction

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2013.

Part IA of this Report presents for action a proposal recommending adoption of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. For the most part, these recommendations are little changed from the proposals that were published for comment last summer. The most obvious changes are encompassed by a recommendation to withdraw amendments that would tighten presumptive numerical limits on some forms of discovery. The remaining amendments form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending adoption of a revised Rule 37(e). Publication was approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to the June 2013 meeting. A substantially revised version was approved for publication at the June meeting. The invitation for comments included five specific questions on points highlighted in the Standing Committee discussion. Many concerns were raised in extensive testimony and voluminous comments that addressed these five questions and many other matters as well. The rule text has been revised extensively in response to the testimony and comments, and was further revised in light of comments on the draft that appeared in the agenda materials for the April Civil Rules Committee meeting. The core of the published rule, however, remains.

Part IC presents for action a recommendation to approve for adoption a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part ID presents for action a recommendation to approve adoption of an amendment that clarifies an ambiguity inadvertently introduced to Rule 6(d) in 2005. It may be appropriate to defer submission to the Judicial Conference pending action on other proposals to amend Rule 6(d) that have not yet been published for comment.

Part IE presents for action a recommendation to approve adoption of an amendment that clarifies a longstanding ambiguity in Rule 55(c).

Part IIA presents the recommendation to publish an amendment that deletes the provision in Rule 6(d) that allows 3 added days to respond after service by electronic means. The recommendation was approved last January. It is presented here to complete the package of parallel amendments proposed for publication by the Appellate, Bankruptcy, and Criminal Rules Committees.

Part IIB presents for action a recommendation to approve publication of an amendment of Rule 4(m) to make it clear that service on a foreign corporation outside any judicial district of the United States is exempt from Rule 4(m) time limits.

Part IIC presents for action a recommendation to approve for publication a revised rule text that seeks to better accomplish the purpose of a Rule 82 amendment that was approved for publication, subject to further consideration of the rule text, at the January, 2014 Standing Committee meeting.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. DUKE RULES PACKAGE

The Standing Committee approved the August, 2013 publication of a package of proposed amendments developed by the Duke Conference Subcommittee. Amendments were proposed for Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The proposals, along with other proposals published at the same time, were explored at three maximum-capacity hearings in November (Washington, D.C.), January (Phoenix, Arizona), and February (Dallas, Texas). They were also addressed in more than 2,000 written comments submitted to the Committee. A summary of the comments and testimony is attached.

The Civil Rules Committee unanimously recommends that the Standing Committee recommend most of the published proposals for approval by the Judicial Conference and adoption by the Supreme Court. The Committee recommends that the Standing Committee withdraw these proposed amendments: to reduce the presumptive numbers of depositions under Rules 30 and 31 and interrogatories under Rule 33; to limit the number of requests to admit under Rule 36; and to reduce the length of an oral deposition from seven hours to six hours. The reasons for these recommendations are described below.

These proposals were carefully developed as a package in response to the advice offered by some 200 voices at the Duke Conference in 2010. There was nearly unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management. It also was agreed that these goals should be pursued by several means. Continuing education of bench and bar was one means; the Federal Judicial Center has acted on this advice and worked toward enhanced education programs. A second means was exploration through pilot projects structured to facilitate rigorous evaluation. The Federal Judicial Center is actively monitoring some of these projects. Careful appraisal of state-court procedures is a related activity, advanced in part by work of the Institute for the Advancement of the American Legal System. The Conference also prompted a project launched by the Committee and the National Employment Lawyers Association to develop protocols for initial discovery in individual employment cases. The protocols were developed by a team of lawyers evenly balanced between those who commonly represent employees and those who commonly represent employers. The protocols have been adopted by numerous District Judges; experience with the protocols has led to calls for more widespread adoption, and the hope that similar protocols might be developed for other categories of litigation. These programs of education and innovative pilot projects continue.

Rule amendments were the third component of the response to the Duke Conference. There was widespread agreement that the present rule structure is basically sound, that the time has not come to consider fundamental revision of the familiar structure. But there is room to pursue careful changes that will advance the goals of cooperation, proportionality, and active judicial case

management. The proposed amendments were published as a package of integrated measures that would work toward those goals. The parts that are carried forward toward adoption remain an integrated package aimed at the same goals. The parts that are omitted were designed to contribute to these ends, but the remaining package will function well without them.

The Committee has carefully studied the public testimony and comments. The comments were divided, but largely supportive, on the proposal to amend Rule 1 to advance cooperation among the parties, and on the proposals to amend Rules 4 and 16 to enhance early and active case management. Reactions to the discovery proposals were mixed. Many comments, often identifiable as reflecting pro-plaintiff or pro-defendant views, divided sharply between strong opposition and strong support. Other comments provided more balanced assessments of possible advantages and disadvantages. Many of these comments came from public agencies or from organized bar groups that generated their positions by a process that sought to establish a consensus acceptable to all sides. After considering all points of view, the Committee is convinced that the recommended amendments will make the civil litigation process work better for all parties.

Rather than take the package in numerical rule order, these recommendations begin with the discovery proposals. Rules 1, 4, and 16 follow at the end.

(1) Discovery Proposals

The Committee recommends that the Standing Committee forward most of the published discovery proposals for adoption, with a few revisions in rule texts and with considerably expanded Committee Notes. The Committee also recommends, however, that the Standing Committee put aside the proposals for new and reduced presumptive limits for discovery under Rules 30, 31, 33, and 36. All that remains of these proposals are the parts that amend Rules 30, 31, and 33 to reflect the proposal to transfer the operative provisions of present Rule 26(b)(2)(C)(iii) to Rule 26(b)(1).

(a) Rule 26(b)(1): Four Elements

The Rule 26(b)(1) proposal includes four major elements. The cost-benefit factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery, identifying elements to be considered in determining whether requested discovery is proportional to the needs of the case. The examples recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated as no longer necessary. The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is also eliminated. And the provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten. Each element deserves separate consideration.

(i) Scope of Discovery: Proportionality

There was widespread support at the Duke Conference for the proposition that discovery should be limited to what is proportional to the needs of the case. But discussions at the two miniconferences sponsored by the Subcommittee revealed significant discomfort with simply adding a bare reference to “proportional” discovery to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To illuminate and constrain the concept of proportionality, the Committee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which courts now are to consider in limiting “the frequency or extent of discovery,” be relocated to Rule 26(b)(1) and included in the scope of discovery. All discovery is currently subject to those factors by virtue of a cross-reference in Rule 26(b)(1), and the Committee was informed that these factors are understandable and work well.

This proposed change provoked a stark division in the comments. Those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed only to favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy any uniform application among different courts. They asserted that “proportionality” will become a new automatic and blanket objection to all discovery requests, or would encourage reluctant parties to withhold relevant and responsive information by making unspoken and self-serving determinations of nonproportionality, leading to increased motion practice with attendant costs and delays. And they were particularly concerned that proportionality would routinely defeat the rather extensive discovery ordinarily needed to prove many claims that involve modest amounts of money but principles important not only to the plaintiffs but also to the public interest. These problems were particularly emphasized in noting categories of cases that typically involve “asymmetric information” — plaintiffs in many employment and civil rights actions have little relevant information, while defendants hold all the important information and reveal it only through extensive discovery. Many asserted that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Finally, some argued that the proportionality proposal is a solution in search of a problem — that discovery in civil litigation already is proportional to the needs of cases. These arguments were often coupled with the assertion that there is no empirical evidence to support concerns that disproportional discovery is sought in a worrisome number of cases.

The Committee has considered these comments carefully, as well as those that favored the change, and remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery — with some modifications as described below — would constitute a significant improvement to the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

1. Findings from Duke

A principal conclusion of the Duke conference was that discovery in civil litigation would

more often achieve the goal of Rule 1 — the just, speedy, and inexpensive determination of every action — through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys done in preparation for the conference. In a report to the Chief Justice on the Duke conference, the Committee summarized findings from the conference as follows: “One area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case.” The report added: “What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained, active, hands-on judicial case management.” The Committee remains convinced that these conclusions are correct, and that emphasizing proportionality in Rule 26(b)(1) will help achieve the just, speedy, and efficient resolution of civil cases.

Some comments on the proportionality change suggest that the change is not needed — that discovery in civil litigation already is proportional to the needs of cases. Many of these comments rely on a closed-case survey prepared by the Federal Judicial Center for the Duke Conference at the Committee’s request. The Committee does not agree that the FJC survey or other surveys prepared for the conference suggest no need for change.

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the “right amount” of information, and more than half reported that the costs of discovery were the “right amount” in proportion to their client's stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients’ stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5 percent of plaintiff attorneys and 39.9 percent of defendant attorneys in cases that actually settled. On the question whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs, defendants, and both about equally, that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke conference showed even greater dissatisfaction with the costs and extent of civil discovery. In surveys of lawyers from the American College of Trial Lawyers (“ACTL”), the ABA Section of Litigation, and the National Employment Lawyers Association (“NELA”), more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. A report from the ACTL Task Force on Discovery and the Institute for the Advancement of the American Legal System (“IAALS”) reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today’s civil litigation system takes too long

and costs too much, resulting in some deserving cases not being brought and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: “Proportionality should be the most important principle applied to all discovery.”

The surveys of the ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of Litigation, 78% percent of plaintiffs’ attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, and 33% of plaintiffs’ lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreed that litigation costs are not proportional in large cases. In the NELA survey, which surveyed primarily plaintiffs’ lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits of the case than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce proportionality limitations on their own.

2. *The history of proportionality and Rule 26(b)(1).*

The proportionality factors to be added to Rule 26(b)(1) are not new. As detailed in the expanded Committee Note, they were added to Rule 26 in 1983 and originally resided in Rule 26(b)(1). Their original intent, according to the 1983 Committee Note, was “to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry,” and “to encourage judges to be more aggressive in identifying and discouraging discovery overuse.” Although the factors were later moved to Rule 26(b)(2)(C) when section (b)(1) was divided, they remain part of the scope of discovery. The last sentence of current Rule 26(b)(1) specifically states that “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” And several of the proportionality factors are found in Rule 26(g), which provides that a lawyer’s signature on a discovery request, objection, or response constitutes a certification that it is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.”

The adoption of the proportionality factors in 1983 was followed by amendments in 1993 and 2000 that were designed to encourage courts to enforce them. Despite these efforts, the clear sense of the Duke conference was that a greater emphasis on proportionality is needed. The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging

parties and courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes. Four different advisory committees acting independently across many years have independently concluded that proportionality is an important dimension of discovery practice. If the expressions of concern in the testimony and comments reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.

3. *Adjustments to the 26(b)(1) proposal.*

The Committee has listened carefully to concerns expressed about the move of the proportionality factors to Rule 26(b)(1) — that it will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended, and the proposed Committee Note has been revised to address them. The Note explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The Note also states that the change does not support boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court. And the Committee remains convinced that the proportionality considerations — which already govern discovery and parties’ conduct in discovery — should not and will not increase the costs of litigation. To the contrary, the Committee believes that more proportional discovery will decrease the cost of resolving disputes in federal court without sacrificing fairness.

One proposed revision in the published rule text is to invert the order of the first two factors so now they are “the importance of the issues at stake, the amount in controversy * * *.” This rearrangement adds prominence to the importance of the issues at stake, avoiding any possible implication that the amount in controversy is the first and therefore most important concern. In addition, the Committee Note is expanded to address in depth the need to take account of private and public values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies.

A second revision in published rule text adds a new factor drawn from the Utah discovery rules: “the parties’ relative access to relevant information.” This factor addresses the common concern that the frequently asymmetric distribution of information means that discovery often will impose greater burdens on one party than on another. These differential burdens are often entirely appropriate. They can be taken into account under the familiar factors already in Rule 26(b)(2)(C)(iii) and transposed by the amendment to (b)(1), and should be. But it is useful to underscore this element of the analysis. The Committee Note elaborates on this theme.

(ii) Discovery of Discoverable Matters

Rule 26(b)(1) now illustrates discoverable matters as “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” These words do no harm; there is no indication that the absence of any reference to electronically stored information has supported untoward negative implications. But Rule 26 is more than twice as long as the next longest rules (Rules 71.1 and 45 vie for that dubious distinction), the point illustrated in this language is now widely understood by courts and attorneys, and removing excess language is a positive step. Some of the comments expressed doubt about the Committee’s assertion that discovery of these matters is so well entrenched that the language is no longer needed. They urged that the Committee Note should include this statement, so as to thwart any ill-founded attempts to draw negative inferences from the deletion. The Note has been revised to address this concern. And the Note also mentions discovery of information about a party’s information system as an example of permitted discovery that is not expressly covered by the deleted language.

(iii) Subject-Matter Discovery

Up to 2000, Rule 26(b)(1) provided for discovery of any nonprivileged matter “relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” Responding to repeated suggestions that discovery should be confined to the parties’ claims or defenses, the 2000 amendments narrowed the scope of discovery by preserving subject-matter discovery, but allowing discovery to extend beyond what was relevant to the pleaded claims or defenses only on court order for good cause. The 2000 Committee Note conceded that the dividing line that separates discovery relevant to the subject matter from discovery relevant to the pleaded claims or defenses “cannot be defined with precision.” The change was “designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.” The distinction between lawyer-managed discovery and court-managed discovery, however, has not had any noticeable effect in encouraging judges who remain reluctant to provide more active management of discovery to become more active.

Some comments have sought to defend discovery of information relevant to the subject matter of the action by explaining that allowing discovery on this theory avoids the need to draw fine lines in determining what is relevant to the claim or defense of any party and proportional to the needs of the case. The proposal reflects the view that it is better to think carefully, when need be, about what is relevant to the parties’ claims and defenses. The expanded Committee Note describes three examples the 2000 Note provided of information that, suitably focused, would be relevant to claims or defenses: other incidents similar to those at issue in the litigation; information about organizational arrangements or filing systems; and information that could be used to impeach a likely witness. Suitable focus is the key. The Committee Note also recognizes that if discovery relevant to the pleaded claims or defenses reveals information that would support new claims or

defenses, the information can be used to support amended pleadings.

(iv) “Reasonably calculated to lead”

The final change in Rule 26(b)(1) substitutes this sentence: “Information within this scope of discovery need not be admissible in evidence to be discoverable,” for the current sentence: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The new provision carries forward the central principle — nonprivileged information is discoverable so long as it is within the scope of discovery, even though the information is in a form that would not be admissible in evidence. The change is designed to curtail reliance on the “reasonably calculated” phrase to expand discovery beyond the permitted scope.

Original Rule 26 governed depositions. An amendment of Rule 26(b) adopted by the Supreme Court in 1946 that took effect in 1948 provided: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” The 1946 Committee Note explained that the purpose of the sentence was to prevent parties from refusing discovery of relevant information on admissibility grounds. In 2000, this provision was amended to limit it to “[r]elevant information.” The 2000 Committee Note expressed concern that this provision “might swallow any other limitation on the scope of discovery.” It explained that “relevant” as added to the sentence “means within the scope of discovery as defined in this subdivision [(b)(1)].” In other words, the sentence has never been intended to define the scope of discovery. It is merely a ban on admissibility-based refusals to provide relevant discovery. And yet lawyers and courts often rely on this provision as an independent definition of the scope of discovery that extends beyond information relevant to the parties’ claims or defenses, or even the subject matter of the action.

The perception that the “reasonably calculated” language has taken on an independent role in defining the scope of discovery is implicitly bolstered by many comments on the published proposal. These comments describe the “reasonably calculated” language as a bedrock definition of the scope of discovery. That perception is itself reason to attempt to make good on the purpose the 2000 amendment may have failed to achieve in a uniform way.

(b) Rule 26(b)(2)(C)(iii): Reflect (b)(1)

Rule 26(b)(2)(C)(iii) would be amended to reflect transposition of its operative elements to Rule 26(b)(1).

(c) Rule 26(c)(1): Allocation of Expenses

Rule 26(c)(1)(B) would be amended to include “the allocation of expenses” among the terms that may be included in a protective order.

Rule 26(c)(1) now authorizes an order to protect against “undue burden or expense.” This authority includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. Some courts are exercising that authority now. It is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note admonishes that recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding. The Discovery Subcommittee plans to explore the question whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding.

(d) Rule 34: Specific Objections, Production, Withholding

Three proposals would amend Rule 34 (a fourth, dealing with requests served before the Rule 26(f) conference, is described later).

The first change would require that an objection to a request to produce must be stated “with specificity.” The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and may state a reasonable time for the response. The third requires that an objection state whether any responsive materials are being withheld on the basis of that objection.

These Rule 34 proposals have been well supported by the testimony and comments, although some qualms have been expressed. It has been noted, for example, that a party may state a reasonable time to produce but later find that more time is needed. Such events are common in discovery, and can be handled as they are now.

A particular concern is that a party who limits the scope of its search may not know what documents or ESI it has not found, and cannot state whether any responsive materials are being “withheld.” This concern has been addressed by expanding the brief comment in the published Committee Note. A party who does not intend to search all sources that would be covered by a request should object to the request by stating that it is overbroad and by specifying the bounds of the search it plans to undertake. The objection, for example, could state that the search will be limited to sources created after a specified date, or to identified custodians. This objection serves also as a statement that anything outside the described limits is being “withheld.” That is all the requesting party needs to know if it wishes to seek more searching discovery.

The proposals also amend Rule 37(a)(3)(B) to reflect the increased emphasis in proposed Rule 34 on responding by way of producing.

(e) Early Discovery Requests: Rule 26(d)(2)

The proposals would add Rule 26(d)(2) to allow a party to deliver a Rule 34 request before the Rule 26(f) conference. The request is treated as served at the first Rule 26(f) conference for measuring the time to respond. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose is to facilitate discussion at the conference by providing concrete discovery proposals.

The comments on this proposal are mixed. Some express the concerns that the Committee considered at length before recommending publication. Doubts are expressed whether anyone will seize this new opportunity, in part by wondering why a party would want to disclose its discovery plans before the conference. And fears are expressed that requests formed before the conference will be inappropriately broad, and will encourage the requesting party to adhere to them without taking account of good-faith objections expressed at the conference.

Other comments, however, echoed the Committee's thoughts. Lawyers who represent plaintiffs have been more likely to say they would use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) conference. Lawyers who represent defendants are more likely to say that they would welcome receiving advance requests than to say that they would likely make them.

The Committee recommends that this proposal be approved for adoption.

(f) Numerical Limits: Rules 30, 31, 33, 36

The published proposals sought to encourage more active case management, and to advance the efficient use of discovery, by amending the presumptive numerical limits on discovery. The intent was to promote efficiency and prompt a discussion, early in the case, about the extent of discovery truly needed to resolve the dispute. Rules 30 and 31 would have been amended to reduce from 10 to 5 the presumptive limit on the number of depositions taken by the plaintiffs, the defendants, or the third-party defendants. Rule 30(d) would have been amended by reducing the presumptive limit for an oral deposition from one day of 7 hours to one day of 6 hours. Rule 33 would have been amended to reduce from 25 to 15 the presumptive number of interrogatories a party may serve on any other party. And, for the first time, a presumptive limit of 25 would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents from the court.

These proposals garnered some support. They also encountered fierce resistance. The most basic ground of resistance was that the present limits in Rules 30, 31, and 33 work well. Many expressed the fear that presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims and defenses. The comments further suggested that there is no shown need or reason to change them, nor is there any experience that

would suggest that requests to admit are so frequently over-used as to require introduction of a first-time presumptive limit.

The proposals addressing depositions were further resisted by urging that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that any agreement among the parties might be reached only by paying inappropriate trade-off prices in other areas; and that the rule would be seen to express a presumptive judgment that 5 depositions ordinarily are the ceiling of reasonableness — that the sorts of showings now required to justify an 11th or 12th deposition would come to be required to justify a 6th or 7th deposition. All of these concerns were commonly bundled into the argument that reduced limits would generate more contentiousness and increased motion practice. It also was commonly observed that contingent-fee attorneys have every incentive to hold the numbers of depositions down to what is necessary to the case.

Resistance to the reduction of the presumptive number of interrogatories, and to introducing a presumptive limit on requests to admit, was similar. But it also reflected repeated observations that written discovery by interrogatories or requests to admit is a low-cost, effective way to exchange information and to identify the witnesses that should be deposed. It should be encouraged, not further limited. And numerical limits could encourage parties to frame broader questions and requests, perhaps inflicting greater burdens than a greater number of better-focused requests and perhaps leading to less useful responses.

Narrower concerns addressed the proposal to reduce the presumptive time for an oral deposition from one day of 7 hours to one day of 6 hours. The Committee originally contemplated a 4-hour limit, based on successful experience in some state courts. A reduction of that magnitude could have significant advantages in cost and efficiency. But prepublication comments expressed such grave concerns that the Committee decided to recommend a more generous 6-hour limit. That recommendation rested as much on concerns for the burdens imposed on the deponent as on hopes for reduced cost and increased efficiency. Many comments, however, suggested the need for at least the full 7 hours in cases that involve several parties, questioning based on lengthy documents that the deponent must review, or obstructive behavior such as speaking objections or other tactics designed to “run the clock.”

These concerns have persuaded the Committee that it is better not to press ahead with these proposals. Some of the more extreme expressions of concern may be overblown, but the body of comments suggests reasonable ground for caution. The intent of the proposals was never to limit discovery unnecessarily, but many worry that the changes would have that effect on judges and litigants. Other changes in the proposed amendments, such as the renewed emphasis on proportionality and steps to prompt earlier and more informed case management should achieve many of the objectives of the proposed presumptive limits. In addition, an increased emphasis on early and active case management in judicial education programs and by other means will encourage

all judges to take a more active case management role.

(2) Early Case Management

The proposals aimed at encouraging early and active case management drew far fewer comments than the discovery proposals. The proposals to add to Rule 16 met general, although not unanimous, approval. The Committee recommends the Rule 16 proposals for adoption without change. The proposal to reduce the time for service under Rule 4(m) encountered substantial opposition. The Committee considered these comments and recommends that the time to serve be reduced from 120 to 90 days, rather than the earlier proposal to reduce the time to 60 days.

(a) Rule 16

Four sets of changes are proposed for Rule 16.

The words allowing a scheduling conference to be held “by telephone, mail, or other means” are deleted. The rule text now requires “a scheduling conference.” The Committee Note explains that such a conference can be held by any means of direct simultaneous communication among the court and the parties. A telephone conference remains permitted; mail or an exchange of messages by other means is not permitted, nor are any “other means” that do not involve direct simultaneous communication. But Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties’ report under Rule 26(f) without holding a conference.

The time for the scheduling conference is set at the earlier of 90 days after any defendant has been served, down from 120 days in the present rule, or to 60 days after any defendant has appeared, down from 90 days in the present rule. But the proposal also adds, for the first time, a provision allowing the judge to set a later time on finding good cause for delay. The concerns about these shortened times expressed in the testimony and comments echoed concerns the Committee considered in recommending publication. The concerns rest on the fear that the new times may not suffice to prepare adequately for the conference, particularly when the case is complex or when a large institutional party needs time to work through the complexities of its internal organization. The Department of Justice has expressed special concerns in this connection. The Committee, however, recommends that the proposal be recommended for adoption as published. It remains desirable to get the case started sooner, not later. Adding the new provision to delay the conference for good cause addresses the concern that some cases may properly require more time if the first scheduling conference is to be effective. The Committee Note has been expanded to emphasize this flexibility.

The proposal also adds two subjects to the list of contents permitted in a scheduling order: the preservation of ESI, and agreements reached under Evidence Rule 502. Parallel provisions are added to the subjects for the parties’ Rule 26(f) discovery plan. There is no significant objection to these provisions.

Finally, the proposal also lists as a permitted topic a direction in the scheduling order that before moving for an order relating to discovery, the movant must request a conference with the court. The Committee originally thought it might be desirable to adopt the pre-motion conference as a requirement, not simply a topic permitted for a scheduling order. A good number of courts have adopted such requirements by local rule or scheduling order. Experience shows that this practice is effective in resolving discovery disputes quickly and at low cost. But what works for some courts may not work for all. Simply calling attention to this practice, as a means of encouraging it, carries no noticeable costs.

(b) Rule 4(m): Time to Serve

Rule 4(m) now sets 120 days as the presumptive limit for serving process. The published proposal sought to expedite actual initiation of the litigation by reducing this period to 60 days. The comments and testimony have led the Committee to recommend that the period be set at 90 days.

Many comments offered reasons why 60 days is not enough time to serve process. Some cases involve many defendants. Some defendants are difficult to identify through chains of interlocking or changing corporate relationships. Some defendants seek to evade service. Pro se plaintiffs may find it difficult to accomplish service. The Marshal's Service may find it difficult to effect service when ordered to do so under Rule 4(c)(3) for an in forma pauperis plaintiff or for a seaman. Some comments even suggested that the time between filing and actual service can be put to good use in satisfying Rule 11 obligations that cannot effectively be met within the time to file required by a limitations period, or to negotiate a settlement.

Other comments suggested that a 60-day period will effectively undercut the opportunity to request a waiver of service. Very little time will be left to effect service after it becomes clear that the defendant will not waive service. This point seemed particularly persuasive.

After considering all of the comments, the Committee has concluded that the time should be set at 90 days. Language has been added to the Committee Note to recognize that even at 90 days, the new limit “will increase the frequency of occasions to extend the time for good cause.”

Finally, several comments asked whether the Committee has thought about the relationship between Rule 4(m) and Rule 15(c)(1)(C), which governs relation back of an amendment changing or adding a party against whom a claim is made. Rule 15(c)(1)(C) requires high quality notice of the action to the new party “within the period provided by Rule 4(m) for serving the summons and complaint.” This relationship has in fact been considered throughout the development of this proposal. The Committee Note is revised to note this relationship.

(3) Cooperation

The published proposal amends Rule 1 to direct that the rules “be construed, ~~and~~

administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The Committee recommends approval of this proposal for adoption without change to either rule text or Committee Note.

Cooperation among the parties was a theme heavily and frequently emphasized at the Duke Conference. It has been vigorously urged, and principles of cooperation have been drafted by concerned organizations. There is little opposition to the basic concept of cooperation.

Such doubts as have emerged go in different directions. One concern is that Rule 1 is “iconic,” and should not be touched. Another is that the rules directly provide procedural requirements, while the rules of professional responsibility add requirements both for effective representation and responsible use of procedural rules. Attempting to complicate these provisions by a vague concept of “cooperation” may invite confusion and ill-founded attempts to seek sanctions for violating a duty to cooperate.

Doubts also were expressed on more practical grounds. Many comments suggested that the proposed rule is attractive as an abstract proposition, but argued that it should be withdrawn because it will prompt the strategic use of “Rule 1 motions” for dilatory purposes.

A more specific question, largely ignored in the comments, asks whether the parties should be directed to construe and administer the rules, as well as to employ them, to the desired ends. The rule could be written: “construed and administered by the court, and employed by the parties, to secure * * *.” But on balance it seems better to retain the hint that the parties should undertake to construe the rules for their intended purposes, and — to the extent that the parties commonly administer the rules, as in discovery — to administer them for the same purposes.

None of these concerns has seemed to warrant any change of the published proposal.

DUKE RULES PACKAGE¹

1 **Rule 1. Scope and Purpose**

2 * * * [These rules] should be construed, ~~and administered,~~ and employed by the court and
3 the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

4 Committee Note

5 Rule 1 is amended to emphasize that just as the court should construe and administer these
6 rules to secure the just, speedy, and inexpensive determination of every action, so the parties share
7 the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to
8 achieve these ends. But discussions of ways to improve the administration of civil justice regularly
9 include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and
10 result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative
11 and proportional use of procedure.

12 Gap Report

13 No changes were made in the rule text or Committee Note as published.

14 **Rule 4. Summons**

15 * * *

16 **(m) Time Limit for Service.** If a defendant is not served within ~~120~~ 90 days after the complaint
17 is filed, the court * * * must dismiss the action without prejudice against that defendant or
18 order that service be made within a specified time. But if the plaintiff shows good cause for
19 the failure, the court must extend the time for service for an appropriate period. This
20 subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or
21 to service of a notice under Rule 71.1(d)(3)(A).

22 Committee Note

23 The presumptive time for serving a defendant is reduced from 120 days to 90 days. This
24 change, together with the shortened times for issuing a scheduling order set by amended
25 Rule 16(b)(2), will reduce delay at the beginning of litigation.

26 Shortening the presumptive time for service will increase the frequency of occasions to

¹ The rule texts use overlining and underlining to show changes from the present rule texts. The Committee Notes use underlining to show additions to the Notes as published.

27 extend the time for good cause. More time may be needed, for example, when a request to waive
28 service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis
29 action.

30 The final sentence is amended to make it clear that the reference to Rule 4 in
31 Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make
32 timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

33 Shortening the time to serve under Rule 4(m) means that the time of the notice required by
34 Rule 15(c)(1)(C) for relation back is also shortened.

35 Gap Report

36 The time to serve was set at 60 days in the published proposal. It has been changed to 90
37 days. Text was added to the Committee Note to address occasions to extend the time, and to call
38 attention to the relationship between Rule 4(m) and Rule 15(c)(1)(C).

39 **Rule 16. Pretrial Conferences; Scheduling; Management**

40 **(b) Scheduling.**

41 (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district
42 judge — or a magistrate judge when authorized by local rule — must issue a
43 scheduling order:

44 (A) after receiving the parties' report under Rule 26(f); or

45 (B) after consulting with the parties' attorneys and any unrepresented parties at a
46 scheduling conference ~~by telephone, mail, or other means.~~

47 (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in~~
48 ~~any event unless the judge finds good cause for delay, the judge must issue it~~ within
49 the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or
50 90 60 days after any defendant has appeared.

51 (3) *Contents of the Order.* * * *

52 (B) *Permitted Contents.* The scheduling order may: * * *

53 (iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically
54 stored information;

55 (iv) include any agreements the parties reach for asserting claims of privilege
56 or of protection as trial-preparation material after information is
57 produced, including agreements reached under Federal Rule of
58 Evidence 502;

59 (v) direct that before moving for an order relating to discovery, the movant
60 must request a conference with the court;

61 [present (v) and (vi) would be renumbered] * * *

62

Committee Note

63 The provision for consulting at a scheduling conference by “telephone, mail, or other means”
64 is deleted. A scheduling conference is more effective if the court and parties engage in direct
65 simultaneous communication. The conference may be held in person, by telephone, or by more
66 sophisticated electronic means.

67 The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after
68 any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This
69 change, together with the shortened time for making service under Rule 4(m), will reduce delay at
70 the beginning of litigation. At the same time, a new provision recognizes that the court may find
71 good cause to extend the time to issue the scheduling order. In some cases it may be that the parties
72 cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference
73 in the time allowed. Litigation involving complex issues, multiple parties, and large organizations,
74 public or private, may be more likely to need extra time to establish meaningful collaboration
75 between counsel and the people who can supply the information needed to participate in a useful
76 way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling
77 conference or order, an order extending the time for the scheduling conference will also extend the
78 time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first
79 scheduling conference in the time set by the rule.

80 Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

81 The order may provide for preservation of electronically stored information, a topic also
82 added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of
83 Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is
84 filed.

85 The order also may include agreements incorporated in a court order under Evidence
86 Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or
87 work-product protection, a topic also added to the provisions of a discovery plan under
88 Rule 26(f)(3)(D).

89 Finally, the order may direct that before filing a motion for an order relating to discovery the
90 movant must request a conference with the court. Many judges who hold such conferences find
91 them an efficient way to resolve most discovery disputes without the delay and burdens attending
92 a formal motion, but the decision whether to require such conferences is left to the discretion of the
93 judge in each case.

94

Gap Report

95 No changes were made in the published rule text. Language was added to the Committee

96 Note to address examples of circumstances that may establish good cause to delay issuing the
97 scheduling order.

98 **Rule 26. Duty to Disclose; General Provisions; Governing Discovery**

99 * * *

100 **(b) Discovery Scope and Limits.**

101 (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as
102 follows: Parties may obtain discovery regarding any nonprivileged matter that is
103 relevant to any party's claim or defense and proportional to the needs of the case,
104 considering the importance of the issues at stake in the action, the amount in
105 controversy, the parties' relative access to relevant information, the parties'
106 resources, the importance of the discovery in resolving the issues, and whether the
107 burden or expense of the proposed discovery outweighs its likely benefit.
108 Information within this scope of discovery need not be admissible in evidence to be
109 discoverable. —including the existence, description, nature, custody, condition, and
110 location of any documents or other tangible things and the identity and location of
111 persons who know of any discoverable matter. For good cause, the court may order
112 discovery of any matter relevant to the subject matter involved in the action.
113 Relevant information need not be admissible at the trial if the discovery appears
114 reasonably calculated to lead to the discovery of admissible evidence. All discovery
115 is subject to the limitations imposed by Rule 26(b)(2)(C).

116 (2) *Limitations on Frequency and Extent.*

117 * * *

118 (C) *When Required.* On motion or on its own, the court must limit the frequency or
119 extent of discovery otherwise allowed by these rules or by local rule if it
120 determines that: * * *

121 (iii) ~~the burden or expense of the proposed discovery is outside the scope~~
122 ~~permitted by Rule 26(b)(1) outweighs its likely benefit, considering~~
123 ~~the needs of the case, the amount in controversy, the parties'~~
124 ~~resources, the importance of the issues at stake in the action, and the~~
125 ~~importance of the discovery in resolving the issues.~~

126 * * *

127 **(c) Protective Orders.**

128 (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or
129 person from annoyance, embarrassment, oppression, or undue burden or expense,

130 including one or more of the following: * * *
131 (B) specifying terms, including time and place or the allocation of expenses, for the
132 disclosure or discovery; * * *

133 **(d) Timing and Sequence of Discovery.** * * *

134 (2) Early Rule 34 Requests.

135 (A) Time to Deliver. More than 21 days after the summons and complaint are served
136 on a party, a request under Rule 34 may be delivered:

137 (i) to that party by any other party, and

138 (ii) by that party to any plaintiff or to any other party that has been served.

139 (B) When Considered Served. The request is considered as to have been served at
140 the first Rule 26(f) conference.

141 (23) Sequence. Unless, ~~on motion~~, the parties stipulate or the court orders otherwise for the
142 parties' and witnesses' convenience and in the interests of justice:

143 (A) methods of discovery may be used in any sequence; and

144 (B) discovery by one party does not require any other party to delay its discovery.

145 * * *

146 **(f) Conference of the Parties; Planning for Discovery.** * * *

147 (3) Discovery Plan. A discovery plan must state the parties' views and proposals on: * * *

148 (C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically
149 stored information, including the form or forms in which it should be
150 produced;

151 (D) any issues about claims of privilege or of protection as trial-preparation
152 materials, including — if the parties agree on a procedure to assert these
153 claims after production — whether to ask the court to include their agreement
154 in an order under Federal Rule of Evidence 502;

155 Committee Note

156 ~~The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope~~
157 ~~of discovery to what is proportional to the needs of the case. The considerations that bear on~~
158 ~~proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are~~
159 ~~familiar, and have measured the court's duty to limit the frequency or extent of discovery, the~~
160 ~~change incorporates them into the scope of discovery that must be observed by the parties without~~
161 ~~court order.~~

162 Rule 26(b)(1) is changed in several ways.

163 Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim
164 or defense and is proportional to the needs of the case. The considerations that bear on

165 proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one
166 addition.

167 Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983
168 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1).
169 Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined
170 that “the discovery is unduly burdensome or expensive, taking into account the needs of the case,
171 the amount in controversy, limitations on the parties’ resources, and the importance of the issues at
172 stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing
173 a discovery request, response, or objection certified that the request, response, or objection was “not
174 unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already
175 had in the case, the amount in controversy, and the importance of the issues at stake in the
176 litigation.” The parties thus shared the responsibility to honor these limits on the scope of discovery.

177 The 1983 Committee Note stated that the new provisions were added “to deal with the
178 problem of over-discovery. The objective is to guard against redundant or disproportionate
179 discovery by giving the court authority to reduce the amount of discovery that may be directed to
180 matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage
181 judges to be more aggressive in identifying and discouraging discovery overuse. The grounds
182 mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in
183 issuing protective orders under Rule 26(c). * * * On the whole, however, district judges have been
184 reluctant to limit the use of the discovery devices.”

185 The clear focus of the 1983 provisions may have been softened, although inadvertently, by
186 the amendments made in 1993. The 1993 Committee Note explained: “[F]ormer paragraph (b)(1)
187 [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs
188 (3) and (4).” Subdividing the paragraphs, however, was done in a way that could be read to separate
189 the proportionality provisions as “limitations,” no longer an integral part of the (b)(1) scope
190 provisions. That appearance was immediately offset by the next statement in the Note: “Textual
191 changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of
192 discovery.”

193 The 1993 amendments added two factors to the considerations that bear on limiting
194 discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,”
195 and “the importance of the proposed discovery in resolving the issues.” Addressing these and other
196 limitations added by the 1993 discovery amendments, the Committee Note stated that “[t]he
197 revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose
198 additional restrictions on the scope and extent of discovery * * *.”

199 The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment
200 made in 2000 that added a new sentence at the end of (b)(1): “All discovery is subject to the
201 limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)].” The Committee Note

202 recognized that “[t]hese limitations apply to discovery that is otherwise within the scope of
203 subdivision (b)(1).” It explained that the Committee had been told repeatedly that courts were not
204 using these limitations as originally intended. “This otherwise redundant cross-reference has been
205 added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive
206 discovery.”

207 The present amendment restores the proportionality factors to their original place in defining
208 the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider
209 these factors in making discovery requests, responses, or objections.

210 Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing
211 responsibilities of the court and the parties to consider proportionality, and the change does not place
212 on the party seeking discovery the burden of addressing all proportionality considerations.

213 Nor is the change intended to permit the opposing party to refuse discovery simply by
214 making a boilerplate objection that it is not proportional. The parties and the court have a collective
215 responsibility to consider the proportionality of all discovery and consider it in resolving discovery
216 disputes.

217 The parties may begin discovery without a full appreciation of the factors that bear on
218 proportionality. A party requesting discovery, for example, may have little information about the
219 burden or expense of responding. A party requested to provide discovery may have little
220 information about the importance of the discovery in resolving the issues as understood by the
221 requesting party. Many of these uncertainties should be addressed and reduced in the parties’ Rule
222 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties
223 continue to disagree, the discovery dispute could be brought before the court and the parties’
224 responsibilities would remain as they have been since 1983. A party claiming undue burden or
225 expense ordinarily has far better information — perhaps the only information — with respect to that
226 part of the determination. A party claiming that a request is important to resolve the issues should
227 be able to explain the ways in which the underlying information bears on the issues as that party
228 understands them. The court’s responsibility, using all the information provided by the parties, is
229 to consider these and all the other factors in reaching a case-specific determination of the appropriate
230 scope of discovery.

231 The direction to consider the parties’ relative access to relevant information adds new text
232 to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some
233 cases involve what often is called “information asymmetry.” One party — often an individual
234 plaintiff — may have very little discoverable information. The other party may have vast amounts
235 of information, including information that can be readily retrieved and information that is more
236 difficult to retrieve. In practice these circumstances often mean that the burden of responding to
237 discovery lies heavier on the party who has more information, and properly so.

238 Restoring proportionality as an express component of the scope of discovery warrants
239 repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983
240 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the
241 discovery process and thus acknowledges the reality that it cannot always operate on a self-
242 regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of
243 recent decades has greatly increased both the potential cost of wide-ranging discovery and the
244 potential for discovery to be used as an instrument for delay or oppression.” What seemed an
245 explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again
246 reflects the need for continuing and close judicial involvement in the cases that do not yield readily
247 to the ideal of effective party management. It is expected that discovery will be effectively managed
248 by the parties in many cases. But there will be important occasions for judicial management, both
249 when the parties are legitimately unable to resolve important differences and when the parties fall
250 short of effective, cooperative management on their own.

251 It also is important to repeat the caution that the monetary stakes are only one factor, to be
252 balanced against other factors. The 1983 Committee Note recognized “the significance of the
253 substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule
254 recognizes that many cases in public policy spheres, such as employment practices, free speech, and
255 other matters, may have importance far beyond the monetary amount involved.” Many other
256 substantive areas also may involve litigation that seeks relatively small amounts of money, or no
257 money at all, but that seeks to vindicate vitally important personal or public values.

258 So too, consideration of the parties’ resources does not foreclose discovery requests
259 addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy
260 party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-
261 handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce
262 a party, whether financially weak or affluent.”

263 A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing
264 discovery of any matter relevant to any party’s claim or defense, the present rule adds: “including
265 the existence, description, nature, custody, condition, and location of any documents or other
266 tangible things and the identity and location of persons who know of any discoverable matter.”
267 Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter
268 the long text of Rule 26 with these examples. The discovery identified in these examples should still
269 be permitted under the revised rule when relevant and proportional to the needs of the case. Framing
270 intelligent requests for electronically stored information, for example, may require detailed
271 information about another party’s information systems and other information resources.

272 The amendment deletes the former provision authorizing the court, for good cause, to order
273 discovery of any matter relevant to the subject matter involved in the action. The Committee has
274 been informed that this language is rarely invoked. Proportional discovery relevant to any party’s
275 claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

276 The distinction between matter relevant to a claim or defense and matter relevant to the subject
277 matter was introduced in 2000. Until then, the scope of discovery reached matter “relevant to the
278 subject matter involved in the pending action.” Rule 26(b)(1) was amended in 2000 to limit the
279 initial scope of discovery to matter “relevant to the claim or defense of any party.” Discovery could
280 extend to “any matter relevant to the subject matter involved in the action” only by court order based
281 on good cause. The Committee Note observed that the amendment was “designed to involve the
282 court more actively in regulating the breadth of sweeping or contentious discovery.” But even with
283 court supervision, discovery should be limited to matter relevant to the parties’ claims or defenses,
284 recognizing that the parties may amend their claims and defenses in the course of the litigation. The
285 uncertainty generated by the broad reference to subject matter is reflected in the 2000 Note’s later
286 recognition that “[t]he dividing line between information relevant to the claims and defenses and that
287 relevant only to the subject matter of the action cannot be defined with precision.” Because the
288 present amendment limits discovery to matter relevant to any party’s claim or defense, it is
289 important to focus more carefully on that concept. The 2000 Note offered three examples of
290 information that, suitably focused, would be relevant to the parties’ claims or defenses. The
291 examples were “other incidents of the same type, or involving the same product”; “information
292 about organizational arrangements or filing systems”; and “information that could be used to
293 impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is
294 relevant to the parties’ claims or defenses may also support amendment of the pleadings to add a
295 new claim or defense that affects the scope of discovery.

296 The former provision for discovery of relevant but inadmissible information that appears
297 “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. Hearsay
298 is a common illustration. The qualifying phrase — “if the discovery appears reasonably calculated
299 to lead to the discovery of admissible evidence” — is omitted. Discovery of inadmissible
300 information is limited to matter that is otherwise within the scope of discovery, namely that which
301 is relevant to a party’s claim or defense and proportional to the needs of the case. The discovery of
302 inadmissible evidence should not extend beyond the permissible scope of discovery simply because
303 it is “reasonably calculated” to lead to the discovery of admissible evidence. The phrase has been
304 used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000
305 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery
306 “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to
307 prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear
308 that “‘relevant’ means within the scope of discovery as defined in this subdivision * * *.” The
309 “reasonably calculated” phrase has continued to create problems, however, and is removed by these
310 amendments. It is replaced by the direct statement that “Information within this scope of discovery
311 need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not
312 admissible in evidence remains available so long as it is otherwise within the scope of discovery.

313 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on
314 proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed
315 discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

316 Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that
317 allocate expenses for disclosure or discovery. Authority to enter such orders is included in the
318 present rule, and courts already exercise this authority. Explicit recognition will forestall the
319 temptation some parties may feel to contest this authority. Recognizing the authority does not imply
320 that cost-shifting should become a common practice. Courts and parties should continue to assume
321 that a responding party ordinarily bears the costs of responding.

322 Rule 26(d)(1)(B)-(2) is added is amended to allow a party to deliver Rule 34 requests to
323 another party more than 21 days after that party has been served even though the parties have not
324 yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has
325 been served, and by that party to any plaintiff and any other party that has been served. Delivery
326 does not count as service; the requests are considered to be served at the first Rule 26(f) conference.
327 Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery
328 moratorium is designed to facilitate focused discussion during the Rule 26(f) conference.
329 Discussion at the conference may produce changes in the requests. The opportunity for advance
330 scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether
331 to allow additional time to respond.

332 Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-
333 specific sequences of discovery.

334 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery
335 plan — issues about preserving electronically stored information and court orders under Evidence
336 Rule 502.

337 Gap Report

338 The published text of Rule 26(b)(1) is revised to place “the importance of the issues at stake”
339 first in the list of factors to be considered in measuring proportionality, and to add a new factor, “the
340 parties’ relative access to relevant information.” The proposal to amend Rule 26(b)(2)(A) to adjust
341 for the proposal to add a presumptive numerical limit on Rule 36 requests to admit is omitted to
342 reflect withdrawal of the Rule 36 proposal. The result restores the authority to limit the number of
343 Rule 36 requests by local rule. The proposal to amend Rule 26(b)(2)(C) to adjust for elimination
344 of the local-rule authority is withdrawn to reflect restoration of that authority. Style changes were
345 made in Rule 26(d)(1), deleting the only proposed change, and in 26(d)(2). The Committee Note
346 was expanded to emphasize the importance of observing proportionality by recounting the history
347 of repeated efforts to encourage it. Other new material in the Note responds to concerns expressed
348 in testimony and comments, particularly the concern that restoring proportionality to the scope of
349 discovery might somehow change the “burdens” imposed on a party requesting discovery when
350 faced with a proportionality objection.

351 **Rule 30. Depositions by Oral Examination**

352 **(a) When a Deposition May Be Taken. * * ***

353 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
354 extent consistent with Rule 26(b)(1) and (2): * * *

355 **(d) Duration; Sanction; Motion to Terminate or Limit.**

356 (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to
357 one day of 7 hours. The court must allow additional time consistent with
358 Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent,
359 another person, or any other circumstance impedes or delays the examination.

360 Committee Note

361 Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of
362 proportionality in Rule 26(b)(1).

363 Gap Report

364 The proposals to reduce the presumptive number of depositions from 10 to 5, and to shorten
365 the presumptive length of an oral deposition from one day of 7 hours to one day of 6 hours, were
366 withdrawn. The Committee Note was changed accordingly.

367 **Rule 31. Depositions by Written Questions**

368 **(a) When a Deposition May Be Taken. * * ***

369 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
370 extent consistent with Rule 26(b)(1) and (2): * * *

371 Committee Note

372 Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of
373 proportionality in Rule 26(b)(1).

374 Gap Report

375 The proposal to reduce the presumptive number of depositions from 10 to 5 was withdrawn.
376 The Committee Note was changed accordingly.

377 **Rule 33. Interrogatories to Parties**

378 **(a) In General.**

379 (1) *Number.* * * * Leave to serve additional interrogatories may be granted to the extent
380 consistent with Rule 26(b)(1) and (2).

381 Committee Note

382 Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of
383 proportionality in Rule 26(b)(1).

384 Gap Report

385 The proposal to reduce the presumptive number of interrogatories from 25 to 15 was
386 withdrawn. The Committee Note was changed accordingly.

387 **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things,**
388 **or Entering onto Land, for Inspection and Other Purposes * * ***

389 **(b) Procedure.** * * *

390 (2) *Responses and Objections.* * * *

391 (A) *Time to Respond.* The party to whom the request is directed must respond in
392 writing within 30 days after being served or — if the request was delivered
393 under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f)
394 conference. A shorter or longer time may be stipulated to under Rule 29 or
395 be ordered by the court.

396 (B) *Responding to Each Item.* For each item or category, the response must either
397 state that inspection and related activities will be permitted as requested or
398 state with specificity the grounds for objecting to the request with specificity,
399 including the reasons. The responding party may state that it will produce
400 copies of documents or of electronically stored information instead of
401 permitting inspection. The production must then be completed no later than
402 the time for inspection stated in the request or a later another reasonable time
403 stated in the response.

404 (C) *Objections.* An objection must state whether any responsive materials are being
405 withheld on the basis of that objection. An objection to part of a request
406 must specify the part and permit inspection of the rest. * * *

407 Committee Note

408 Several amendments are made in Rule 34, aimed at reducing the potential to impose
409 unreasonable burdens by objections to requests to produce.

410 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34
411 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f)
412 conference.

413 Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with
414 specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less
415 specific objections might be suitable under Rule 34. The specificity of the objection ties to the new
416 provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive
417 materials are being withheld on the basis of that objection. An objection may state that a request
418 is overbroad, but if the objection recognizes that some part of the request is appropriate the objection
419 should state the scope that is not overbroad. Examples would be a statement that the responding
420 party will limit the search to documents or electronically stored information created within a given
421 period of time prior to the events in suit, or to specified sources. When there is such an objection,
422 the statement of what has been withheld can properly identify as matters "withheld" anything
423 beyond the scope of the search specified in the objection.

424 Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of
425 documents or electronically stored information rather than simply permitting inspection. The
426 response to the request must state that copies will be produced. The production must be completed
427 either by the time for inspection stated in the request or by a ~~later~~ another reasonable time
428 specifically identified in the response. When it is necessary to make the production in stages the
429 response should specify the beginning and end dates of the production.

430 Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state
431 whether anything is being withheld on the basis of the objection. This amendment should end the
432 confusion that frequently arises when a producing party states several objections and still produces
433 information, leaving the requesting party uncertain whether any relevant and responsive information
434 has been withheld on the basis of the objections. The producing party does not need to provide a
435 detailed description or log of all documents withheld, but does need to alert other parties to the fact
436 that documents have been withheld and thereby facilitate an informed discussion of the objection.
437 An objection that states the limits that have controlled the search for responsive and relevant
438 materials qualifies as a statement that the materials have been "withheld."

439 Gap Report

440 Style changes were made in the published text of Rule 34(b)(2)(B). The Committee Note
441 was expanded to emphasize the interplay between a specific objection that defines the scope of the
442 search made for responsive information and the requirement to state whether any responsive
443 materials are being withheld.

444 **Rule 36. Requests for Admission**

445 Gap Report

446 The published proposal to add a presumptive limit of 25 requests to admit, not counting
447 requests to admit the genuineness of described documents, was withdrawn.

448 **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

449 **(a) Motion for an Order Compelling Disclosure or Discovery. * * ***

450 (3) *Specific Motions.* * * *

451 (B) *To Compel a Discovery Response.* A party seeking discovery may move for an
452 order compelling an answer, designation, production, or inspection. This
453 motion may be made if: * * *

454 (iv) a party fails to produce documents or fails to respond that inspection
455 will be permitted — or fails to permit inspection — as requested
456 under Rule 34.

457 Committee Note

458 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of
459 documents or electronically stored information rather than simply permitting inspection. This change
460 brings item (iv) into line with paragraph (B), which provides a motion for an order compelling
461 “production, or inspection.”

RULES TEXT

1 **Rule 1. Scope and Purpose**

2 * * * [These rules] should be construed, administered, and employed by the court and the
3 parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

4 **Rule 4. Summons**

5 * * *

6 **(m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed,
7 the court * * * must dismiss the action without prejudice against that defendant or order that
8 service be made within a specified time. But if the plaintiff shows good cause for the failure,
9 the court must extend the time for service for an appropriate period. This subdivision (m)
10 does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a
11 notice under Rule 71.1(d)(3)(A).

12 **Rule 16. Pretrial Conferences; Scheduling; Management**

13 * * *

14 **(b) Scheduling.**

15 (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district
16 judge — or a magistrate judge when authorized by local rule — must issue a
17 scheduling order:

18 (A) after receiving the parties' report under Rule 26(f); or

19 (B) after consulting with the parties' attorneys and any unrepresented parties at a
20 scheduling conference.

21 (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but
22 unless the judge finds good cause for delay, the judge must issue it within the earlier
23 of 90 days after any defendant has been served with the complaint or 60 days after
24 any defendant has appeared.

25 (3) *Contents of the Order.* * * *

26 (B) *Permitted Contents.* The scheduling order may: * * *

27 (iii) provide for disclosure, discovery, or preservation of electronically stored
28 information;

29 (iv) include any agreements the parties reach for asserting claims of privilege
30 or of protection as trial-preparation material after information is
31 produced, including agreements reached under Federal Rule of
32 Evidence 502;

33 (v) direct that before moving for an order relating to discovery, the movant
34 must request a conference with the court;

35 [present (v) and (vi) would be renumbered] * * *

36 **Rule 26. Duty to Disclose; General Provisions; Governing Discovery**

37 * * *

38 **(b) Discovery Scope and Limits.**

39 (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as
40 follows: Parties may obtain discovery regarding any nonprivileged matter that is
41 relevant to any party's claim or defense and proportional to the needs of the case,
42 considering the importance of the issues at stake in the action, the amount in
43 controversy, the parties' relative access to relevant information, the parties'
44 resources, the importance of the discovery in resolving the issues, and whether the
45 burden or expense of the proposed discovery outweighs its likely benefit.
46 Information within this scope of discovery need not be admissible in evidence to be
47 discoverable.

48 (2) *Limitations on Frequency and Extent.*

49 * * *

50 (C) *When Required.* On motion or on its own, the court must limit the frequency or
51 extent of discovery otherwise allowed by these rules or by local rule if it
52 determines that: * * *

53 (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

54 * * *

55 **(c) Protective Orders.**

56 (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or
57 person from annoyance, embarrassment, oppression, or undue burden or expense,
58 including one or more of the following: * * *

59 (B) specifying terms, including time and place or the allocation of expenses, for the
60 disclosure or discovery; * * *

61 **(d) Timing and Sequence of Discovery.** * * *

62 (2) *Early Rule 34 Requests.*

63 (A) *Time to Deliver.* More than 21 days after the summons and complaint are served
64 on a party, a request under Rule 34 may be delivered:

- 65 (i) to that party by any other party, and
66 (ii) by that party to any plaintiff or to any other party that has been served.

67 (B) *When Considered Served.* The request is considered to have been served at the
68 first Rule 26(f) conference.

- 69 (3) *Sequence*. Unless the parties stipulate or the court orders otherwise for the parties' and
70 witnesses' convenience and in the interests of justice:
71 (A) methods of discovery may be used in any sequence; and
72 (B) discovery by one party does not require any other party to delay its discovery.

73 * * *

74 **(f) Conference of the Parties; Planning for Discovery.** * * *

75 (3) *Discovery Plan*. A discovery plan must state the parties' views and proposals on: * * *

76 (C) any issues about disclosure, discovery, or preservation of electronically stored
77 information, including the form or forms in which it should be produced;

78 (D) any issues about claims of privilege or of protection as trial-preparation
79 materials, including — if the parties agree on a procedure to assert these
80 claims after production — whether to ask the court to include their agreement
81 in an order under Federal Rule of Evidence 502;

82 **Rule 30. Depositions by Oral Examination**

83 **(a) When a Deposition May Be Taken.** * * *

84 (2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the
85 extent consistent with Rule 26(b)(1) and (2): * * *

86 **(d) Duration; Sanction; Motion to Terminate or Limit.**

87 (1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to
88 one day of 7 hours. The court must allow additional time consistent with
89 Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent,
90 another person, or any other circumstance impedes or delays the examination.

91 **Rule 31. Depositions by Written Questions**

92 **(a) When a Deposition May Be Taken.** * * *

93 (2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the
94 extent consistent with Rule 26(b)(1) and (2): * * *

95 **Rule 33. Interrogatories to Parties**

96 **(a) In General.**

97 (1) *Number*. * * * Leave to serve additional interrogatories may be granted to the extent
98 consistent with Rule 26(b)(1) and (2).

99 **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or**
100 **Entering onto Land, for Inspection and Other Purposes * * ***

101 **(b) Procedure. * * ***

102 (2) *Responses and Objections. * * **

103 (A) *Time to Respond.* The party to whom the request is directed must respond in
104 writing within 30 days after being served or — if the request was delivered
105 under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f)
106 conference. A shorter or longer time may be stipulated to under Rule 29 or
107 be ordered by the court.

108 (B) *Responding to Each Item.* For each item or category, the response must either
109 state that inspection and related activities will be permitted as requested or
110 state with specificity the grounds for objecting to the request, including the
111 reasons. The responding party may state that it will produce copies of
112 documents or of electronically stored information instead of permitting
113 inspection. The production must then be completed no later than the time for
114 inspection stated in the request or another reasonable time stated in the
115 response.

116 (C) *Objections.* An objection must state whether any responsive materials are being
117 withheld on the basis of that objection. An objection to part of a request must
118 specify the part and permit inspection of the rest. . * * *

119 **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

120 **(a) Motion for an Order Compelling Disclosure or Discovery. * * ***

121 (3) *Specific Motions. * * **

122 (B) *To Compel a Discovery Response.* A party seeking discovery may move for an
123 order compelling an answer, designation, production, or inspection. This
124 motion may be made if: * * *

125 (iv) a party fails to produce documents or fails to respond that inspection
126 will be permitted — or fails to permit inspection — as requested
127 under Rule 34.

SUMMARY OF TESTIMONY & COMMENTS, AUGUST 2013 PUBLICATION

Three sets of summaries capture the core of the public testimony and written comments on the package of proposals published for comment in August, 2013. One set is devoted exclusively to Rule 37(e). Two sets cover the remaining proposals. One summary, much more compact, describes the pre-publication comments. It is set out separately. The second summarizes in some detail the testimony at the three hearings and the post-publication comments through number 486. Comments after number 486 are treated differently. Some are described in some detail, whether because they provide new thoughts, or because they reflect the considered views of organizations that attempt to explore and resolve competing interests, or because they come from official sources, or because they are elegant expressions of points made in many other comments. Comments between number 487 and 600 that are not covered by more extensive notes are counted at the end as if votes on the points they address. This format was adopted to illustrate the waste that would be involved in counting every comment in this way. Comments after number 600 that add nothing of new substance to the discussion are not listed separately.

It should be emphasized that the decision to forgo summaries of many of the higher-numbered comments does not reflect on the qualities of those comments. Many thoughtful, sophisticated, elegantly nuanced observations are made in them. But a summary of a thousand pages would not serve the purpose of providing a reminder of the points that must be considered in reviewing the published proposals. The summaries are designed to capture all elements of the comments, including those that support the proposals, those that oppose them, and those that seek to improve them. Constant repetition of the same points could get in the way of refreshing memories of all the testimony heard and all the comments read.

The comments include many suggestions for adding to the Committee Notes. Many of the suggestions are attractive. Failure to add many of them to the Notes does not reflect on their merit. It seems better to have the merits of these ideas tested in actual cases that will provide specific context and more thorough development.

— Edward H. Cooper

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GENERAL COMMENTS

[This category was added late in the venture to reflect some very brief comments in the early set, up to number 486. A few of the later comments offered general observations on the nature of the rulemaking process that merit a quick note.]

415, Bill Lockett: Favors all the proposals, apart from some suggestions to modify proposed Rule 37(e).

418, Harlan I. Prater, IV: Generally supports all the proposals, with specific support of Rule 26(b)(1) and some suggestions to change Rule 37(e).

422, Thomas Schwab: "I strongly support the proposed changes."

425, David Hudgins: Supports the proposed amendments "as a means to help control runaway costs of litigation which increasing[ly] threaten our justice system and the Constitutional right to trial by jury in civil cases."

427, John F. Schultz for Hewlett-Packard Co.: Supports the proposals generally, recommending a few changes, and "also supports the active and early judicial involvement contemplated * * *."

443, Grant Rahmeyer: The proposed rules "are completely one-sided, as in, they only favor major corporations." "The real purpose is to try and prevent cases from going before a jury."

444, James Cocke: Offers strong support for many of the proposed changes — as a medium sized company, a true attempt to comply with all discovery demands would shut down our operation.

729, Stephen B. Burbank: (1) "[T]he comments and testimony already submitted suggest that some interested observers regard repetition as an important means of influencing the rulemaking process." But if "the Enabling Act process is to be distinguishable from the legislative process, it must be in substantial part because reason and reliable data are more important than interest group talking points, self-serving assertions or cosmic anecdotes, however often or vigorously espoused." (2) "[I]f these proposals become effective, rulemaking would be destined for controversies, professional and political, akin to those which led to the 1988 amendments to the Enabling Act and attended the 1993 amendments — controversies that this Committee's predecessors worked hard to put behind them." Indeed, "forcing these changes through to effectiveness" would seriously undermine the integrity of the Enabling Act process. "That would be unfortunate."

735, Nicholas Wooten: "I am also dismayed that every 'tort-reform' group in the country has a link to the comment page here and is running an organized campaign to their members asking them to comment in support of these unnecessary amendments."

784, Michael Millen: "[Q]uestions such as proportionality call into question a very difficult political balance (e.g., economic realities of the defense versus the trial preparation realities of the plaintiffs) which I believe is best made by the people's representatives rather than a technical committee." The Committee should report that some of the proposals "are so politically charged that Congress should make the first move."

1221, Kris Aleksoy: "The seventy emails I have received from my colleagues tell me that this is the most important issue that has graced my email this year."

1379, James R. Maxeiner: Comprehensive reform is needed. "The Duke Rules Package does not go there." So for Rule 4, courts should serve complaints, and should in every case review them before making service. Proportionality in discovery should not be left to the parties; judges should control discovery, which should take place in court and require the judge to evaluate the testimony and veracity of the witnesses. Comprehensive reform would include a general loser-pays rule. Cooperation should be made mandatory — including cooperation in disclosing all the facts available to a party.

1870, David Stevens: Delayed rulings on motions to dismiss are a real problem; parties "blow through" discovery deadlines because no one wants to waste money on useless discovery until the motion to dismiss is decided.

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: Agrees that federal civil procedure should be adopted through the Enabling Act process. On December 10, 2013, the IPO adopted this resolution:

RESOLVED, IPO opposes Congress dictating the outcome of deliberations of the Judicial Conference of the United States, or bypassing the Judicial Conference and its rulemaking entirely, relative to the rules of civil procedure such as (a) the scope and sequencing of discovery in patent cases including claim construction, (b) the setting of pleading standards for patent infringement, and (c) the initial disclosure and joinder of interested parties.

Pointing to local rules in some districts for patent cases, a second resolution urges that the Judicial Conference "develop and adopt rules to address issues of case management and discovery in patent cases in a timely manner."

January Hearing, Jon L. Kyl: p. 45 It is important to move this rulemaking process to a conclusion. "[F]rustrated parties and interests * * * have other options, such as * * * congressional action * * *."

February Hearing, John W. Griffin: p 57 As a member of defense groups, I have been implored to get my testimony in. As a member of plaintiff groups, I have been told I need to make my views known. "[T]his is not an election for people to get their votes in. This is serious business."

RULE 1

267, Lawyers for Civil Justice, by Alex Dahl: "While we believe cooperation is a valid aspirational goal, we do not believe the rules should be used as a tool to enforce it." Creating rule text will seem to create "a duty, the breach of which could lead to sanctions and more." The result will be the same as the experience under the prior version of Rule 11. In any event, the Committee Note should be revised to delete any reference to cooperation. The Committee decided not to add a duty to cooperate to rule text. The same considerations apply to the Note, which could be read to enshrine a duty to cooperate into the rule itself. The Sedona Conference sources on cooperation show how vague the concept is. Is a lawyer obliged to cooperate by disclosing information helpful to the adversary and damaging to the lawyer's client? Even despite the duties of loyalty and diligence? "Cooperation" has no settled meaning or usage: it is not fit for rules use.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality." Although indirect, p. 942, n. 63, seems to support adding parties to Rule 1 by invoking the Committee Note to the 1993 amendment. The Note recognizes "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[I]f Rule 1 is to be amended to encourage cooperation, it should be done explicitly and not indirectly through" the Committee Note. The 1993 Committee Note states that attorneys share responsibility with the judge. If greater cooperation is to be achieved, the proposal does not go far enough. "To enshrine cooperation as a touchstone of federal procedure, it needs to be made explicit in Rule 1. If such were to occur, the litigation that would ensue over compliance might very well be worth it." As it stands, the Section does not support the proposal.

311, James Coogan: (This is indirect, not a comment on Rule 1 as such:) "Consider that the rules often do not affect reasonable litigants. The rules become an issue when parties to litigation are not reasonable."

327, Malini Moorthy for Pfizer Inc.: "[S]upports the proposed additional goals of increasing cooperation among lawyers * * *."

331, Robert DiCello: "The proposals are not likely to encourage collegiality among lawyers — something much desired and needed today." (From the context, this appears to be directed to the discovery proposals, not Rule 1.)

333, Racine Miller: Similar to 331 above.

335, Rebecca Heinegg: This comment seems at most an indirect reflection on Rule 1: "[T]he proposals are not likely to encourage collegiality among lawyers. If anything, they make it more likely that there will be contentious motion practice over the scope of discovery."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Opposes the proposal. Cooperation is desirable, but the change will encourage wasteful motion practice. Imposing duties in addition to those exacted by the Rules of Professional Conduct should be considered carefully, especially with respect to "conflict with the notions of this country's adversary

system."

345, Kim Stone for Civil Justice Association of California: applauds the goal to improve cooperation among lawyers.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses the proposed rule text and the Committee Note. These proposals are consistent with The Sedona Conference Cooperation Proclamation. 494, Charles R. Ragan seems to endorse the Sedona language: "construed, complied with, and administered." But also illustrates an alternative within the framework of the published language: "and employed by the court, counsel, and the parties."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Endorses the proposal, "which is designed to embody the principle that the parties should cooperate in achieving the goals of" the Rules. This principle has been established in E.D.N.Y. since it was first adopted in standing orders in 1982.

356, Richard McCormack: "Please add 'parties' to Rule 1 * * *."

359, Andrew B. Downs: Rule 1 should be repealed. The judges who cite it do so "to justify some unfair personal modification to the generally understood mores of practice in a particular district," to "run roughshod over all counsel."

366, Paul D. Carrington: "[D]o we need to empower judges to make a more generalized disapproval of the role of an advocate in failing to maintain a cooperative spirit in the conduct of adversary litigation"? Extending the power to punish parties and counsel for excessive zeal is questionable.

November Hearing, Paul D. Carrington: p 60, 68 The Rule 1 proposal "kind of suggests that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side." "I would certainly not want to go very far down the road of burdening plaintiffs' lawyers with duties that diminish their ability to bring their cases * * *." The plaintiff's lawyer should not be made responsible for the outcome. Rule 1 is a good rule. "[B]ut trying to impose an independent duty on the part of a lawyer representing the plaintiffs to try to save costs and prevent this from being too vigorous a dispute is I think subject to the same kind of complaint" that was made to the original 1993 version of initial disclosure, which required an attorney to identify witnesses and documents harmful to the client.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery cooperatively and collegially, not as a club to inflict unnecessary costs. "We therefore applaud the goals * * * to inject a more cooperative spirit into the discovery rules * * *."

383, Alan B. Morrison: Without supporting or opposing, observes: (1) The Note says the change is to foster cooperation — if so, cooperation should be added to the rule text: "the parties are [expected] to cooperate to achieve * * *." That would lead to deleting "employed by the court and parties." (2) Speedy and inexpensive are achieved by reducing the prospect of a just result. The tension should be reflected in rule text — "to secure by an appropriate balance the just," etc.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

399, Edward Miller: "Creating a duty to cooperate is a well-intentioned idea that is sure to lead

to unintended negative consequences, including abusive motions * * *. The meaning of 'cooperation' is vague, and the tension between cooperation and a lawyer's duties to the client are (sic) already complicated."

407, David J. Kessler: The language on cooperation should be removed from the Committee Note. If anything is to be said about cooperation, it should track *The Case for Cooperation*, The Sedona Conference Journal, Vol. 10 Supp., 339. "We are starting to see cooperation become a weapon and courts chastise parties for not being cooperative even when they follow the rules and simply decline to provide information to their opponents to which they are not entitled." Cooperation should not be available as a "meta-threat" used by courts to coerce parties into providing discovery not required by the rules. But if the Committee chooses to say something about cooperation in the Note, it should be this: "Cooperation means undertaking litigation and discovery in compliance with these Rules and acting in good faith. Parties and Counsel should refrain from abusing these rules. Parties are encouraged to cooperate and reach agreements to resolve disputes amicably during litigation, but cooperation does not require such agreements and parties that comply with these Rules need not voluntarily cooperate if they believe in good faith that it is not in their best interest."

412, Mark S. Stewart for Ballard Spahr LLP: More than 120 United States district courts have signed on to the Sedona Cooperation Proclamation. The spirit of Rule 26(f) mandates cooperation in discovery, and Rule 37(f) permits sanctions for failure to participate in good faith in a Rule 26(f) conference. The proposal to amend Rule 1 does not clearly define cooperation and may provide a new basis for motion practice without altering the parties' obligations in any material way. The proposal should be abandoned.

421, Louis A. Jacobs: "Amending Rule 1 to encourage parties to play nice and responsibly is swell but in no way changes the adversarial system. In my experience [representing employment plaintiffs] defense counsel are honorable and represent their clients zealously." That means producing only the discovery that a judge would require be produced.

427, John F. Schultz for Hewlett-Packard Co.: Opposes the Rule 1 proposal. An exhortation to cooperate is well-intentioned, but "it is likely to lead to abusive motion practice whereby parties accuse each other of failing to cooperate."

455, W. Michael Scott for CrownQuest Operating, LLC: Opposes. "The possibility of motions * * * for the failure to cooperate will only encourage wasteful motion practice." The Rules of Professional Responsibility should be supplemented only with great care, especially to the extent that the proposal could be considered at conflict with the notions of an adversary system.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the Rule 1 initiative. The rule text should not incorporate the principle of cooperation, which is better incorporated in the Committee Note. [This may be ambiguous. The Note cannot say anything unless the rule text is revised. The proposed rule text does not refer to cooperation.]

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: "We support efforts to encourage cooperation and civility."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: pp. 11-12 offer examples of pilot projects and district guidelines mandating cooperation. p. 15 applauds proposed Rule 1, but suggests it should reach attorneys as well as parties.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: This comment summarizes the discussion at a day-long conference of about 40 invited lawyers and judges with long experience on "both sides of the 'v'." The participants included a good number who have participated actively in the federal rulemaking process, including two former members of the Civil Rules Advisory Committee (Judge Lee H. Rosenthal and Daniel Girard), and the current chair of the Standing Committee (Judge Jeffrey Sutton). The overall report is a clear and concise summary of views expressed by many others in the public comment process. Familiar divisions of view are found here. But there also is a greater level of consensus on some topics than may be found in the overall comments.

For Rule 1, "there was a mixed response." A slim majority favored the proposed language, hoping for a culture change; they would add "attorneys" to make it explicit that they are included. Some of the opponents did not oppose the concept, but did not want to tamper with the iconic language of Rule 1. Other opponents stressed the importance of vigorous advocacy, suggested there would be limited practical effect, and feared that the new language could be used as a tactical weapon.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn. (The same comments were reposted in a different format as 1196; the duplication is not noted in later summaries.): Endorses the proposal.

624, Joseph E. O'Neil: Able and experienced attorneys cooperate now. Those who are not cannot be educated to change their views or their behavior. The proposal will make no difference in behavior, but it will invite motion practice. It should not be adopted.

645, Allison O. Skinner: Offers several versions of a sentence to be added to the Committee Note. The sentence would point to the advantages of using alternate dispute resolution techniques to encourage cooperation in discovery, or to actually resolve discovery disputes. Three articles are attached, one by Ms. Skinner, another by Judge Waxse, and a third co-authored by Judge Scheindlin. Together the articles run a bit more than 100 pages.

677, Noah G. Purcell for Washington State Attorney General's Office: "[W]elcomes the changes to Rule 1."

922, Pamela Davis for Google Inc.: Welcomes the Rule 1 proposal. But cautions "that cooperation under Rule 1 should not be read to impose discovery obligations beyond good faith and reasonable diligence on the parties." Courts should "start with the presumption that lawyers are behaving ethically in discharging their duties, as evidenced by the certification requirement of Rule 26(g)."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal as "mak[ing] explicit what is already implicit," and an attempt to refocus lawyers and courts on the foundational principles of Rule 1.

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports the proposal. This is "an enforceable mandate. The enforcement * * * will, we hope, lead to a decrease in litigation costs for all parties. We further hope that [it] will provide guidance and a basis for courts to curtail abusive litigation tactics, * * * that we see all too often used by defendants in civil actions."

1457, Peter J. Oesterling for Nationwide Mut. Ins. Co.: Supports the proposal, believing that it

will promote cooperation. "[C]ooperation is often essential in focusing preservation and discovery on the true needs of a case."

1489, Ralph Artigliere: This comment speaks from experience as a litigator, Florida trial judge, and present teacher of electronic discovery. "[C]ooperation is always party neutral." It is not enough to view it as an aspirational principle. It belongs in the rules. Cooperation benefits the client. So long as it is not in the rules, parties and lawyers who seek the cooperative path are at a disadvantage when the opponent does not reciprocate; in turn, that creates a disincentive to cooperation. As a judge, I learned that holding lawyers to a higher standard of behavior caused everyone "to up their game." Professionalism was mandatory in my courtroom. Some lawyers behave unprofessionally with their opponent, then come to court "with a different face for the judge." "Send a message to federal judges [although there are many now who care passionately] that you support their efforts toward fair, unimpeded disclosure in discovery by giving them a rule that says cooperation is a requirement."

1883, Norman E. Siegel: Favors the proposal, and suggests more precise language that puts some of the burden on counsel.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports the proposal. "[T]he intent and result of the rule change are to make explicit what is implicit, that parties must cooperate." But "in our experience Rule 1 is rarely invoked. Thus, we do not believe that the changes to Rule 1 will have a major impact on the behavior of parties and their counsel."

2173, Ariana J. Tadler: "Cooperation" should be added to the rule text, with a statement of what is expected in the Committee Note. "Cooperation, when sincerely applied, is widely acknowledged to be the best, if not the only, way to guard against excessive discovery." It is no more amorphous than "speedy," or "inexpensive," or — particularly — "just." And "just" is the ultimate and most important goal. February Hearing, Ariana Tadler: p 325 Supports, but suggests that "cooperation" be added to the rule text. Cooperation "really, really works. It's a win, win." Judges know when the parties do not cooperate, and hold them accountable.

November Hearing, Jack B. McCowan: p. 8: "I support the committee's goals of * * * attorney cooperation."

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 "I hope [this] will be vigorously enforced by the district courts and by the magistrate judges." That will have a positive impact in reducing the cost of litigation to all parties.

February Hearing, Danya Shocair Reda: p 349 Approves the Rule 1 amendment.

RULE 4

Time to Serve

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Reducing the time to serve to 60 days will undermine the waiver-of-service provisions because a plaintiff will not know about waiver until well into the 60-day period. And it is not time enough to serve a defendant who cannot be found or who actively avoids service. Plaintiffs will be encouraged to move aggressively for extensions.

265, American Association of Justice Civil Rights Section, by Barry H. Dyller: The 60-day limit will effectively eliminate the ability to serve by mail. And there are countless examples of defendants ducking service. An illustration is provided by a doctor at a federal prison that has thwarted service by returning mailings, refusing to "forward" calls to the doctor, and so on. Nor is there any benefit to reducing the time.

266, American Association of Justice Aviation Section, by Michael L. Slack: 60 days is not enough time to serve foreign manufacturers and airlines in compliance with treaties. (This comment flags an ambiguity in Rule 4(m), which "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." Rule 4(f) applies directly only to service on an individual in a foreign country. Rule 4(h)(2) provides for service on a corporation or other entity in a foreign country "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(1)." Service on a foreign corporation thus seems to be "under" Rule 4(h), and only in a manner prescribed by Rule 4(f). If the 120-day limit applies to service on a foreign corporation, this concern is greater.)

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

276, John D. Cooney: The time reduction will discourage plaintiffs from requesting waivers of service because a plaintiff will not know whether the defendant will waive until some time after requesting the waiver, leaving only 30 days to effect service. A plaintiff may need to sue a company he worked for decades ago — extensive research may be required to find the company's current name. Time will be wasted on motions for an extension of time to serve. (321, Timothy M. Whiting, is similar.)

278, Perry Weitz: Changing only a few words, tracks 276, noted above.

279, Kyle McNew: "A lot of cases settle in between filing and service, but 60 days just isn't enough to get a case settled." So fewer cases will settle.

280, Oren P. Noah: 60 days is not enough. In asbestos litigation, "service on entities that have changed names, moved offices, etc. in the decades since they caused the relevant asbestos exposures sometimes take[s] substantially longer." And shortening the period will encourage certain defendants to avoid service.

292, Lyndsey Marcelino for The National Center for Youth Law: Litigation on behalf of children typically involves many parties in many different locations. Social workers have a very high turnover rate. Cutting the time to serve in half "would be a nearly insurmountable burden in situations where we are litigating in different states against individual defendants with unknown locations."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Similar to 264, the AAJ Transvaginal Mesh Litigation Group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves the proposal, but recommends two additions to the Committee note: (1) Extensions for good cause should be liberally granted for the sake of better overall efficiency, and there is no change in the discretion to grant extensions even absent good cause. (2) An example of good cause should be provided — one would be "multi-party actions in which it may be difficult to identify, locate, and serve all defendants in two months (possibly excepting cases where fewer than all defendants must be served via the Hague Convention)." November Hearing, p 287, Michael C. Rakower for the Section: Repeats that the good cause provision is an important limit on the shorter time to serve, and urges that the Note "show situations in which good cause can be employed so that parties don't think that good cause should be a limited form of remedy."

306, William C. Faber, Jr.: "[S]ervice of summons can be more complicated than you imagine."

311, James Coogan: It often takes 60 days to find out that the address initially used for service is outdated. The proposal will increase delays by increasing the need to seek additional time to serve.

317, Steven Banks for the Legal Aid Society in New York City: In forma pauperis cases should be governed by the current 120-day limit. Service is made by the Marshals Service. Marshals frequently fail to make service within 120 days. IFP litigants are not penalized for this, but the failures undermine their faith in the fair administration of their claims. Reducing the time to 60 days will "raise expectations that cannot be satisfied and promote cynicism about government's adherence to the law."

327, Malini Moorthy for Pfizer Inc.: The amendments to Rule 4(m) and 16(b) are "important signals to the judiciary that early and active case management is critical * * *."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing homes often are owned and managed by way of a complex organizational structure involving several defendants. A 60-day limit could result in costly refile of complaints because of the logistical difficulties in serving all defendants.

360, Robert Peltz: Often defendants are located in other domestic and foreign jurisdictions. Long-arm service or substituted service can be very time consuming, "even if one knows where the defendant is." It is worse when it is necessary to track down the defendant. And a dismissal nominally without prejudice is with prejudice if the limitations period has run.

361, Caryn Groedel: This is an arbitrary change for the benefit of defendants and to the detriment of plaintiffs.

363, Dean Fuchs, at request of NELA-Georgia Board: Reducing the time to serve will create a perverse incentive for defendants to evade service. It can be difficult to personally serve some defendants. They often utilize P.O. boxes, drop boxes, or other contrivances to obfuscate their actual addresses or whereabouts. "I am often forced to unnecessarily incur the expense of engaging private process servers, and on occasion, more expensive private investigators to stake out and surveil the defendants * * *." Problems with timely service are more likely to arise from evasive defendants than lazy plaintiffs' counsel. There is one circumstance, however, in which

plaintiff's counsel properly delays service. The 90 days available to sue after the EEOC issues a right-to-sue letter are used up in obtaining the EEOC investigative file under FOIA, and most competent attorneys will want to review the file before undertaking a case. A plaintiff may be required to file pro se while seeking representation. After investigation, prospective counsel may advise the plaintiff the case is not worth pursuing and should be voluntarily dismissed. If the case is pursued, counsel will have an opportunity to amend the complaint before it is served. In these circumstances, delay in service will promote judicial economy. The present 120-day period enhances the ability of plaintiffs with viable claims to retain counsel.

365, Edward P. Rowan: Service can be quite difficult. Statutes of limitations are extremely harsh. It is wrong to provide a harsh time period for service.

369, Michael E. Larkin: "The present time limit does not affect the length of litigation." Change achieves nothing meaningful.

372, J. Burton LeBlanc, for American Association for Justice: Reducing the time to 60 days is entirely unnecessary. The 120-day period does not delay a case unnecessarily. It is an important stepping stone for the start of a case. In some kinds of cases, such as admiralty cases where plaintiffs must reach a ship to effect service, 60 days will almost always be inadequate. With the 120-day period, courts do not often confront motions for an extension of time; with a 60-day period, they will confront such motions much more frequently.

383, Alan B. Morrison: (1) Is there any evidence that plaintiffs are deliberately delaying service for tactical advantage? Remember that many statutes of limitations require service in a period shorter than 120 days after filing. (2) Rule 15(c)(1)(C) requires notice to a not-named defendant within the period provided by Rule 4(m) — if shortening this period is intended, the Note should say so. And there are other problems with relying on Rule 4(m) in Rule 15(c)(1)(C): Rule 4(m) does not apply to service in a foreign country, and the proposal also excludes notice under Rule 71.1(d)(3)(A). What of relation back in those settings? The cure is to delete the cross-reference in 15(c)(1)(C), substituting the desired number of days, whether 60 or 120.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

403, Donald H. Slavik for AAJ Products Liability Section: Products cases often involve manufacturers and sellers located overseas. Service is time-consuming. 60 days is not enough; 120 days usually are enough. [Note this comment points to an ambiguity in Rule 4. Rule 4(m) does not apply to service in a foreign country "under Rule 4(f) or 4(j)(1)." Rule 4(h)(2) provides for service on a corporation not within any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual. Literally, Rule 4(m) applies to service under Rule 4(h)(2). It may be useful to look into this.]

408, Elliot A. Glicksman for Arizona Association for Justice: "For example, in trucking cases, the very nature of a truck driver's job has them on the road, hard to find, and difficult to serve." 120 days often is extremely difficult; 60 days would often be unworkable. And the change would undermine the system of encouraging defendants to waive service.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Shortening the time for service is acceptable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Plaintiffs have the incentive to serve defendants as soon as possible. In multidefendant cases it is often necessary to request more than 120 days to effect service on individuals and on agent partnerships in limited liability companies that are evading service. 448, Robert D. Curran, tracks 410.

443, Grant Rahmeyer: There is no need to change. "Corporations play shell games and intentionally make it difficult to serve the correct party."

457, Carl A. Piccarreta: "The 120 day limit has * * * allowed for cases to informally resolve so as to avoid service of process and the initiation of formal/expensive litigation." And finding some defendants, for example interstate truckers, can be a problem.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The current time period should be retained. The Department often encounters defendants that attempt to evade service. It also often has cases involving multiple defendants, "some of whom can only be located with great difficulty." Shortening the time to 60 days is likely to discourage use of the Rule 4(d) waiver provisions. If the time is to be shortened, it should be to 90 days. And the Committee Note should state that the new limits may need to be extended where a defendant evades service or is difficult to locate. The Note also should say: "More time also may be needed to effect waiver of service under Rule 4(d)."

465, Neil T. O'Donnell: Plaintiffs attempt to serve as soon as possible. But some defendants are hard to find, and some avoid service. Reducing the time to serve also will interfere with the excellent rule for requesting waiver; the plaintiff will not know whether the defendant has waived until perhaps 25 days remain to make service.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: 60 days is not enough "in certain types of cases, most especially those with foreign defendants, or defendants who must be served by publication or other non-judicial means." The result will be more motion practice.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Reducing the time to serve will make the process less efficient because parties would often have to seek more time. "It would affect Oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

487, Peter J. Mancuso for Nassau County Bar Assn.: Opposes. The present rule does not prejudice plaintiffs or defendants.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Plaintiffs' attorneys at the conference thought there is little need for change; pointed to the potential impairment of requests to waive service; and feared the effects when the "parties are trying to identify the defendant and the statute of limitations is close to expiring."

502, Peter Everett: 120 days allow more opportunity to try to resolve rather than litigate a dispute.

518, Robert Stoney: When a plaintiff comes late to the lawyer, "this requires a quick filing with time needed to prepare the case." 60-day service gives an advantage to the defendant.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: The proposal will undermine the procedure for waiving service. Finding the current name of a defendant may require research through a dozen mergers and acquisitions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The time should be not less than 90 days. Reducing it to 60 days will result in more motions to extend, "especially from parties with fewer resources to track down defendants' addresses and from pro se plaintiffs."

616, Marcia Murdoch: Insurance companies are often unwilling to discuss settlement until suit is actually filed. And "I have had numerous cases where defendants are not even known by the insurance company, and the insurance company requires service as propounded the rules." 60 days are not enough.

703, Jeffrey K. Rubin: "[G]iven that dismissal is without prejudice, at best this rule change increases costs by requiring refiling when a missing defendant is finally located."

726, Mark T. Lavery: "In most of the individual consumer cases that we file, we send a waiver of service to the defendant. * * * [M]ost Defendants who are not interested in ducking service will waive service if given the opportunity." Reducing service time to 60 days will interfere with waiver practice — the plaintiff should have 90 days to serve when there is now waiver.

784, Michael Millen: Plaintiffs often approach me a few days before expiration of the limitations period. When I cannot take the case I help them draft a pro per complaint. Then they look for an attorney to take over the case after filing it in pro per. And they are afraid to attempt to make service themselves while looking, lest they make a mistake. "There is a world of difference between finding an attorney in 60 days versus finding an attorney in 120 days."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal. It will require plaintiffs to be more diligent when seeking a waiver of service. The effects on relation back of an amendment changing defendants under Rule 15(c)(1)(C) do not alter the endorsement. In the small numbers of cases where limitations issues force filing before a Rule 11 investigation can be performed, 60 days are adequate.

1025, Senator Jeff Merkley, Senator Ron Wyden: The change "would affect Oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

1054, Assn. of Bar of the City of New York: Generally 60 days is enough. But service under the Hague Convention on a foreign corporation or other entity routinely takes more than 60 days. Application of Rule 4(m) to service under Rule 4(h)(2) is not expressly excluded by the exclusions for service under Rule 4(f) and (j)(1). Courts seem to exclude such service, but offer no clear explanation. Rule 4(m) should be amended to expressly exclude service under Rule 4(h)(2). And the Committee Note might observe that pro se litigants often will deserve more time.

1105, David Ginsburg: "Insurance companies will often 'alert' their insureds of pending service which encourages defendants to evade service. The carriers refuse to accept alternate service and refuse to provide current defendant addresses without court orders."

1209, Christopher Heffelfinger: Provides a nice statement on several familiar arguments that 60 days are too few, including the difficulties of locating individual defendants — "is a stakeout

necessary" to show good cause for an extension when an individual has been absent from the place for attempted service twice, three times, four times?

1210, AAJ Admiralty Section: A reminder that service — arrest — in an in rem admiralty action must be delayed until the vessel is in port.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Moderately opposes. A 60-day period will interfere with requests to waive service. In addition, "obtaining service is sometimes a challenging and time-consuming process." Setting the period at 60 days will increase motion practice.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "The very nature of finding and serving an over-the-road truck driver is problematic."

1672, Michael T. Blotevogel: Cases do not move fast enough in federal courts to benefit from shortening the time for service. But it will increase expenses.

1175, Shawn Spencer: To keep costs down and to avoid service at a person's home or office, I often try service by certified mail. If that is unsuccessful, the Postal Service will not return the complaint to me until at least 21 days have passed. A 60-day period to serve would leave little time.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Requiring that service * * * take place within 60 days in most cases makes excellent sense."

1292, George Wailes: Suggests a problem that may be unique to California. When it is not easy to find the defendant, it may be necessary to move to publish summons under Rule 4(n)(2). The rules for publication in California require a court order based on a declaration of diligence, and then provide that service is complete only 28 days after first publication. If the Rule 4(m) period is shortened to 60 days, it will be necessary to file an ex parte application to shorten the time for a motion to publish the summons.

1388, Jonathan Marcus for CFTC: "[M]any defendants named in CFTC civil actions simply do not want to be found. This is especially true for defendants engaged in Ponzi and other schemes who also may attempt to run from criminal prosecution." Shortening the time also will interfere with requests to waive service.

1414, David Abrams: Reducing it to 60 days will discourage initial resort to informal and inexpensive means that may not work. But if it is shortened, the rule should provide an automatic extension if the defendant contests service.

1555, Anthony Tarricone: Spells out the reasons why service under the Hague Convention often takes 90 days, 120 days, or more. One snag is that service must be made by the "Central Authority" in the country where service is made, according to its own rules; the plaintiff has no control over this. Matters are worse in countries that are not signatories to the Convention. And notes that foreign defendants who are provided courtesy copies of service papers through contemporary means rarely waive the formalities of Hague Convention service, or whatever other rules apply, choosing "to delay advancement of the case in court by insisting on the formalities of service * * *."

1588, Leigh Ferrin for Public Law Center: Pro se plaintiffs encounter great difficulty in figuring

out whom to serve, and how. The difficulties are greater when suing a government agency. Some are able to invoke the Marshals Service, but the marshals are overworked and frequently fail to meet even the 120-day deadline.

1932, Brian R. Wilson: The change increases the risk that games will be played with arguments of insufficiency of service. In 2007 the Ohio Supreme Court ruled that a properly raised and preserved insufficiency-of-service defense is not waived by active participation in the litigation — and affirmed dismissal for insufficient service on a motion for directed verdict made after the conclusion of the plaintiff's case in chief.

2002, Hon. Candy Wagahoff Dale for Local Rules Advisory Committee, D. Idaho: In cases where there is good cause to take more than 60 days, there will be increased motion practice. Idaho allows 180 days; even now, the 120-day period in Rule 4(m) "has caused plaintiffs to endure precarious arguments regarding statute of limitations defenses."

2014, Jennifer Verkamp: In False Claims Act cases the complaint remains under seal, unserved, until the government decides whether to intervene in the litigation. The moment when the government decides not to intervene is the first moment when the relator is informed of the results of the government investigation. These cases are often complicated, and the relator must undertake a close analysis and perhaps do further investigation or consultation with new counsel before deciding whether to proceed further. Careful deliberation will be impeded by reducing the time to serve.

2209, Richard Talbot Seymour: "Sometimes, a delay in service is occasioned by nothing more sinister than waiting for a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission, so that all claims can be made in the same case."

2334, Robert A. Hyde for City of Phoenix: Supports shortening the time to serve. The City "continues to encounter plaintiffs seeming to 'park' cases for nearly four months after filing, only then to rush to accomplish service on the 120th day (or after). The proposed amendment * * * will foster diligence at the earliest stages of a lawsuit * * *."

November Hearing, Barry H. Dyller: p 183 Reducing the time to serve is unnecessary "because it's always in plaintiff's interest to get the summons and complaints served as soon as possible." And this is a de facto repeal of the Rule 4(d) waiver process — by the time I know there will be no response there will be about 25 days to accomplish service, and it is not always possible. I have never had a problem in getting extensions. But I generally serve by requesting waiver because that is most efficient; this will make me think twice about that.

November Hearing, Nicholas Woodfield: p 235 Rule 4(m) is not broken; there is no need to "fix" it. And the reduction to 60 days will cause serious problems. In employment cases you often have a plaintiff appear at the last minute after receiving a right-to-sue letter. You're trying to protect the statute of limitations — "you can prepare pro se complaints over your own name or you can file it." Due diligence standards are lower in these circumstances; remember the defendant controls the evidence. Similar problems can arise in False Claims Act cases, which can be suspended under seal for months while the government decides whether to take over — long down the road, the government may decide not to intervene, but after accumulating much information that the plaintiff should get under the Freedom of Information Act. 120 days is not much time for that, much less 60. The full 120 days to serve may lead to a decision to withdraw the case without serving. And Rule 4(m) is not a major cause of delay in moving to final disposition. Routine motions to dismiss cause much delay. Another source of delay is taking too

much time to decide motions for summary judgment.

January Hearing, P. David Lopez (EEOC): Agrees with the proposal.

February Hearing, Michael M. Slack: p 193 This is one of the several discussions that assumes the present 120-day limit applies to service on a foreign corporation. Even 120 days is not enough to comply with the often complicated treaty provisions that apply. We keep getting agitated calls from federal court asking why we have not made service within the limit. Please, please do not reduce it from 120 days.

Exclude Condemnation Notice

383, Alan B. Morrison: Excluding notice under Rule 71.1(d)(3)(A) from Rule 4(m) will create relation-back problems because Rule 15(c)(1)(C) governs relation back for a new defendant by invoking Rule 4(m). These problems may arise with some frequency because it may be easy to get wrong the names of persons with peripheral or remainder interests.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department suggested this change. "Service of a notice in condemnation actions is different from service of a complaint in other civil actions." Dismissal under Rule 4(m) for failure to serve the notice in 120 days would adversely affect, not benefit, prior landowners who are entitled to just compensation. The law now is as proposed by the amendment, which serves only to make the law clear.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Notes this aspect in approving the 4(m) revision.

RULE 16: TIME FOR SCHEDULING ORDER

(Some of the comments summarized here address case management generally, without focusing directly on the specific Rule 16 proposals.)

Nonofficial comments: It has been suggested that Rule 16(b)(1) should be revised to authorize standing orders that exempt categories of actions from the scheduling-order requirement. The point is that bankruptcy courts often adopt standing orders like this, and at the same time generally follow the civil rules. The published proposal simply carries forward the present provision: a court must issue a scheduling order "[e]xcept in categories of actions exempted by local rule." It would be easy drafting to add "or by standing order." The questions are whether it would be wise to do this as a general provision in the civil rules; whether the circumstances confronting bankruptcy courts suggest a special need for express authorization of standing orders; and whether, if there is a special need, it is better to meet it in the bankruptcy rules themselves.

This suggestion relates to an ongoing project to reconsider the permission to rely on local rules to exempt categories of cases from the scheduling order requirement. Rule 26(a)(1)(B) exempts nine categories of cases from the initial disclosure requirement. These exemptions are incorporated in Rule 26(d)(1), so the discovery moratorium does not apply. They also are incorporated in Rule 26(f), so the parties need not confer. It could be attractive to extend the exemptions to Rule 16(b)(1), displacing local-rule exemptions, so as to have a uniform set for these related purposes. The next step in this project is to study local-rule exemptions to determine whether they illustrate additional categories of cases that should be added to those now listed in Rule 26(a)(1)(B).

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves shortening the time to serve the worthy objective of reducing delay. There is some concern that the "good cause" exception will be routinely applied in cases involving parties with complex infrastructures and complex discovery issues. But, so long as the good-cause exception is retained, the court will have the necessary flexibility. The exception will address the problems that arise in multi-defendant cases when some defendants are served at the close of the 60-day period provided by revised Rule 4(m). The Committee Note should offer such cases as an example of good cause. November Hearing: Michael C. Rakower, p 287: Renews the Section's support, urging that "the good cause exception should be underscored."

327, Malini Moorthy for Pfizer Inc.: "[S]upports the proposed amendments to Rules 4(m) and 16(b) as important signals to the judiciary that early and active case management is critical * * *." This goal can be furthered by using the rules "to encourage judges to develop standard discovery orders or case management plans that outline the scope of discovery and reinforce the parties' obligations to work together to manage discovery." Injecting judicial oversight, casting the judges as gatekeepers to prevent unnecessarily burdensome discovery will help end the use of onerous discovery merely as a leverage for settlement.

342, Stephen C. Yeazell: Exhortations to district judges to manage better are not likely to be effective. "Our experience, with Rule 16 and with the text of various Rules that already vest judges with the power to manage litigation, suggests that some simply will not or cannot." FJC

conferences and manuals might help.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The proposal, adding "unless the judge finds good cause for delay," is "awkward because it implies that the parties have not been diligent, even though the court is to make its finding even before it meets the parties." The proposal should be revised to direct that the judge must issue the scheduling order within the prescribed times "unless the court anticipates that the complexity of the case, the needs of the parties, or the ends of justice warrant additional time."

352, Lee Kaplan: Supports the package as "commonsense recommendations that will speed up the litigation process."

383, Alan B. Morrison: (1) It would be better to state the time directly, rather than work backward from the Rule 26(f) conference. Require the parties to meet within a stated period after the first defendant is served, and set the scheduling conference at 21 days after that. (2) Delete "as soon as practicable." (3) Move "unless the judge finds good cause for delay" to the end of the sentence for better readability.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 16 proposals without further comment.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]he service of any defendant should not be the trigger for issuing a scheduling order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ctive case management, particularly at the early stage of the case, is generally effective in reducing delay." But the amendment may be counterproductive. The integration of the discovery moratorium, the parties' Rule 26(f) conference, and the scheduling conference are designed to give the parties sufficient time to analyze the case before conferring and developing an effective discovery plan to present to the court. "[I]n many cases, scheduling orders issued under the accelerated time-lines will have been developed without sufficient time for the parties to discuss and plan proposed discovery and other case-related activities, and therefore to develop a comprehensive, carefully crafted case management proposal." "[P]reserving additional time at the outset of litigation pays dramatic dividends down the road." Acceleration will be a particularly pronounced problem in more factually complicated cases and in cases in which ESI may be produced. Counsel need sufficient time to understand their client's information systems before planning discovery. Acceleration, further, presents unique problems for the federal government. Time is needed to designate the proper litigator within the Department structure. Officials at client agencies also need time to organize and prepare. These needs are reflected in the additional time to answer provided by Rule 12(a)(2) and (3). All of these problems are accentuated in Bivens actions against individual government employees, particularly when time is needed to decide whether there is a conflict of interests that will lead to selection and payment of private counsel to represent the employee. And in districts that do not exempt actions under the Administrative Procedure Act from Rule 16(b), time is needed to understand the size and breadth of the record.

Some of these problems may be alleviated by the "good cause" exception added to the proposal, but the Department is concerned that relief "will be granted quite infrequently." At the least, the Note should recognize these problems by stating that good cause to extend the deadline will likely arise in complex cases (specific note language is suggested at p. 11).

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Applauds

the proposed change.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Supports; it will improve the discovery process.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 16(b) proposals "to facilitate case management."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference, plaintiff and defense attorneys alike, "agreed that lawyers and parties are more cooperative when the judges are involved from the beginning of a case." Some thought the proposed case-management proposals should be adopted now, deferring the "proportionality" amendment of Rule 26(b)(1) to see whether more active management under present rules will do the job.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The shortened time may get cases on a schedule earlier, and at least in theory lead to earlier resolution. But there is a risk that the shortened time will interfere with early court-sponsored settlement discussions. Southern District of California at Local Rule 16.1, for example, requires an early neutral evaluation conference within 45 days after any defendant has appeared. Nearly 25% of civil cases there settle before the case management conference. Condensing the time to the scheduling conference may force the parties into an adversarial posture that interferes with early settlement efforts. It would help to state in the Committee Note that there is good cause for delay in a district that has an early neutral evaluation or ADR program.

635, Matthew D. Lango for NELA/Illinois: Supports.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, despite concerns that the reduction puts pressure to retain counsel, analyze the complaint, develop a litigation strategy and discovery plan, and prepare for and conduct the Rule 26(f) conference.

1119, Rebecca Love Kourlis for IAALS: The first attachment is the National Center for State Courts evaluation of the New Hampshire pilot project for Proportional Discovery/Automatic Disclosure Rules. The rules, for the first time, require fact pleading and an answer; a meeting of the parties after the answer is filed — the goal is to have the parties file a stipulation that becomes the case scheduling order, but if they fail the court holds a scheduling conference, which may be by telephone; automatic disclosure of some information; limits to 25 interrogatories and 20 hours of deposition time; and a separate meeting to discuss preservation of ESI. Contrary to expectations, the new rules did not reduce the time to disposition during the 2-year study period. The rate of filing answers went from 15% when they were not required to 56% under the regime that required them; there was a statistically significant reduction in the rate of default judgments. The rate of holding court scheduling conferences fell dramatically. "Contrary to expectations, there was not a statistically significant change in the proportion of cases in which a discovery dispute was litigated."

The second attachment is the Final Report on a survey answered by 44 attorneys (25% of the target population) who participated in the Suffolk Superior Court Business Litigation Session Pilot Project. The Project principles were to limit discovery to the magnitude of the claims actually at issue; to stage discovery; to require all parties to produce all reasonably available, nonprotected documents that may be used to support claims, counterclaims, or defenses; and requiring parties to confer early and often on discovery and make periodic reports on the conferences to the court. Participation in the pilot was voluntary; very few of those who

responded to the survey opted out. Answering 10 questions, 80% thought the pilot procedures were better or much better than regular Business Litigation Section practice; a still higher number thought the pilot procedures better or much better than regular Superior Court procedures. The materials are sparse, but it appears that enthusiasm for the pilot practices arose from more intense judicial management and from more efficient discovery.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Advancing the deadline for issuance of the initial scheduling order is also worthwhile in order to promote progress earlier in the litigation." And it is hoped that "more judges will see the wisdom in personally conducting those conferences."

1481, George Dent: Accelerating the scheduling conference puts undue pressure on the Rule 26(f) conference and initial disclosures.

1536, Lisa Tate for American Council of Life Insurers: Opposes. "It is extremely difficult, and unrealistic, for a corporate defendant to investigate, hire counsel, and formulate a litigation strategy within the first sixty-to-ninety days after being served."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports the Rule 16 proposals for early and active court involvement.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1746, David Holub: Opposes. "Impromptu conferences lead to ambushes rather than thoughtful briefing and citation to authority."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Shortening the time "does not create an undue burden on the parties, specifically defendants," and "is not extremely onerous" since additional time can be allowed.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports.

2209, Richard Talbot Seymour: The proposal does not, but should, change the current rule that measures time from the date of service on any defendant. A later-served defendant should not be burdened with the results of a conference it was unable to attend. The time should run from service on all defendants, or from "some number of defendants fewer than all." (2252, David J. Lender expresses a similar concern: the shorter time is unfair to later-served defendants, an unfairness that could be exacerbated by serving early Rule 34 requests on the first-served defendant, hoping to set the ground rules for document preservation and production before all defendants can be heard.)

November hearing, Jack B. McCowan: p. 8: "I support the committee's goals of advancing early and effective case management."

November hearing, John C.S. Pierce: p. 24: Favors early case management. It provides an opportunity to consider the proposed presumptive limits and allow more discovery when appropriate.

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 "IJ welcomes the amendments encouraging early and active judicial case management."

November Hearing, Frank L. Steeves: p 302 Speaking from experience as General Counsel of Emerson Electric Co.: Our statutes do not function the way they are intended. Civil justice has "become reduced to a series of guides where cases can be just as much about finding and exploiting the other side's errors during pretrial phases as it is about finding what truthfully happened and therefore finding justice." Working with chief legal officers of companies across the globe, many of them cite our legal system as a reason to stay away from the United States. The proposed changes "will go far in knocking down opportunity for abuse." "Shortened discovery" will force a better focus at the outset. "[I]nvolvement of judges will enhance their early understanding," and reduce the "got-cha" mentality that clogs the courts.

January Hearing, Paul V. Avelar: p 250 The Arizona Chapter of the Institute for Justice "welcomes the amendments encouraging early and active case management."

February Hearing, Rebecca Love Kourlis, for IAALS: p. 37 The current system involves gamesmanship. It is geared toward settlement, perhaps not a good thing. It is prohibitively expensive, not a good thing. Everyone agrees that more active judicial case management is a good thing; there is very little disagreement with that set of proposals.

February Hearing, Michael L. Slack: p 193 In several ways, this is a plea for more direct and active involvement by federal judges with their cases. Some do this. Many do not, viewing the process as too formal, too rigid. State-court judges in Texas are involved, with a status conference every 30 days. That is much better.

February Hearing, Conor R. Crowley: p 280 Endorses the Rule 16 proposals, and suggests several additions to "improve preservation, "to include "privacy issues," and to state in the Committee Note that judicial intervention is appropriate only after the parties meet and confer in good faith.

RULE 16: ACTUAL CONFERENCE

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[A] scheduling conference is more effective if the court and the parties engage in direct simultaneous communication." E-discovery-specific disagreements should benefit significantly because they present numerous challenges. "Such challenges often manifest themselves in more pugilistic behavior as attorneys may be more willing to fight or use delaying tactics than address a novel issue." Still, geography or limited stakes may justify a conference by direct, simultaneous communication, rather than an in-person conference. And it is good to recognize that there are cases in which the judge can properly rely on the Rule 26(f) report without a conference.

316, Hon. Michael M. Baylson: Telephone conferences can be an effective and inexpensive way of conducting litigation in a great majority of cases. About half of the E.D.Pa. docket is employment discrimination and civil rights cases, with a congenial bar experienced in what discovery is appropriate. "Telephone" should be restored to rule text.

325, Joseph M. Sellers: Requiring telephone, in-person, or "other real-time means" for the conference is unobjectionable. But it does not seem likely that many conferences are held by mail now. And the real problem is that "scheduling conferences are often not focused on achieving early disclosure of key evidence, or are not held at all. Both attorneys and courts would benefit from stronger guidance on how to structure early scheduling conferences to identify key issues and design discovery and pre-trial process accordingly." November Hearing: p 306 Renews the theme. Speaking to civil rights cases, shares the concerns many have expressed as to the proposals on proportionality, numerical limits, and cost shifting. Contingent-fee attorneys are very careful about the discovery they undertake. The problems arise from a one-size-fits-all set of rules. "[M]uch earlier and more active involvement by the courts in the management of discovery would help greatly." Rule 16 should be amended to require this. Courts, working with the parties, could often stage discovery, "focusing on those matters that they believe * * * are especially central to one side or the other or both." Courts now are empowered to do this, but they should be directed to do it. There may be some judges who will resist such a direction in the rules, but they should come to recognize that the investment of time at the beginning will be more than repaid by savings at later stages of the process. And it will be useful to wait to see what lessons can be learned from ongoing pilot projects, such as the complex litigation project in the Southern District of New York.

383, Alan B. Morrison: The idea is sound. It would be clearer to add " * * * at a scheduling conference involving simultaneous communication."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "The Department strongly supports the option of conferences by telephone or more sophisticated electronic means," particularly when that saves travel time and expense.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: A firm and reliable trial date is the best means to speed up an action. This does not mean a "rocket docket." In the past, "every new case filing would result in a status conference with the assigned judge." That no longer happens. But a party ought to be able to request a Rule 16 conference — or, if not a Rule 16 conference, an opportunity to "see the judge to discuss the progress and prospects of a case before the trial starts."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Endorses

the proposal, "but we hope that in time, and with some experience, the Committee will see fit to make initial pretrial conferences mandatory." Even if a Rule 26(f) report provides a sound basis for a scheduling order, an "initial pretrial conference could do more than simply serve as the basis for a scheduling order." It can inform the court about the issues, and may narrow the issues. It provides an opportunity for the judge to get involved, learn the issues, and tailor the case. "Multiple pilot projects have emphasized the importance of the initial pretrial conference." If proportionality is incorporated in the discovery rules, "it reasonably falls to the judge to make that determination, and early engagement by the judge facilitates a fair and appropriate analysis."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was consensus at the conference that in-person conferences are more effective. Some would go further, to require face-to-face conferences absent good cause. But it was recognized that technology can offer creative and less expensive means.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses eliminating "by telephone, mail, or other means" as "outdated and unnecessary."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": "[I]t is an improvement to require that scheduling conferences be held by simultaneous and live communication * * *."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. Telephone conferences are still permitted, but removing the word from the rule suggests preference for an in-person conference.

2032, Carlo Sabatini: "I agree that an actual conference by direct communication with the court is valuable."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Face-to-face conferences are more conducive to resolving issues, but telephone conferences may be more efficient in some circumstances. The revision is wise.

RULE 16: PRESERVING ESI, RULE 502 AGREEMENTS

287, Lynne Thomas Gordon, for the American Health Information Management Association: AHIMA members "typically manage electronic health record (EHR) systems." They play a key role in e-discovery. Federal statutes and regulations converge and overlap with the Civil Rules "to create an entangled environment ripe for e-discovery requests." The healthcare industry "is still primarily focused on the implementation of EHRs and their use in providing clinical care, rather than establishing new systems, processes, and policies to respond to litigation and regulatory investigations." The early stages of litigation often take far too long. To address this problem, and to ensure that "all forms, formats, and locations of information are preserved," the court should ensure "that qualified and credentialed HIM professionals are actively involved early on in any/all matters involving healthcare litigation or regulatory investigations."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports adding to the subjects of a scheduling order, and of a Rule 26(f) conference, preservation of ESI and Evidence Rule 502 orders. (1) At the conference the court may modify current preservation practices and set the rules for post-order preservation activity, providing greater certainty. Together with Rule 26(f)(3)(C), this will provide a strong incentive for the parties to cooperate on preservation issues and either agree or clearly identify their disagreements, providing a means to address preservation issues more efficiently. (2) The reference to Rule 502 will likely focus the parties' attention on the importance of such agreements. Increased use of Rule 502(d) orders will be a good thing. November Hearing: Michael C. Rakower, p 287: Renews the support.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Adding "preservation" to the list of topics is endorsed. But greater change is suggested, in part to bring all forms of information into the reach of preservation:

(iii) ~~provide for disclosure, discovery, or preservation of electronically stored information.~~ address the scope and limitations of discovery or preservation;

Suggests adding these words: "including agreements reached under Federal Rule of Evidence 502 and any agreements addressing legally protected privacy interests." This "would facilitate the resolution of an issue that is of increasing concern in civil litigation.

In Appendix C, an addition is suggested for the Committee Note that comments on providing for preservation of electronically stored information: "judicial intervention is appropriate only after the parties meet and confer in good faith about these issues." This suggestion seems tied to several other suggestions for revising Rule 16(a) and (b). Some of the suggestions are noted in "other" at the end of these summaries; others go to more general preservation and spoliation issues focused on Rule 37(e). 2260, Thomas N. Vanderford, Jr., and Meghan B. Hoffman, for Hyundai Motor America Supports the Sedona recommendation that "privacy" be added to the list of subjects to be addressed, noting a transnational dimension that is reflected in other comments as well: "Hyundai Motor Company is subject to strict privacy laws of Korea."

349, Valerie Shands: This comment bears indirectly on the proposal, suggesting the rules should "enhance claw-back provisions for inadvertent disclosure," so that "one could speed up the process by allowing the producing party to disclose all of the information, then retract the few pieces that may be privileged."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Supports, but urges that preservation should be discussed by the parties and incorporated in the scheduling order in terms of all evidence, not only ESI.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports inclusion of Rule 502(d) in the list.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal, and the parallel provisions in Rule 26(f). The effort to encourage attorneys to discuss Evidence Rule 502(d) orders is desirable. Rule 502(a) is an underused but potentially valuable tool; a well-developed plan framed by a Rule 502(d) order "can all but eliminate the potential waiver of privilege during the production process."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes the proposal. "[T]he scheduling order is often a very premature occasion for" discussing preservation. This topic is too important to be approached hurriedly. And if it is included, the result may be to impede entry of a scheduling order.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Addressing preservation will enhance cooperation. "FRE 502 is an invaluable tool for lessening the time and expense associated with privilege reviews and waiver issues." The Committee "understand that a typical FRE 502(d) agreement would prevent the waiver of privilege and allow for the claw-back of privileged materials."

2150, Gayla Thal for Union Pacific Corp.: This is one of several comments endorsing the Sedona Conference recommendation that preservation should be added to Rule 16(a) as one of the purposes of a pretrial conference.

RULE 16: CONFERENCE BEFORE DISCOVERY MOTION

292, Lyndsey Marcelino, for The National Center for Youth Law: "[R]equiring an information conference with the court before parties file discovery motions may reduce the time between service and a Rule 16 conference." That will be helpful.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Many local rules and many judges require a conference or a short letter before a discovery motion. Anecdotal experience suggests this reduces the number and burden of discovery motions. Some question whether a terse presentation could predispose the court to a decision before an adequate presentation is made by motion papers. So it is wise to make the pre-motion conference an option, not a requirement for all cases.

325, Joseph M. Sellers: This comment provides a strong endorsement of early, active, hands-on case management, summarized with the "discovery generally" comments. The pre-motion conference is such a good idea that it should be made the default — a judge who strongly resists this approach could opt out, but more judges would be encouraged to use it.

349, Valerie Shands: Suggests it will be useful to increase informal resolution of discovery disputes by a brief conference call with the judge.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Supports. "The vast majority of discovery disputes are simple and can be quickly resolved in a telephone conference with the court."

357, Joanne S. Faulkner: Courts already have the discretion to require a pre-motion conference. "[M]y experience is that off-the-cuff discovery rulings are often based on less than adequate information (such as would be contained in a brief)" and are wrong.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: This is acceptable.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: "Several jurisdictions around the country * * * have implemented similar procedures * * * with very positive results."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was broad support at the conference, from both plaintiff and defense attorneys. They reported positive experiences. Some noted that it may be useful to require a one- or two-page letter before the pre-motion conference. And some urged that the pre-motion conferences should be required before dispositive motions, including summary judgment motions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Because the proposal only permits and does not require a pre-motion conference, the Association is not opposed. But it would oppose a requirement that might conflict with local rules or practices.

623, R. Matthew Cairns: Chief Judge LaPlante, D.N.H., "has this requirement (although his colleagues do not) and it has proven to be highly effective." February hearing, p 6, at 10: says the

same.

635, Matthew D. Lango for NELA/Illinois: "This change will encourage cooperation between the parties, reduce gamesmanship, and generally aid in the efficient and speedy resolution of claims."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports.

854, Hon. James G. Carr: The pre-motion conference should be required. It has been required by local rule in the Northern District of Ohio since 1994, and it works. "I probably have no more than two or three formal motions to compel a year. During that time, I will have perhaps a couple dozen phone conferences following a request for assistance. Those conferences rarely last more than a half hour, are always on the record, invariably result in a prompt and binding decision, and move cases along far more quickly * * *."

864, Wendy Butler Curtis: Undertook a docket survey of eight district judges — four who require either a pre-motion conference or a short letter brief before making a discovery motion, and four who do not. The ratio of motions to cases was 5.59% for the judges who do not have such a requirement, and 1.37% for those who do. This practice should be required.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes. "In our experience, such conferences, without a written motion before the court and the parties, lend themselves to quick and less-informed decisions on matters that potentially can have a significant impact on the merits of the case and involves substantial expense."

1413, Jocelyn D. Larkin for Impact Fund and several others: Supports the proposal. "Most discovery disputes (even those in large cases) are not factually complicated and do not warrant extensive (and expensive) briefing on a 35-day motion calendar. Systemic reform cases often present threshold questions about the scope of discovery * * *. Attorneys for government agencies may have less flexibility to cooperate in discovery matters than their private counterparts, making early and active assistance from the court particularly critical."

1883, Norman E. Siegel: Several districts have this rule, including our local district, W.D.Mo. This "is the single most important mechanism to make discovery more efficient and curb discovery abuses." It will not add significant burdens on the courts.

2032, Carlo Sabatini: (1) Some judges in M.D.Pa. issue an order at the beginning of each case that implements this proposal. But "the procedure actually encourages parties to initially take unreasonable discovery positions." That is because if a motion is required, the risk of a fee sanction if an unreasonable party does not abandon unreasonable positions in the pre-motion conference of the parties leads to abandoning unreasonable positions. An informal hearing before a motion means that there is no risk — there is no provision for sanctions for taking unreasonable positions, and any position that remains to be pursued by a formal motion is substantially justified because the court did not force abandonment. (2) But if the proposal goes forward, the rule should require that the conference be on the record.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Many courts require pre-motion conferences. They often serve to resolve discovery disputes without motions.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This change appears likely to save time,

reduce costs, and generally aid in the efficient and speedy resolution of claims."

November hearing, John C.S. Pierce: p. 24: My clients — defendants — do not like discovery disputes, do not like paying for them. Getting the judge on the phone resolves the issue. "That is a wonderful tool * * *."

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Fully endorses this proposal.

RULES 26 ET SEQ.: DISCOVERY GENERALLY

261, David McKelvey: The proposals will not streamline litigation, but will favor parties with more financial resources to investigate matters presuit.

283, Christian Mester: Large companies and insurance companies routinely ignore interrogatories and requests for documents, forcing plaintiffs to make motions to compel that are unpopular with judges. The rules changes would prevent discovery that has been available under the present rules, taking procedure back to the days of trial by ambush, and placing plaintiffs at a further disadvantage.

286, Stephen J. Herman: Comments primarily on Rule 26(b)(1), but adds a footnote: "[T]he existing and proposed Rules attempt to 'micro-manage' the litigation process, and legislate issues that are better left to the Court's discretion, to be applied on a case-by-case basis." So generally opposes the proposed changes to Rules 30, 36, and 37, as well as the other changes to Rule 26.

289, Craig B. Shaffer & Ryan T. Shaffer: Magistrate Judge Shaffer begins this 30-page article, 7 Federal Courts Law Review 178, 179, by noting that the proposals "May become a background on which competing philosophical perspectives wage war over the role of civil litigation in today's society."

291, Fred Slough: As it is, in discrimination and consumer cases discovery limits have been closing the federal courts for the ordinary American. Plaintiffs need adequate discovery, but the limits imposed work all to the advantage of defendants who have all the information and need little from plaintiffs.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: "The uncertainty that these changes will inject into discovery will lead to mountainous collateral litigation * * *."

301, Hillary G. Rinehardt: "The proposed changes will negatively impact almost all plaintiffs, but in particular those plaintiffs involved in complex litigation where there are multiple defendants." Typically defendants control the majority of relevant information, and will have new tools to avoid providing it.

302, John K. Rinehardt: Verbatim the same as 301.

306, William C. Faber, Jr.: "The complex organizational structure of organizations demands more discovery than the changes provide." There is little help for senior citizens seriously injured by the neglect of a nursing home or a citizen wounded by international banks' financial fraud."

310, Johnathan J. Smith, for NAACP Legal Defense Fund: "[T]he proposed amendments * * * threaten to undermine the ability of civil rights plaintiffs to obtain relief through the federal courts." And the impact of limiting discovery (and limiting sanctions for failure to preserve discoverable information) should be assessed in the context of other recent developments that have made it more difficult to prevail on civil rights claims. Pleading standards have been raised. Class certification has become more difficult.

318, Brian Sanford: Further restrictions on discovery will mean that summary-judgment records are even more different from trial records. The restrictions will favor the defense and infringe on

the right to jury trial. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

322, Michelle D. Schwartz, for Alliance for Justice: Includes a long preface to more specific comments. The proposals will not only make it more difficult for plaintiffs to stand up for their rights in court. They also will make it more difficult "for the public to learn of corporate wrongdoing and threats to their health and safety." These effects must be considered in a broader context that is restricting access justice. (1) Courts are understaffed and overburdened. (2) Forced arbitration clauses divert disputes to private proceedings with no discovery and "conducted by an arbitrator of the company's choosing." (3) Access to class actions is being limited. (4) Pleading standards have been heightened. Compounding these problems by restricting discovery will make plaintiffs less willing to come forward, and will make attorneys less willing to take their cases. Private enforcement of public policy will be further limited.

324, Jonathan J. Margolis: Writes primarily for employment plaintiff litigation, but reflects on other types of cases as well. Cumulatively, the proposed changes will favor those who have more information — commonly defendants — and harm those who have less — commonly plaintiffs. Information imbalance is especially rife in civil rights litigation. "The progression that has led to the near-extinction of civil trials will only be exacerbated if less discovery is permitted * * *." The amendments, moreover, will encourage misuse of discovery by obstructionism. Efficiency will be impaired by more frequent motion practice — for example, there are few motions to take more than 10 depositions, but there will be many motions to take more than 5. There is little evidence of any need to impose these changes and costs.

325, Joseph M. Sellers: The proposed discovery changes will unsettle the law, "requiring parties more often to appeal to the courts to obtain discovery in excess of tightened presumptive limits, and providing more hooks on which to hang objections * * *." This comment includes a lengthy statement of the advantages of early, active, hands-on case management, but "agree[s] with the Committee's point that adoption of new, universal mandates regarding judicial case management is likely premature * * *." Much can be learned from pilot projects, such as the NELA protocol for employment cases and the S.D.N.Y. complex-case project. And individual judges, such as Judge Grimm, are helping to mark the way through discovery management orders.

329, Bryan Spoon: "The proposed changes benefit large corporations and add another barrier between a Plaintiff and the materials that could prove, or disprove his/her case." (It is not clear from context whether this addresses only proposed Rule 37(e), or other of the proposals more generally.)

331, Robert DiCello: (These brief comments seem to be addressed to various aspects of the discovery proposals, although only the numerical limits proposals are directly identified.) There is no problem of excessive discovery. The numerical limits are too low for many serious or complicated cases, and will disproportionately impact civil rights case. They are completely one-sided in favor of defendants, and do not do much of anything to penalize obstruction in discovery and unwarranted motion practice. They will not make litigation more accessible to everyday citizens.

332, Samuel Cohen: The proposals will not reduce costs; instead they will increase motion practice. They will disadvantage plaintiffs litigating against well-resourced defendants. The limits on depositions and document requests (?) should not be enacted.

335, Rebecca Heinegg: The proposals are one-sided. They hurt plaintiffs by limiting discovery,

"but do nothing to penalize obstruction in discovery and unwarranted motion practice."

336, William York: The proposals are one-sided. They will limit discovery, hurting plaintiffs' attorneys. They will increase contention and disagreements, leading to more contentious motion practice.

340, Joseph Treese: Seems to be aimed at the full package of proposals in suggesting careful consideration of the expanded case-management burden faced by the judiciary.

341, Karen Larson: "These limitations on discovery are strictly for the benefit of defendants," who hold all the evidence. Plaintiffs largely bear the cost of depositions anyway. Further discovery disputes will result.

342, Stephen C. Yeazell: "[A]vailable empirical evidence does not suggest a crisis in civil litigation of the scope that would merit the proposed changes. The FJC studies "do not portray a system in need of the[se] wide-ranging changes." They show only that occasional bad lawyers or less-than-diligent judges allow pretrial proceedings to impede justice. The studies contradict the proposals.

349, Valerie Shands: "As lawyers and judges, we suffer from perception bias." "[I]t may be that the length of time for discovery is entirely necessary and proper." Hard research is needed. We do not have it. The FJC analysis of surveys, including one by the American Bar Association Litigation Section and one by the American College of Trial Lawyers, shows remarkable inconsistencies of results. Further, "[t]he trial itself" requires roughly two times the amount of man hours as the discovery process."

Also suggests amending Rule 37 to increase the use of sanctions to teach many attorneys that they can no longer "get away with frivolous motions, irrelevant discovery requests, and unfounded blanket objections."

351, Eric Hemmendinger for Shawe Rosenthal LLP: Discovery is the major reason for the excessive cost of litigation. It often pressures employers into settling nonmeritorious cases.

354, Joseph Scafetta Jr.: Rather than allocate this one paragraph among the several topics it covers, the point is that the rules should be expanded to allow more discovery. Not 10, but 20 depositions; not 25, but 50 interrogatories; unlimited requests to admit. "[C]ost should never enter into the equation defining what is discoverable."

357, Joanne S. Faulkner: Adopt a rule that discovery objections are waived unless the objector initiates and conducts a good faith conference within two weeks of the objection." "[T]ypically I have to chase objecting counsel for weeks on end to get a 'good faith' discovery conference going."

361, Caryn Groedel: From the plaintiff's perspective in employment law, the proposals appear "overwhelmingly and undeniably aimed at chilling the number of lawsuits filed in the federal courts."

364, Sarah Tankersley: In medical malpractice cases, defendants have vastly superior knowledge and much more documentation. "Restricting the ability of parties to obtain relevant information is going to lead to unfair results."

366, Paul D. Carrington: There are occasional excesses, but the FJC data do not support the

claim that discovery is generally excessive. It has been made expensive by hourly billing, but the hourly fees in responding to requests to produce and sending teams of lawyers to depositions are declining, and technology will bring further reductions. "The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the rights of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses."

371, AJ Bosman: In civil rights cases, "[I]t is already next to impossible to obtain necessary discovery in an action, with Defense counsel taking full advantage of the current rules to hide evidence essential" to plaintiffs. "Judges routinely interpret the existing rules against Plaintiffs and in favor of Defendants * * *." "Raising the bar to obtain essential and necessary evidence is just going to leave Plaintiffs and their attorneys at the mercy of big companies and their big law firms — and the Judges with another excuse to favor the Defendants." Remember fee-shifting statutes reflect the role of private attorneys general. Please reconsider, or at least provide some protection for plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: AAJ disagrees with the claim that excessive discovery occurs in a worrisome number of cases, and creates serious problems. These concepts are not defined by the Committee. The FJC study demonstrates there is no pervasive problem with discovery. In complex, high-stakes cases the parties will agree to extend beyond the narrow restrictions set by the proposed rules. The impact will occur only in cases involving smaller plaintiffs against large defendants. And they will create an incentive to maintain information in forms that are costly to access, in order to claim the cost of production outweighs possible benefits.

Additional general observations at pp. 24-25 suggest that the proposals will force plaintiffs "to engage in these mini-trials to prove unknown facts in order to even discover the facts." With less fact discovery, parties will have to rely on more experts to prove their cases; defendants can cover the cost, but plaintiffs cannot.

So, p. 25: "It is worth noting that this Committee and even the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach."

pp. 27-31 examine the "empirical" studies relied on by defense interests to show a crisis in discovery and conclude that the studies are biased. Other studies show discovery is working well.

The conclusion, pp. 31-33, argues that close analysis shows that discovery problems lie not in disproportionate costs imposed by small plaintiffs on corporate defendants, but in defendants that "deliberately drive up the costs of discovery by fighting discovery, hiding relevant documents, and coming up with excuses to avoid producing discovery that will allow the other side to meet its burden of proof." Taken together, the proposed changes will have a devastating impact, and are a solution to a problem that does not exist.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Empirical evidence shows that the discovery system is working well. The presumptive limits would strip judges of the flexibility they now use to manage discovery as they find necessary. The proportionality standard will be impossible to apply.

The proposed changes "are extremely controversial and nearly universally opposed by the plaintiffs' bar." They are not ready for prime time.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): "[T]hese proposed rules appear to be the Committee's attempt to 'legislate' some form of tort reform."

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proposed changes should be considered in the context of other procedural hurdles — heightened pleading, obstacles to class certification, enforcement of arbitration clauses in consumer contracts, and those imposed by the Prison Litigation Reform Act.

383, Alan B. Morrison: "All of the changes move in one direction — less discovery — not just for the mega-cases, which are the only ones with reported problems, but for all cases. * * * [C]umulatively they will have a very negative impact on many plaintiffs." And they will narrow judges' discretion by putting a heavy thumb on the scale of less discovery. Balanced recommendations would include a softening of the impact of the Twombly and Iqbal pleading decisions. The Committee should step back and ask whether these changes, which reduce a plaintiff's chance of prevailing, achieve a fair balance. When it is prepared to recommend adoption, the Committee should seek another, very brief, period of comment on its style choices, not the substance, to ensure the rules are as clear as possible.

The discovery rules have become very detailed, perhaps because of the process of incremental changes. They can become a trap for those who do not regularly practice in federal court. It may be too much to ask the Committee to take a fresh look at making the rules simpler and better integrated, but the problem of increased complexity should be kept in mind in considering these proposals.

384, Larry E. Coben for The Attorneys Information Exchange Group: On the whole, the pretrial discovery system continues to work well. The rules are not broken and do not need fixing. More importantly, the proposed changes will make discovery more expensive, more time consuming, and less productive. Responding to the submission by the Ford Motor Company, offers examples, illustrated by lengthy attachments, of cases in which courts found inappropriate attempts to avoid discovery.

386, Arthur R. Miller: Decisions and rules amendments have erected a series of procedural stop signs that narrow citizen access to court. The effects both reduce individual remedies and curtail enforcement of important public policies. To a large extent defendants, by general motion practice and resistance to discovery, are to blame for high litigation costs. "Some restoration of the earlier philosophy of the Federal Rules seems necessary." These proposals turn away from the original vision of a relatively unfettered and self-executing discovery regime.

Changes designed to narrow discovery began in 1983. "In retrospect, the Committee's and my collective judgment was impressionistic, not empirical. * * * [T]ime has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26. Those doubts continue to be applicable to the comparable assertions one hears today." And the attack on discovery has continued in the 1993 amendments limiting the numbers of depositions and interrogatories and the 2000 amendment that required court permission to discover matters relevant to the subject matter of the litigation. The present proposals would magnify these limitations.

The problems of e-discovery are likely to resolve themselves as information retrieval science and technology prove to reduce costs, accelerate the process, and enhance the accuracy of retrieval through a combination of statistics, linguistics, and computer science.

"The Committee should focus more on how to make civil justice available to promote our public policies." "[O]ur civil justice system has lost some of its moorings." Much can be achieved through more extensive and sophisticated judicial management, and by promoting cooperation between and among counsel. It might even be wise to seek amendment of the Rules Enabling Act, as by removing the restriction to "general" rules so as to support rules that are specific to types of litigation by complexity, dimension, or substantive subject. January Hearing,

p. 36: Professor Miller repeated the same themes, adding that there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect. We should not be preoccupied with the cliched invocations of cost, abuse, and extortion. Abuse is in the eyes of the beholder. Extortion is the settlement you just agreed to.

472, Christopher Benoit: Supports the perspectives offered by Professor Miller. Many more invoke Professor Miller.

387, Morgan S. Templeton: (For want of a more obvious place to summarize:) "I want to let the Committee know that I support the proposed changes * * *."

392, Senators Christopher A. Coons, Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, and Al Franken: Specific mention is made of the reduced presumptive limits in Rules 30, 31, 33, and 36, but the general tenor is addressed to all of the discovery package, expressing the fear that the proposals are insufficient to address excessive discovery and susceptible to limiting access to justice. This is the full summary.

The Senate Judiciary Subcommittee on Bankruptcy and the Courts held a hearing on the discovery proposals on November 5, 2013. Four questions were explored.

(1) "We have no doubt that discovery abuses exist and contribute to excessive litigation costs when they occur." But there is a need for "a lot more empirical data." The Advisory Committee recognizes that in most cases discovery is reasonable and proportional to the needs of the case. Corporate structures and profits have grown; it should be expected that discovery costs will vary in proportion to the stakes of the litigation.

(2) It is doubtful whether the proposals will reduce excessive costs in the worrisome number of cases where discovery is said to be excessive. Attempts to curb perceived abuses are reflected in amendments made in 1980 (adding discovery to the pretrial conference); 1983 (adding proportionality); 1993 (adding presumptive numerical limits); 2000 (narrowing the scope); and 2006 (addressing ESI that is difficult to access). Additional "stop signs" have been erected in pleading, summary judgment, and class certification. All of these make litigation costs a persisting problem. Why would we expect proportionality, and tighter numerical limits, to work where other attempts have failed? "We fear that they would not."

(3) The proposals are likely to have significant collateral effects with "civil rights, consumer rights, antitrust, and other litigation where the government lacks sufficient civil and criminal enforcement resources to achieve optimal deterrence of socially injurious behavior." This is especially true in civil rights litigation, where social disapproval of discrimination means there often is no "smoking gun," forcing plaintiffs to rely on circumstantial evidence that is within the power of the defendant. Only one side is likely to benefit from the new limits in these cases. And the proposals will encourage defendants to increase motions practice before any facts are discovered, imposing especially burdensome burdens on clients with few resources.

(4) Rather than throw plaintiffs under the bus because of dramatic stories about million-dollar discovery cases, other means should be tried. Judicial training should be pursued. More judgeships should be created when needed, and qualified nominations promptly confirmed. Technology may offer solutions to the perceived cost of electronic discovery. And clients can monitor counsel to reduce the incentives created by hourly billing.

397, Patrick Barry: "The proposed amendments are wholly unwarranted and would further tilt the balance against those of limited means and limited power." Lawyers should be trusted to behave professionally, not strangled by new rules.

401, Urs Broderick Furrer: Many of the proposals will streamline litigation, reducing time and expense. The Committee should consider adopting the additional proposals made by Lawyers for Civil Justice.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Begins with a long list of reasons why plaintiffs need much discovery. These are noted with the proposed numerical limits. But includes the observation that defendants in product liability cases commonly disclose the hot documents, plans, prior test results, and prior similar incidents only at the end of discovery, and only after the materials are uncovered after multiple depositions, requests, hearings, and orders. Defendants, further, commonly demand confidentiality agreements as part of settlement, and non-sharing agreements and protective orders to prevent plaintiffs in other cases from easily obtaining the fruits of discovery in concluded cases.

412, Mark S. Stewart for Ballard Spahr LLP: "The high cost of electronic discovery distorts the litigation process." It "tilts toward an asymmetrical burden" because plaintiffs in mass tort or class-action securities cases, and patent assertion entities, generally do not bear the same discovery burdens as defendants. Plaintiffs' counsel "frequently focus on the discovery process itself as a means of obtaining strategic leverage."

424, Patricia Shaler: Supports the discovery proposals "for the reasons set forth by John Kyl, WSJ, Jan 21, 2014." And Rule 11 should be enforced more frequently. "Civil litigation has morphed from its intended purpose to an abusive, pugilistic battleground by lawyers and for lawyers."

426, James Moore: Writes as a non-attorney, inspired by John Kyl's column, noted with 424 above. Supports the proposed changes to Rule 26, having observed actions in which discovery is a fishing expedition, and in which frivolous actions are settled as a business decision to avoid the costs of discovery. Suggests consideration of the British system in which the plaintiff pays defense costs if the plaintiff loses.

428, Dave Stevens: Writes as owner of a small campground to support "any and all rule changes that might reduce the cost of discovery." Discovery and other costs seem to lead insurance companies to just settle. And insurers are no longer willing to cover many of the activities formerly provided at the campground, forcing the owners to withdraw those activities — no diving boards, no rope swing, no renting kayaks, no zip line.

429, Lori Overson: "I second the comments of James Moore [426 above] and Senator Kyl."

430, Attilio Di Marco: Strongly supports the revisions of the discovery rules "because they will decrease the high cost of litigation in federal courts."

431, Tom Ingram: Participated as an "expert witness" in a 9-year litigation. In the first week on the job he wrote a "request for disclosure" that produced the smoking gun. Four years of discovery followed, generating 200,000 pages of discovery that was not nearly as useful. Eventually they settled for \$3.5 million, but the CEO who chose to accept this sum repeatedly said they would have been better off to drop the suit and get back to business. Do anything you can to reduce the delay, cost, confusion, and opportunity for lawyer abuse arising from the discovery system.

432, Michael Croson: "I am in favor of the proposed changes to Rule 26."

437, Craig Rothburd: "The way to streamline litigation is not by placing limitations on information gathering, which harms all litigants and only benefits larger more powerful interests, but instead to provide more flexibility to the Courts in fashioning realistic and measured discovery plans." Many courts do that now.

438, Pat Smith: "These rule changes are common sense and should be enacted."

439, Kate Browne: "I have been a lawyer for almost 30 years and strongly believe the proposed rule changes would be very positive for all litigants."

440, Steve Mack: Writes not as a corporate lawyer but as a stockholder in many companies: "I support the proposed changes to discovery rules that will limit in scope the ability of parasitic plaintiffs/plaintiff attorneys to force defendant companies to spend inordinate sums of money" and to settle meritless claims to avoid discovery costs.

441, Cheryl Conway: The current rules of discovery damage nonprofits as well as for-profit enterprises. This very expensive legal process gives the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer.

442, Christopher Wright: The rules are not broken. Why fix them? The proposals "will only serve to deter meritorious cases, and give corporate defendants a tactical and evidentiary advantage over plaintiffs."

445, Gerald Acker, for Michigan Assn. for Justice: Endorses the comments submitted by AAJ. The proposals lack balance — they help defendants at the expense of plaintiffs, particularly in asymmetric information cases. There is no empirical demonstration of problems that need to be corrected; concerns about e-discovery should not sweep the board. The proposals have a cumulative impact. Less discovery means that more cases will be tried because the parties cannot accurately assess the risks of trial.

447, Charles Crueger: "I have never had a client even suggest that a case should settle because of the cost of discovery." Nor has an opposing party ever settled for this reason.

451, Brian McElwee: Favors the discovery proposals. "You only have to have one experience in a system that requires years to process and costs disproportionate to any possible outcome to know that the system needs to be improved."

452, David Hill: Many years as a chief financial officer of various companies showed the need to seriously curtail fishing expeditions in discovery.

466, Lisa O. Kaufman for Texas Civil Justice League: "[S]trongly supports changes to FRCP 26(b)(1) that limit the scope of discovery to clearly pleaded claims and defenses." Texas has adopted changes that accomplish many of the same goals. "Our members report to us that these changes have reduced discovery costs and promoted better cooperation between parties without in any way impairing full and fair discovery."

471, Robert Fisher: Supports the proposed changes. Discovery is often more about gamesmanship than a legitimate effort to find relevant information.

474, Adam Childers: As an employer representative in employment-related matters, fully supports the proposals as "long past due."

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The proposals will lead only to more law and motion practice. There is no empirical evidence to support them; the FJC study shows that discovery generally is working well, reflecting wise exercise of judicial

discretion. Tools to control discovery already exist. Perhaps the time has come to create two tracks for discovery — one for "complex" cases in which no limits apply, another for other cases in which the current limitations apply (perhaps with some modification).

481, J. Paul Allen: Supports. "Please narrow the scope of discovery to that which is necessary to the dispute."

482, Charles Cavas: Supports the proposals, which will restore rationality. "Tactical abuse of the existing rules has created a system where too often fair resolutions do not occur but rather are driven by extortionist discovery demands and resulting expenses."

484, Torgny Nilsson: Supports the discovery proposals, but notes "that no amendments to the Rules will solve discovery abuses in general until the federal courts start aggressively holding both counsel and their clients accountable through monetary and other sanctions for their failure to abide by their discovery obligations."

485, Peter Morse: Supports the Rule 26(b)(1) changes "and believe that even more practical considerations should be made."

486, Timothy Guerriero: In supporting "the proposed e-discovery amendments," seems to embrace the discovery proposals in general as "just a small step in bringing some rationality and common sense to this aspect of our court system."

490, Patricia W. Moore: Professor Moore opposes the proposed amendments, but focuses on discovery. (1) The FJC Study shows discovery does not impose unreasonable cost or delay. (2) Average case disposition times, the best indicator, have remained essentially stable since 1986. (3) Judges and lawyers are well aware of proportionality, and implement it, as shown by many cases easily retrieved on WestLaw. (4) Federal courts are widely perceived as pro-defendant; these proposals will aggravate this perception. 921, Kevin Marshall: (a practicing lawyer) entirely agrees. 929, D. Richard Jones III: Another practicing lawyer fully adopts. 932, Douglas Alexander; 943, Robert Jensen; 954, D. Chris Russell; 956, Sandra Finch; 970, Jeffrey Rowe; and 972, David Mitchell: Ditto. (More endorsements appear later; this gives the flavor.)

494, Charles R. Ragan: "I have no doubt that some requesting parties have used the existing rules to force settlements on the basis of cost, rather than the merits of a case. On the other hand, I have no doubt that some producing parties have sought to delay merits adjudication or obfuscate factual issues through mischievous production tactics. It does not follow from these perceptions that the Committee should try in the rule-making process to legislate against every potential 'bad actor.'"

540, Alex Dahl for Lawyers for Civil Justice: Supplements comment 267, pointing to the testimony of several witnesses describing the great volumes of information preserved and produced. Discovery is slowing, and often preventing, reaching the merits.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "Important changes have been made to the rules, especially Rule 26, in recent years. Judges and lawyers need time to learn to use the changed rules, so that we can assess the efficacy of the changes that have been made and what further changes might be productive." Sufficient time should be allowed for any of the proposed changes to become part of the legal culture before undertaking any further changes. (1) The FJC study itself shows that discovery is a problem only in a small fraction of federal cases. (2) Past efforts to reduce the burdens of discovery in these cases — involving high stakes,

complexity, contentiousness, big law firms, and hourly billing — have failed. There is no reason to suppose that the present proposals will succeed on this front. (3) But the proposals will impede desirable discovery in many of the cases that now do not present problems. They will limit access to information, particularly in cases where one party holds much more relevant information than another. They will increase motion practice, in part because they are confusing. (4) The causes of high litigation costs may lie outside the Civil Rules. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (5) All of the proposed changes to Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The FJC study shows that discovery is not a problem in the large majority of federal cases. Even cases that involve high levels of discovery may well deserve high levels of discovery. (2) These proposals will not be effective in reducing the burdens of discovery in the cases that do encounter excessive discovery. The causes lie in the nature of the cases — high stakes, complex issues, contentious behavior, big law firms, and hourly billing. Attempts to address these problems in 1993 and 2000 have failed. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (3) These proposals will limit desirable discovery in cases that are not a problem now. (4) The changes, moreover, will engender confusion and invite increased motion practice. (5) All three of the major changes in Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *." 2078, Judith Resnik, joined by 170 additional law professors: supporting this comment. 2316, Phillip H. Miller: (a practitioner who represents regular taxpaying citizens): The analysis of these professors "is solid, but they have been too kind * * *."

630, Jon Kyl & E. Donald Elliott: "The process needs to move to conclusion. Frustrated parties and interests have other options, such as the Congressional action being pursued on patent litigation reform." "Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in, with results that are not always easy to predict."

634, William W. Large, Mark K. DeLegal, and Matthew H. Mears for The Florida Justice Reform Institute: "The current rules do not adequately protect litigants from excessive discovery." "As a whole, the package of Proposed Amendments will be a decisive step forward."

684, Michael E. Klein for Altria and Philip Morris USA: "PM USA has maintained a public website containing documents it has produced in all products liability litigation. Today, plaintiffs have access to more than five million documents — nearly 25 million pages of information that detail virtually every aspect of PM USA's business since the 1930s."

707, David Angle: "These proposed amendments are transparently corrupt." And reprehensible.

729, Stephen B. Burbank: (1) After a detailed review of discovery rule amendments from 1980 onward, concludes: "Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective, further discovery amendments at this time (other than those that address special problems, as in 2006 and 2010) are at best premature. At worst they are

overkill." (2) "[I]t is disconcerting to see how little attention the Advisory Committee has given to the benefits of litigation and discovery." Congress relied on simplified notice pleading and broad discovery in enacting many statutes that rely on private enforcement to substitute for public enforcement in implementing broad economic, political, and social values. The Enabling Act exercises delegated legislative power. It is not an exercise of Article III judicial power. The proposed reductions in discovery risk destabilizing the infrastructure that Congress has relied on. (3) It is a mistake to fixate on the ideal of transsubstantive rules to adopt amendments that aim at the problems generated by a small subset of contentious, high-stakes litigation but inflict serious costs on the much larger range of ordinary litigation.

730, Langrock Sperry & Wool: "[W]e've watched with growing alarm as the federal courts — once the models of even-handed justice in civil cases, where the 'little guy' could hold accountable even well-funded corporate wrongdoers — increasingly tilt in favor of the defense. We urge the Conference to reject" [the discovery and Rule 4 changes].

853, Kenneth Lipper: This letter to Jon Kyl contributes a public comment. (1) There should be a tight uniform set of rules governing all federal courts to deter forum shopping. (2) This should include much earlier consolidation of related cases to protect "hapless defendants forced to comply with a large number of differing discovery demands and withering motion practice by contingency plaintiff's lawyers." If judges believe there must be some discovery to inform a decision whether to consolidate related cases, the discovery should be limited by law to what is absolutely necessary to decide on consolidation or dismissal.

854, Hon. James G. Carr: The cases that involve "worrisome" discovery problems are few and far between. In the vast majority of cases discovery is self-limiting. Plaintiffs lack the resources. Insurers and corporate defendants are increasingly more attentive to limiting discovery, and are increasingly setting caps on fees and costs. The occasional big case will involve massive discovery, and the proposals will not change that.

874, Lisa P [sic]: Limiting discovery in the ways proposed will affect the vital role of the court system "in bridging the gap between first awareness of a harm and the tipping point of knowledge leading to needed regulation or legislation to correct the status quo."

880, Myles E. Eastwood: The real problem is that lawyers cannot get their discovery disputes resolved promptly. Many federal judges in Georgia screen all e-filings in their cases and hold a conference call or hearing in chambers, "where they cut to the real issues." "Proportionality is dealt with on the spot within the framework of the current rules." Do not adopt the proposed amendments.

1102, Seth R. Lesser: (1) There has been a sea change, dramatically reducing the costs of ESI discovery — do not be taken in by the claims of great costs. (2) The complaints about increasing discovery costs can be explained: "competition in the law world has caused a great many lawyers to use discovery as a profit center in a way that would have been almost unimaginable two decades ago." A clear illustration is the insistence on reviewing every document for privilege, even classes of documents that are quite unlikely to include anything privileged; "in nearly every case, defense counsel now refuse to consider the pragmatic use of Rule 502 clawback agreements." (3) Foreign investors find the United States markets attractive precisely because we have "a legal system in which wrongs can stand a fair opportunity of adjudication."

1023, Brett J. Nomberg: The survey prepared for the ABA Litigation Section was prepared by an attorney at one of the largest defense law firms. "Many lawyers who received the questionnaires

wrote back stating that there was a clear bias in the survey questions." The bias pushed toward responses favoring limitations on discovery.

1118, 1252, John Vail: "[T]he primary role of the federal courts is political, not commercial." The proposals sacrifice the political purpose to serve the commercial purpose. Those involved in the large majority of cases are asking: "we are managing well; why are you doing this to us"? It is appropriate to address the needs of the cases that continue to be worrisome, but not by proposals such as these. The Committee should ask whether transsubstantive rules can be adapted to the purpose, whether it is time to reconsider the principle of transsubstantivity. (And agrees with the views of Professors Miller; Burbank; Thornburg; and Hershkoff et al.)

1164, Stuart Ollanik, for Public Justice: Resubmits a comment submitted in March, 2013, before publication. "The more prudent course would allow rules and systems already in place including changes made in the last decade to continue to develop. * * * The rules discussed here are neither the problem nor the solution." Most of the discovery rule changes since the 1980s have addressed perceived discovery overuse, not the form of abuse that arises from evasion in responses. It is a mistake to substantially rewrite the definition of relevance by deleting the "reasonably calculated" provision and moving proportionality up to Rule 26(b)(1).

1184, Mark Ledbetter: The rules "simply tilt defense-ward with each new 'vintage.'" "[T]he law has drooped to its nadir as Anacharsis lamented, 'Written laws are like spider's webs; they will catch, it is true, the weak and the poor, but would be torn to pieces by the rich and powerful.'"

1199, William Royal Furgeson: 19 years on the federal bench showed that the discovery system is not broken. It does not need to be fixed. The changes are unnecessary, and indeed counterproductive. We should leave it to the trial judges and trial lawyers to grapple with the difficult issues.

1279, Edwin B. Spievack: Suggests in various ways that the problems lie not in our rules, but in the need to educate judges in the techniques for managing litigation and in the structure of the legal business that encourages "misfeasance or intentional malfeasance."

1650, Suzette M. Malveau: The proposed rules aim at problems encountered in a small fraction of cases. It is a mistake to adopt them as part of a set of rules that remain transsubstantive; applying them to other kinds of cases will work injustice, particularly for individual employment and civil rights claims.

1666, Stanley D. Helinski: "The proposed changes assume that an opposing party will produce, in good faith, the discovery that is requested — and that they will answer interrogatories as written. However, in practice, this is far from the case: the opposing party takes elaborate measures to hide certain evidence. Without a broad scope of discovery, parties will successfully hide relevant and admissible evidence."

1399, Laurie Briggs & John C. Hopkins: quotes from *Krueger v. Pelican Prod. Corp.*, C/A No. 87-2385-A, slip op. (W.D.Okla. Feb. 24, 1989): "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."

1732, J. Burton LeBlanc for American Assn. for Justice: There is no empirical evidence to support the Rule 26(b), 30, 31, 33, and 36 proposals. The havoc they will cause on court dockets will resemble the ill-fated period of mandatory Rule 11 sanctions. "[T]his Committee and even

the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach." "The current attempt fails to honor the liberal discovery regime; it fails to recognize the extent to which intellectual dishonesty and a culture of encouraging cleverness at the expense of truth have infected the profession."

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: One consequence of the extreme costs of unnecessary discovery is that "instead of devoting additional resources to compliance and reporting systems that will enhance fidelity to the law, in-house lawyers must redirect limited funds to litigation holds that will preserve documents with no material effect on the underlying disputes."

2026, Roberta L. Steele for National Employment Lawyers Association: Attaches the NELA summary of the FJC survey of NELA members; the summary was prepared for the Duke Conference. The comment itself seeks to offset comments that 80% of the NELA respondents thought that discovery is disproportionate to the stakes in small cases. The survey summary, p. 13, says that "More than 80% agree that litigation costs are not proportional to the value of a small case (with 43% agreeing strongly) * * *." On the other hand, 51% of the respondents agree that counsel use discovery to force settlement. Two-thirds agree that judges do not invoke Rule 26 limitations on their own. Depositions and requests to produce were found to be very important tools of discovery. Methods identified as very or somewhat cost-effective were requests for hard-copy documents (90%), requests to admit (89%), interrogatories (82%), requests to produce ESI (79%), and depositions of fact witnesses (76%). They currently spend 70% of their time and expense on discovery, but think the number should be closer to 50%.

2063, Kathryn Dickson supplements by pointing to p. 11 of the summary. The "abuse" of discovery NELA respondents find is "things like multiple boilerplate objections; delays in turning over documents; deliberately evasive answers to requests for admissions and interrogatories; overbroad subpoenas for medical records and past employment records; and other dilatory tactics. The 'cost' concern related to the need for endless 'meet and confer' conferences and too many motions to compel to obtain the necessary proof." NELA members overwhelmingly oppose the proposed discovery changes.

2034, William P. Butterfield:(1) The goals of the proposed changes could be achieved without any change in the rules; more active and aggressive case management would suffice. Absent that, two changes are more important than these. (2) "[N]ot until the Rules expressly require meaningful cooperation, rather than obliquely suggest it [as by the proposed Rule 1 amendment], will the costs of discovery, and particularly e-discovery, be meaningfully addressed. "[I]n my experience, even among sophisticated and seasoned practitioners in the federal bar, obstruction, obfuscation and delay in discovery more often rule the day." Some judges exact this now. So do some pilot programs — the Seventh Circuit e-discovery pilot, and the S.D.N.Y. complex litigation pilot. (3) Phased discovery could provide real benefits. "[A] great any courts, under pressure to move cases off their docket, do not allow sufficient time to allow phased discovery to work, setting tight timeframes for conclusion of fact discovery." The result is that, with one bite at the apple, a party must seek out every reasonable piece of discovery, with broad, vague, and ambiguous requests that often must be resolved on motions to compel. Often production is completed under tight time limits, whether necessary to the case or not, for want of time to sort it out.

2154, Jason R. Baron, Bennett B. Borden, Jay Brudz, & Barclay T. Blair, for Information Governance Initiative: An interesting source on the explosion of ESI: Between 2005 and 2020,

the digital universe is expected to grow from 130 exabytes to 40,000 exabytes — 40 trillion gigabytes. The examiner for the Lehman Brothers bankruptcy confronted a universe of 350 billion documents, about 3 petabytes, a volume equivalent to about 300 Libraries of Congress. Attention to information governance should focus on the lifecycle of information, including development of defensible deletion policies. Governance increasingly is seen as including the use of advanced search techniques using predictive analytics and the use of auto-categorization methods for separating out records and information that remain important for long-term retention. The growth of information will dwarf whatever beneficial effects may flow from the proposed amendments of Rules 1, 26, and 37(e).

2178, Michael R. Hugo, for AAJ Section of Toxic, Environmental and Pharmaceutical Litigation: Examines some of the comments and testimony supporting the proposals and urges the Committee not to be fooled or manipulated by the coordinated strategy of the U.S. Chamber of Commerce, "with its obvious bias toward deprivation of individual rights in favor of unfettered corporate hijacking of our judicial system."

2222, Danya S. Reda: The comment provides a copy of Danya Shocair Reda, "The Cost-and-Delay Narrative in Civil Justice reform: Its Fallacies and Functions," 90 Or. L. Rev. 1085 (2012). At 1122: "The very questions implicated by the cost-and-delay narrative — that is, whether civil justice is worth the burdens that it entails — are not questions susceptible to empirical verification." At 1128: "The persistent call to reform civil process to combat (undocumented) cost and delay serves as a proxy for a political struggle over enforcement of legal rights. Paul Carrington characterizes the procedural reform movement as '[o]ne form of deregulation politics' which seeks to limit the regulatory regime established through the grant of broad court access and a multitude of legislative enacted private rights of action." And at 1130: Martha Minow claims that in legal scholarship, "in the latter part of the twentieth century, a broad skepticism had developed about the value of law as a source for truth and justice. [¶] The developments in scholarship reflect the disillusionment with law arising among the elite — and amongst the legal elite in particular." February Hearing, Danya Shocair Reda: p 349 The discovery proposals are too narrow. (1) They overlook "the power to impose costs by discovery avoidance, discovery delay, discovery attrition." (2) They interfere with our societal choice to rely on private enforcement of public regulatory values. Discovery problems are affected not only by information asymmetry, but by the resources a litigant has available to acquire information. They also are affected by fee structure — whether billable hour, contingent, or donor-funded organization.

2266, Stephen N. Subrin: Most of the proposals, including the Rule 16 proposals, will simply add cost and delay to the vast majority of cases where discovery is functioning well and proportionately now. And they will not do much good for the 5% to 15% of cases where something effective should be done.

2267, Brett A. Ross: Approves the changes that will restore "reasonability" to discovery. "If any lawyer with even mediocre skills looks hard enough, he or she will find sufficient prejudicial information against a motor carrier or its driver to leverage a significant settlement. In cases of minimal harm, that should not be the case."

2281, Alex B. Scheingross: This set of proposals "looks like corporate America's wish list to never again be held responsible for anything they do."

November Hearing, Altom M. Maglio: p 28: The proposed changes send the message to magistrate judges and district judges that they have been allowing too much discovery, real

discovery. But real discovery is needed.

November Hearing, Cory L. Andrews for the Washington Legal Foundation: p 42 "[T]he status quo is completely unacceptable." "[D]iscovery-related costs are a competitive drag on the American economy." They deter foreign companies from locating here. They harm the international competitiveness of American business. They are passed on to consumers. This is a matter of fundamental fairness; "[t]he fact that an injustice is visited on litigants with a high net worth is no more reason to ignore it than if an injustice is visited on low net worth litigants." No litigant should be forced to settle an unfounded claim because the discovery costs of defending on the merits are too high. The proposals are "modest, they're incremental, they're common sense. They're not radical. They're not draconian." Costs can run out of control even in commercial litigation between large enterprises — "[T]here's no discounting the role of psychology in litigation."

"[Y]ou might consider adding a materiality element * * *."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 Clients are fleeing the jury litigation system for private arbitrations, or are settling, because of cost. We need to find "an efficient way [to] the key information that will allow the case to be resolved on the merits." This will help both plaintiffs and defendants in § 1983 civil rights cases. Some municipal clients are very tiny townships. In litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Jonathan M. Redgrave: p 70 "I do not believe that we can wait forever for the ever-elusive empirical data to develop." A fourth category of lies may be the absence of statistics. Electronic information is developing at warp speed. The Duke Conference, and many of the written comments already submitted by disparate groups, reflect a consensus that the discovery rules need further amendments. All parties will benefit.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: The amendments should be viewed in a broader context of events that impede access to justice for victims. Judicial vacancies go unfilled and court budgets suffer draconian cuts. Forced arbitration agreements block access. Class actions face increasing limitations. Pleading standards have increased. Limiting discovery will further discourage victims from going to court.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 It is good to narrow the scope of discovery. Studies show that discovery costs range from 25% to 90% of litigation costs; proper scope will help keep it at the 25% end. Cost results from the amount of materials available for searching. Cost harms global competitiveness. It also has a great impact on small businesses. Insurance does not cover the costs incurred by the firm itself, the time, energy, and psychic burden. More fundamentally, the cost of discovery makes it economically rational to settle unmeritorious claims. The proposed amendments will not revolutionize litigation behavior, but they remain desirable. It would be desirable to narrow the standard from relevance by requiring both relevance and materiality.

January Hearing, Henry Kelston: p. 52 Opposes altering the scope and amount of discovery through Rules 26, 30, 33, and 36 for broad reasons. Reaction to the proposals has been polarized because "they are highly skewed in favor of large corporate defendants." "By design, these

amendments will reduce discovery costs for large corporations, simply by reducing plaintiffs' access to the information they need to prove their claims." And there is no evidence that there is a problem with discovery now. Better means can be found to reduce costs: Create incentives to cooperate; revitalize initial disclosure; sanction parties for later production of material adverse evidence. 1708, Henry Kelston: Elaborates on these themes, noting that Professors Carrington and Miller "have expressed to the Committee their doubts that the parties advocating most strongly for changes to the discovery rules are being candid about their motives." Likely others share this view, believing the motive is to shield business enterprise against substantive liability. That view helps to explain the sharp and often bitter divide between the reactions of plaintiffs and defendants.

January Hearing, William P. Butterfield: p. 142 The most important means of reducing discovery costs would begin by adopting a cooperation regime with real teeth. Various local rules and pilot projects provide illustrations. And rather than reduced presumptive limits, phased discovery should be adopted in a real way. The power to direct phased discovery exists in the rules now. But local rules often get in the way.

January Hearing, Henry M. Sneath: p 236 (Speaking for DRI) Generally supports all proposals. Offers the perspective of small business firms caught up in business-to-business litigation. The costs of discovery can be disabling. "Narrowing the goalposts" will provide a much better place to begin the conversations between lawyers about discovery.

February Hearing, Rebecca Love Kourlis, for AALS: p. 39 Overall, the proposals move in the right direction. A supplemental comment will note the results of two pilot projects. (1) A pilot project in New Hampshire seemed to show little difference. But attorneys liked what they were being asked to do because it comported with what they were doing anyway. "So it was a culture issue." But there was one interesting difference -- there was a statistically significant reduction in the number of default judgments against defendants. (2) The Boston Litigation Section project was an opt-out program; the evaluation was by survey of participating lawyers. The net conclusion was that the pilot project rules were better than the existing rules in providing a better resolution, speedier and less expensive resolutions.

February Hearing, William B. Curtis: p. 77 Focusing initially on the numerical limits, but also on proportionality: "You're hearing the defense side and the corporations they represent say, we love it, and the plaintiff side and the folks that we represent saying, you're changing the way the game is played and it's unfair. I think that's a very telling point that we ought to be reminding ourselves of." It is not that discovery is too expensive. It is that disputes about discovery are too expensive. "Rather than restricting the scope * * *, let's restrict the fight about the scope." And it is about defendants who produce millions of pages of documents — the Rule 34 proposals are at least a start, but no more, in aiming for responsible answers.

February Hearing, Bradford A. Berenson: p 111 Offers three examples of General Electric's experience to illustrate "the waste, burden and cost of the current regime." Nuisance-value settlements "go on every day * * * because of the explosion in the cost of electronic discovery." And the use of sanctions for spoliation "creates very strong incentives to gin up sideshow litigation and gotcha games. * * * If they can take attention away from the merits, divert it to this game tactical litigation advantage through ginning up a spoliation fight, they can often obtain settlement leverage, or an adverse inference instruction that will help a weak case."

February Hearing, David Werner: p 185 The main focus is on preservation, but agrees that "[t]he scope of discovery allowed by the rule should be narrowed as the committee has proposed."

February Hearing, Michael L. Slack: p 193 If you want to reduce the costs of discovery, do something about the "return or destroy" agreements. I get the 50,000 core documents in discovery. The case is resolved. Then I get another case growing out of the same defect. In federal court I have to litigate my efforts to discover the same 50,000 documents; defendants resist producing exactly what they produced in the earlier case. In state court I tell the judge the documents I want were produced in another case and the judge tells the defendant to produce them. "[W]e start on a slippery slope by putting technical things in rules, and once we get on that slope, we start tinkering with it, it becomes more technical and more technical and more technical. * * * [T]he problem we have today is we're already technical, now we're ratcheting down further."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Technology changes every three years. It is likely that in three more years technology will solve the problems we now perceive in discovering ESI.

February Hearing, Lee A. Mickus: p 237 The proposals "are likely to sharpen the focus of the discovery process on the real needs of the parties."

February Hearing, Ashish S. Prasad: p 319 The form of technology assisted review known as predictive coding will, of itself, reduce the costs of discovery searches by about 25%. No more than that because lawyers and clients still want eyes-on review to protect personally identifiable information, trade secrets, business-sensitive information, and such. And this saving will be offset by large increases in data volume.

February Hearing, David Kessler: p 342 I have used TAR in dozens of cases, "I'm a huge proponent, but [do] not believe that this committee should rely on it as a solution, as a panacea, or should encourage it in the rules." There is a disturbing trend to force parties, directly, or indirectly, to produce information that is not relevant, or is privileged, or is outside the scope of discovery, on the theory that TAR facilitates identification and Rule 502(d) protects against use of privileged information. A party who wants to review the documents before producing them cannot complain of the cost — that is the party's own choice. But 502(d) does not solve all problems; huge injury can flow from the production.

RULE 26(b)(1): PROPORTIONALITY; TRANSPOSED (B)(2)(C)(III) FACTORS

259, John Scanlon: Opposes all proposed changes. They "unfairly balance the scales against the party seeking information and in favor of a party who is unwilling to produce that information * * *."

263, The Cady Law Firm, by Christopher D. Aulepp: Three of the five factors considered in determining proportionality are criticized, without reflecting that they have been present in Rule 26(b)(2) since 1983. (1) The amount in controversy "sends the message that only multi-million dollar cases are important. This is un-American." Implementation will create a new battleground in litigation. So will the problem presented by cases seeking relief that is not monetary. (2) The importance of the issues: "to my clients, their case is often the most important thing to them." Who decides what is important? If it is Congress, special interests would buy their issue to the top of the list. And it may be difficult to define what the issues are. (3) The parties' resources: No discovery would be available against the bankrupt City of Detroit.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Mistakenly asserts that the amendment eliminates the discovery of nonprivileged matter relevant to a party's claim or defense. Challenges the "five factor proportionality test" without noting present (b)(2)(C)(iii). These factors "would be devastating to individual women seeking to hold massive corporations accountable for their wrongdoing." "The time, expense, and level of litigation would dramatically increase" as the parties litigate the five factors. Judges will apply the factors differently. And this will make it more difficult to discover "subtle issues," such as the practice of medical device manufacturers to arrange "ghostwritten" articles on outcomes the manufacturers select, to be signed by "handpicked doctors."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Eliminating the relevancy standard will increase discovery disputes. The proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases.

266, American Association of Justice Aviation Section, by Michael L. Slack: (The first pages of this comment are a detailed illustration of the need to conduct extensive discovery in many "aviation crash" cases.) Proposed 26(b)(1) will "drastically limit[] the scope of discovery, * * * which will inevitably morph into a new art form aimed at frustrating plaintiffs' discovery." (1) "proportional to the needs of the case" "is flypaper for a defense objection." The proposed factors have too many subjective variables to support consistent application. (1) Will the "amount in controversy" be determined by the tests that apply in establishing diversity jurisdiction? (2) "How can discovery be unimportant in an aviation crash case"? Does importance decline if a plaintiff settles with some defendants, with the effect of discouraging early settlements? Does importance vary with how frequently a product fails? (3) What is the measure of "burden"? Can a defendant multiply the burden by throwing legions of first-year associates at a relatively simple task? Can a plaintiff get more discovery from a wealthy defendant than from a nearly bankrupt defendant?

267, Lawyers for Civil Justice, by Alex Dahl: The emphasis on proportionality, currently in Rule 26(b)(2)(C)(iii), is a great benefit. The concept is routinely ignored. But proportionality will be much better advanced if materiality is added to define the scope of discovery: "any non-privileged matter that is relevant and material to any party's claim or defense." Experience in England "has reportedly resulted in significant curtailment of excess discovery." This would align discovery more closely with the needs of individual cases. 540, Alex Dahl for Lawyers for

Civil Justice: Supplements the first comment by refuting the arguments that the proposal effects a change of burden. The burden of showing that proportionality is not met is on the party who opposes discovery. And both requesting and responding parties have a substantial interest in presenting their best arguments. Rule 26(g) shows that the burden of ensuring proportionality falls on all parties. And those who argue that proportionality means "one size fits all" simply miss the point — proportionality means discovery tailored to the needs of each case.

270, Ohio Association for Justice, by John Van Doorn: The proportionality test "favors those accused of wrongdoing, especially in cases where there is an asymmetry of information." Defendants can hide information by objecting to the scope of discovery. They can take positions based on ill-defined factors. How can a plaintiff test a claim that discovery is too costly? There will be more discovery disputes. The change is unnecessary because present Rule 26(b)(2)(C), including (iii), provides protection. The difference is that the proposal shifts the burden — rather than providing for defendant objections, it will impose a burden on plaintiffs to justify the scope of discovery.

273, Cameron Cherry: Defendants control virtually all information. "[C]hanging the purpose of discovery so that each request must be weighed on a sliding scale" measured by the proportionality factors "will not just hamper, but hamstring justice. Rich and powerful corporations can afford to stonewall discovery, bury relevant documents in a barrage of paper, and file unnecessary objection after objection as it stands." The "studies" offered to support these changes are not impartial.

275, Glenn Draper: As Rule 26(b)(2)(C)(iii) now stands, the burden is on the party resisting discovery to seek protection and justify it. Transferring the same factors to define the scope of discovery will shift the burden to the party seeking information, and it will not have detailed knowledge as to what information is available or the cost of producing it. This is "an attempt to insert additional barriers to prevent the average citizen from confronting powerful corporations on an equal footing in court."

276, John D. Cooney: Eliminating the language that provides discovery of any nonprivileged matter relevant to a party's claim or defense, substituting a cost analysis, would severely restrict the ability of plaintiffs to uncover evidence and hold better-financed defendants accountable for their wrongdoing.

277, Marc Weingarten: Proportionality, measured by five subjective factors, will require a hearing, or at least a motion, for virtually every discovery request. If the parties could agree on the amount in controversy, the case would settle. A party objecting to discovery will not concede the importance of the information. So opinions will differ on expense and benefit. The respective resources of the parties "is usually not even contemplated with respect to the defendant until a punitive damage phase * * * is reached."

278, Perry Weitz: Even without considering purposeful attempts to obscure information by corporate bureaucratic manipulation or unfounded claims of privilege, the proposals will have an unfair impact on mass tort plaintiffs. The change in the scope of discovery will eliminate the well-understood language and presumption that any nonprivileged matter relevant to a party's claim or defense is discoverable. Defendants will habitually object on the basis of the five-factor proportionality test. The delays will be devastating, especially to living but in extremis cancer victims who may lose the chance to have their day in court during their lifetime.

279, Kyle McNew: Now does plaintiff personal-injury litigation, but has been a defense

commercial litigator. Changing the standard from relevance to utility will invite discovery fights — every party will believe the utility of requested information is outweighed by the burden of responding.

280, Oren P. Noah: Changing the standard to require both relevance and proportionality will defeat the presumption that relevant discovery is allowed. A party can simply refuse to provide discovery, forcing a motion to compel — and a well-funded corporate client can easily afford to have its attorneys do this. As cases — including asbestos cases — become increasingly complex, the need for accurate and reliable information increases. And asbestos plaintiffs typically do not have any of the information needed to prove their claims.

281, Daniel Garrie: When a company adopts a new and more efficient information system, it has a choice whether to migrate old information into the new system. Courts should not be afraid to impose the burden of retrieving information from the old system if the company chooses not to migrate it to the new system. There is no need to amend the rule; courts understand this now. But if the rule is amended, the amendment should account for this cost calculus.

282, Susan M. Cremer, Chair, AAJ Federal Tort and Military Advocacy Section: Lawyers in the section litigate many Federal Tort Claims Act actions for medical malpractice. These are complex cases, often involving multiple health care providers. "Under the new rule, the plaintiff would have to argue that the likely benefit of the unknown information outweighs the quantifiable cost and time burden to the defendant. This is an impossible burden." This is followed by a case example. The question was whether the anesthesiologist was present in the operating room when the patient emerged from anesthesia, as standard practice requires. The records did not show him present, but he testified that he was. The defendants resisted the discovery request, but the court ordered production of records from three other operating rooms; one record tended to prove he was in a different room. The plaintiff might not have got this crucial discovery under the proposed rule.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The Foundation champions individual liberty, free enterprise, and a limited and accountable government. The "ever increasing threat of exorbitant discovery costs [must not be] permitted to distort the substantive rights of parties in litigation." "The overly broad scope of discovery * * * has long been a source of mischief." Adding proportionality establishes a balanced approach that is a meaningful improvement. If discovery confined to the parties' claims or defenses produces information suggesting new claims or defenses, the pleadings can be amended. Transplanting the list of proportionality factors to Rule 26(b)(1) is good, because present (b)(2)(C)(iii) too often is ignored or marginalized in practice. But care should be taken to ensure that the emphasis on the parties' resources does not lead to allowing unjust demands simply because a defendant has a high net worth.

The continuing failure of past amendments intended to rein in the scope of discovery suggests that the scope of discovery should be further reduced: "any non-privileged matter that is relevant and material to any party's claim or defense." (Materiality is defined in the 1968 4th edition of Black's Law Dictionary as information that has a legitimate and effective influence or bearing on decision.)

286, Stephen J. Herman: Has experience representing corporate defendants, but writes on behalf of individual plaintiffs. Untested contentions of defense counsel resisting discovery "frequently prove to be incorrect and/or incomplete." There is a "general disincentive" that dissuades "a defendant and its counsel * * * from conducting a thorough investigation, from asking the tough questions, and from disclosing potentially relevant and material information to opposing counsel

and to the court." Given the extreme disparity in knowledge between plaintiff and defendant, the proposed amendment will lead to one or the other of opposing bad results. Plaintiffs may be permitted to conduct preliminary discovery regarding the defendant's claims of burden or expense. Or plaintiffs will not be permitted to engage in such discovery, "thereby risk[ing] dismissal of the action based solely on the untested assertions of one party regarding the existence and nature of potentially relevant evidence." (There follow descriptions of five cases in which crucial information that was not revealed during early stages of discovery ultimately came to light.) "The proposed amendments, if adopted, would greatly foster the potential for additional, albeit unintentional, injustices; may tempt good lawyers to cross the line; and will aid and assist those few unscrupulous lawyers and companies who do have a win-at-all-costs mindset."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: "The availability of the evidence needed to prove liability in an injury or death case against a railroad is highly skewed." The railroad controls the equipment and access to the property involved. Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to (b)(1), where they become a condition of relevant discovery, not a check on abusive discovery, "will inevitably deprive worthy plaintiffs of access to evidence that is relevant and necessary * * *." "Individual plaintiffs should not be punished for corporate complexity they had no part in creating and have no ability to simplify." Discovery is inevitably extensive, "due to both the sheer size and complexity of the industry and to the railroads' use of obstructionist tactics for as long as possible * * *." (A specific example is given.) It is clear that because the railroad controls the information, the burden of discovery falls primarily on the railroad. The proposal risks raising that fact to become an obstacle to necessary discovery.

289, Craig B. Shaffer & Ryan T. Shaffer: Joins the discussion of proportionality with discussion of the proposal to eliminate the provision for discovery that extends beyond claims or defenses to include the subject-matter of the action. The broad conclusion is that although there is little seeming change, as a practical matter these proposals together will have the not undesirable consequence of reducing overbroad discovery requests. (1) "[R]elevance in the context of discovery should be broadly construed." The only limits are that a party cannot rely on speculation or suspicion, cannot roam in the shadow zones of relevancy on the theory that matter that does not presently seem germane might conceivably become relevant. Nothing in the proposals suggests a different measure of relevance. (2) Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) "does not effect any substantive change in the scope of discovery." Rule 26(b)(1) now expressly invokes Rule 26(b)(2)(C) as a limit on all discovery. Rule 26(g)(1)(B)(iii) entrenches the proposition that lawyers are responsible for heeding these concepts on their own. (3) Nonetheless, there may be not undesirable procedural and tactical consequences. All too often discovery requests are recycled or pattern interrogatories and requests for production. The problems are exacerbated when combined with ambiguous or overreaching definitions and instructions. Eliminating the provision for discovery relevant to the subject-matter takes away a safety net that might be relied upon to excuse such excesses. (4) Proportionality is case-specific. The proposed incorporation of proportionality in Rule 26(b)(1) is likely to increase the frequency of objections, but the objections are not likely to be granted more often than other kinds of objections, "particularly in response to carefully drafted interrogatories or requests for production."

290, Randall E. Hart: The present provision for discovery of information reasonably calculated to lead to the discovery of admissible evidence makes the process flow smoothly. Even with it, experience as a contingent-fee attorney finds routine stonewalling and groundless objections, in part responding to the incentives of hourly billing. Adding a multifactor proportionality test will

cause a huge increase in motion practice, impeding the search for the truth.

292, Lyndsey Marcelino for The National Center for Youth Law: The work of this plaintiffs' advocacy group will be impaired by the cost-benefit balancing. Moving this from 26(b)(2)(C)(iii) to become part of the scope of discovery is particularly likely to affect child advocacy work "because the defendants in our cases are likely large public entities with limited financial resources." "'Disproportionate' will become the new 'burdensome,' but with a cruel twist in placing the burden of proof on the plaintiff, in our case — children * * *."

293, John K. Rabiej, Maura R. Grossman, & Gordan V. Cormack: Proposes addition of this paragraph at the end of the first paragraph in the Committee Note to Rule 26(b)(1):

As part of the proportionality considerations, parties are encouraged, in appropriate cases, to consider the use of advanced analytical software applications and other technologies that can screen for relevant and privileged documents in ways that are at least as accurate as manual review, at far less cost.

The proposal is further supported by 24 persons, expressing a consensus reached at the Duke Law Conference on Technology-Assisted Review held on May 2013. This endorsement of the use of advanced analytical software applications and other technologies to screen for relevance and privilege is offered as an offset to the reluctance of some parties to explore these opportunities, the fear that some courts may not sufficiently understand them, and the risk that "an ill-founded opinion may be issued that would further retard the use of TAR."

The proposal is supported by a link to a RAND Study of litigant expenditures for producing electronic discovery and the full text of two articles. Grossman & Cormack, Technology-Assisted Review in E_Discovery, XVII Richmond Journal of Law and Technology, 1-48, concludes: "Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort. Of course, not all technology-assisted reviews (and not all manual reviews) are created equal." The second, published online, is Roitblat, Kershaw, & Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review. This article recounts a comparison of manual review in a real proceeding, conducted by 225 lawyers, with a review of a random and representative sample of the same document collection by different teams of lawyers (5 lawyers for each team) and by technology assisted review. The conclusion is that machine categorization can be a reasonable substitute for human review.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Begins by noting: "Experienced plaintiff firms recognize that the 'game' is now to back a truck of virtual documents up to the courthouse and dump it, that may or may not include the real items requested. As a result, a broad net needs to be cast in the form of requests for production * * *." But the proposals will restrict discovery. Offers as an example discovery against a manufacturer of a generic version of Reglan, a drug used to treat stomach disorders. The request as to produce the label used by the defendant, to determine whether it complied with FDA requirements. It took five years to gain production, which showed the label "was inaccurate and missing bolded warning language." Lengthy appendices describe the efforts to gain discovery. The label might never have been disclosed under the proposed proportionality provision, which will require the requesting party to show the need for full discovery rather than require the producing party to show a burden that justifies restricting discovery. Defendant corporations know what is in their files. Plaintiffs do not.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: The proposed change

would eliminate the well-understood language that allows discovery of any non-privileged matter relevant to a party's claim or defense. Different understandings of proportionality will lead to inconsistent standards even with the same jurisdiction. Parties will litigate each of the five factors, causing substantial prejudice to plaintiffs. "[I]t is not difficult to imagine situations in which discovery issues are litigated for the sole purpose of exhausting the resources of the plaintiffs and their attorneys." With Darvocet and generic propoxyphene, for example, it is often necessary to engage in extensive discovery simply to find out which of several different entities made or sold the drug that harmed the plaintiff. And echoes the comments in 264, the AAJ Transvaginal Mesh Group, that limits on discovery will make it difficult to show that manufacturers have arranged for ghost-written articles on their drugs.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality," 2012 Mich.St.L.Rev. 933-979. Although the Utah rule is given substantial treatment, most of the focus is on present federal practice and the need to adopt an express proportionality limit on the scope of discovery. (1) Among the current practices commended by the authors is the extensive guidelines provided by the District of Maryland. This is a good model, worthy of incorporation in the national rules, but the national rule must be more concise. "While a local jurisdiction perhaps has the luxury of promulgating voluminous procedures and practices, the Federal Rules cannot be cluttered with forty-three additional pages of rules and requirements * * *." (2) The Rule 26(g) attorney certification requirement is incorporated into discovery-motion practice in N.D. Cal. This should be done in Civil Rule 37(a)(1), so that a party moving to compel discovery must certify "that the discovery being sought satisfies the proportionality limitations imposed by Rule 26[(b)(1) and (b)(2)] and Rule 26(g)(1)(B)(iii)." (3) It is anomalous that a party seeking a Rule 26(c) protective order should have the burden of showing that the discovery request is not proportional. Rule 26(c) should be amended to include a provision that "If the motion raises the proportionality limitations imposed by Rule 26(b)[(1) and (2)] and Rule 26(g)(1)(B)(iii), the party seeking the discovery has the burden of demonstrating that the information being sought satisfies those limitations." (4) Proportionality will work better if initial disclosures are expanded. At a minimum, each party should produce copies, not merely identify, documents it may use, and each should produce all documents it refers to in its pleadings. (5) Utah has divided civil litigation into three tiers. The top tier, for cases involving more than \$300,000, imposes limits of 20 interrogatories, 20 document requests, and 20 requests for admissions. Total fact deposition time is restricted to 30 hours. For matters between \$50,000 and \$300,000, these limits are halved. For matters under \$50,000, the limits are reduced to 5 document requests and requests for admissions, and fact depositions are limited to 3 hours total per side; interrogatories are eliminated.

299, Aaron Broussard: If intended to reduce discovery disputes, the proportionality proposal will backfire. Almost every discovery response is preceded by "unduly burdensome"; usually an opposing party thinks your discovery request is worthless, and will not admit its worth even when recognized.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Notes the continuing efforts of bar groups and rules committees to narrow the scope of discovery, going back to 1977. (1) "[T]here has been a continued movement toward proportionality in e-discovery as evidenced in the federal case law." "The Section supports these changes, although it does so with caution." (2) The change likely will lead to substantial litigation regarding application of the proportionality requirement, at least in the beginning. Making proportionality part of the scope of discovery may encourage objections, as compared to current reliance on Rule 26(c) motions for protective orders. (3) To avoid any doubt, the Committee Note should state that existing case law interpreting Rule 26(b)(2)(C)(iii)

applies in determining proportionality. (4) "[T]he new Rule's most important function may be to signal strongly that the scope of discovery should be narrowed." The Advisory Committee thought it had solved the problem when it added the provision that has become Rule 26(b)(2)(C)(iii). The problems have not yet been solved. November Hearing: Michael C. Rakower, p 287: For the section: "[W]e continue to support the proposal, but we do so with caution." It is likely to lead to increased litigation during the early stages while parties and courts become comfortable with the notion and boundaries, but this will even out over time.

307, Hon. J. Leon Holmes: Suggests that making proportionality part of the scope of discovery will generate more disputes, and disputes that "will be less susceptible to principled resolution." This is tied to the proposal to revise the provision that allows discovery of relevant information that appears reasonably calculated, etc., as if this "relevant information" provision now defines the scope of discovery. Whether proposed discovery is reasonably calculated to lead to the discovery of admissible evidence is something that can be decided early in the case. Proportionality cannot be decided without understanding the value of the case and the information available through other sources — information that is not available until discovery is completed, or nearly so, and then will be a subjective matter. And adds that dockets should be managed by judges; cases should be managed by lawyers.

309, Kaspar Stoffelmayr: Writing from Bayer Corporation experience with mass tort cases in MDL proceedings, endorses Lawyers for Civil Justice Proposals. Discovery causes our system to cost far more than the procedure of other countries, with no improvement in results. Most discovery costs are wasted; only a very small fraction of discovery materials are used as evidence. The fact that discovery is practiced in proportion to the needs of most cases should not disguise the fact that 5% of cases account for 60% of litigation costs (a study is cited in n. 4); fixing the system for those cases would be an important advance. Excessive discovery costs systematically increase settlement costs: all parties recognize that a defendant saves the large costs of discovery by settling at a figure well above the expected value of the claim. The proportionality test in present Rule 26(b)(2)(C)(iii) is seldom invoked. It is good to move it to become part of the scope of discovery. But more is needed. Discovery should be limited to information that is material to the parties' claims or defenses. January Hearing: p. 88: Similar, with an example of a case that went to an 8-week trial — Bayer produced over 2,000,000 pages of documents; 0.04% were used as exhibits. It would be hard to transfer the procedures of many other countries to our system, but in Britain they have single-event trials and manage with far less discovery.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Proportionality will frustrate the efforts of plaintiffs in civil rights cases to obtain necessary and vital discovery. Much circumstantial evidence is needed to prove intentional discrimination. Discriminators have learned to "coat various forms of discrimination with the appearance of propriety," or to profess some nondiscriminatory motive.

A special danger is that defendants will self-apply the concept of proportionality in responding to discovery requests, and will monetize the importance of the case. The result will be less diligent efforts to find relevant and responsive information in replying to discovery requests. A defendant will make less effort to respond when a poorly paid plaintiff claims discrimination than when a highly paid executive makes the same claim. Plaintiffs like those who claim widespread abuse of "stop and frisk" police policies will face the same response — individual damages claims are small, or (as in the New York case) no damages are claimed. Present Rule 26(b)(2) leaves implementation of proportionality in the hands of judges. It is a mistake to put it in the hands of those who respond to discovery requests.

Nor is there any showing that discovery costs are a special problem in civil rights cases.

If other types of cases present special problems, changes in the discovery rules should be limited

311, James Coogan: The proposal is "designed to harm a party seeking discovery from a large organization." A party requested to produce will have an incentive to complicate the process in order to complain that discovery is too costly. This "places the burden on the Plaintiff, who is not privy to the operations of a Defendant, to justify the unknown." It will increase disputes and thus delays.

313, Steve Telken: Defending parties will feel compelled to use proportionality "to attempt to block or delay even legitimate discovery requests, lest they be accused of less than zealous advocacy for a corporate client."

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): The current discovery system "is unbalanced and in need of repair." (1) Patent litigation often generates high discovery requests, and offers to settle calculated to fall well below discovery costs. (2) Gamesmanship in personal injury litigation leads to requests for sanctions "to discolor a defendant in the judge's eyes." No matter how careful a defendant is, "there can always be allegations that a page, document, or flash drive has not been produced." (3) Discovery has come to be used to challenge the process of responding. "[P]laintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system's relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions." The changes will be significant steps toward addressing the high, asymmetrical costs of excessive discovery.

Proportionality is the most important principle. The amendment will encourage judges to be active in weighing costs and benefits.

315, David Jensen: Proportionality is a "further invitation for large defendants to continue, or increase, their standard objections based on unarticulated burdens."

317, Steven Banks for the Legal Aid Society in New York City: (This long comment begins with a description of many different types of litigation that would suffer from the proposed proportionality limit and from reducing the presumptive numbers of discovery requests. The background is summarized here, but should be recalled with the comments on other specific proposals.)

Section 1983 actions against municipalities require many discovery events to show custom, policy, or practice of violating the law. Jail and prison litigation often requires proof of a claim under a deliberate indifference standard, and a plaintiff must overcome the deference often extended to prison officials. In Fair Labor Standards Act cases it may be necessary to establish joint employment to satisfy statutory thresholds for coverage; discovery of employment records to show wages and hours can be extensive. In discrimination or retaliation employment cases the defendants possess most of the evidence. *Wal-Mart v. Dukes* means plaintiffs often need discovery for class certification, increasing the number of discovery events. And slashing the limits will be taken as endorsing a more restrictive approach to discovery generally. Finally, many prospective clients must be turned away, and must proceed, if at all, without representation. Their needs should be considered.

The proportionality limit is strongly opposed. Legal Aid clients often have comparatively small damages claims, regardless of the strength of their cases. Discovery should not be curtailed for this reason. Considering the importance of the issues at stake in the litigation "is insufficiently specific to guarantee heightened consideration for civil rights and other

constitutional claims." Rule text or comments should state that constitutional and civil rights claims are presumed to have a high level of importance. And measuring the likely benefit of proposed discovery "is often unknowable at the outset of litigation."

318, Brian Sanford: Excessive discovery is adequately limited now. "The problem is disproportionately low discovery, not high." The \$100,000 claim of a cashier may be as complex as the \$10,000,000 claim of a business owner. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: The proposed changes will have a grossly disproportionate effect on plaintiffs in complex product liability cases. Defendants' information is compartmentalized; plaintiffs' information is a relatively open book. The proposed changes would eliminate the standard that allows discovery of information relevant to the parties' claims or defenses. "By replacing relevance with a cost analysis, these proposed rules would severely restrict the ability of plaintiffs to uncover evidence."

322, Michelle D. Schwartz, for Alliance for Justice: The change "will upset decades of precedent and invite disputes and uncertainty." And the language creates a risk of overreliance on monetary stakes in the cost-benefit analysis.

323, Jonathan Scruggs, Alliance Defending Freedom: "'Proportional to the needs of the case' is an extremely vague standard." "Governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake * * *."

324, Jonathan J. Margolis: Deleting the classic definition of discoverable information — information reasonably calculated to lead to the discovery of admissible evidence — and replacing it with an overriding proportionality standard will mean that relevant evidence is not discoverable as of right. Application of proportionality will be difficult and inconsistent. The "needs of the case" cannot be defined. The amount in controversy will be difficult to assess at the beginning of the litigation, and the inquiry will be unwieldy when equitable relief is significant. The possibility of multiple or punitive damages also must be counted. And balancing will prove inapt when it is necessary to go through discovery to find out what is at stake. And account should be taken of factors not subject to easy quantification, such as pain and suffering or emotional distress. And damages may increase during the course of the litigation. Looking for the amount in controversy could become a self-fulfilling prophecy by constricting the information needed to show what is at stake.

327, Malini Moorthy for Pfizer, Inc.: This change "has the potential to significantly reduce much of the undue burden that Pfizer routinely faces as a defendant responding to discovery requests." With two examples, also provided at the November 7 hearing: one is a litigation in which Pfizer spent \$40,000,000 under a court order to preserve backup tapes for 8 years without any party ever looking for anything there, and also collected multiple millions of documents from 170 custodians and over 75 centralized systems, producing 2,500,000 documents representing more than 25,000,000 pages, to have 400 of those documents marked at trial. Overall, in the year ended October 1, 2013, Pfizer, for as many as 60 ongoing litigation matters, collected roughly 1,000,000,000 pages of documents from 3,000 custodians. Of them about 140,000,000 were identified as potentially responsive. 25,000,000 pages were produced; 5,500,000 of them required at least one (expensive) redaction. "Pfizer is not, and should not be, in the business of discovery." This "is clearly money that could better be spent developing life-saving drugs and improving health outcomes around the world." November Hearing: p 261 Repeats the same

observations.

328, U.S. Chamber Institute for Legal Reform: The proportionality provisions now in Rule 26 have failed to achieve their purpose. Litigants and judges commonly ignore them. Proposed Rule 26(b)(1) "would provide much-needed balance." It would help transform the "anything goes" approach into an approach that protects against the worst abuses. (There are figures for the costs of discovery.)

330, Wade Henderson for The Leadership Conference on Civil and Human Rights: Rule 26(b)(1) is the specific focus of comments addressed to "many of the proposed changes." The proportionality standard will impact plaintiffs, such as victims of employment discrimination, who have the burden of proving their claims "in the face of severe imbalances in access to relevant information. Such information asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." And there is no empirical basis for the proposed changes. The broader statements emphasize the vital importance of private plaintiffs, as private attorneys general, in enforcing civil rights claims. In 2005, out of 36,096 civil rights cases the United States was the plaintiff in 534, 1.5%. The rest were brought by private plaintiffs. And discovery is all the more important in light of recent decisions that "have limited access to the courts for vulnerable Americans," both by substantive rulings and by such procedural rulings as those that heighten pleading standards and expand the reach of arbitration.

343, Doug Lampe for Ford Motor Company: Discovery is used against Ford in personal-injury product liability litigation "to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation." In each of several states Ford has more product litigation than in the rest of the world combined. And it is at a competitive disadvantage because, as a domestic company, most of its documents and witnesses are subject to discovery demands. Its foreign-based competitors have few documents or witnesses subject to discovery compelled by courts in the United States. The emphasis on proportionality invokes factors that are familiar to state and federal courts because they are now in the rules. It makes clear "the reality that discovery necessarily involves a balancing of interests." 450, Vickie E. Turner for Wilson Turner Kosmo LLP: "As counsel for Ford in numerous cases," quotes and adopts the passage quoted above.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The present rules work reasonably well. The changes will adversely affect our clients. Proportionality will be difficult to manage. The party requesting discovery is least in a position to show the cost of producing or the value of information not yet produced. Will there be an evidentiary hearing? Discovery on respective resources? How can the requesting party show the importance of the discovery in resolving the issues when the information remains hidden? Proportionality objections, further, will become boilerplate.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses moving the proportionality provision and limiting discovery to matter relevant to a party's claim or defense. This will help cabin excessive discovery, and may have an indirect effect on the burdens caused by over-preservation.

But, in line with other suggestions that the rules should expressly define the duty to preserve, suggests adding "or preservation" in Rule 26(b)(2)(C) at three points: "the court must limit the frequency or extent of discovery or preservation"; "the discovery or preservation sought is unreasonably cumulative * * *;" the proposed discovery or preservation is outside the scope permitted by Rule 26(b)(1)."

347, Genie Harrison: It is not clear whether this comment addresses a supposed limit on the number of Rule 34 requests, or instead expresses concern with proportionality. Offers an example of a case in which the documents needed to prove a plaintiff's case could not have been asked for "under the rules change."

348, Stephanie Bradshaw: Proportionality will place plaintiffs at even more of a disadvantage to defendants. The Committee Note says that parties must observe proportionality without court order because it is made part of the scope of discovery. "[I]f parties were to miscalculate the proportionality determination, they could thus be exposed to sanctions, which could result in a chilling effect." Reducing the flow of information also will impede settlement, which is more readily achieved when all parties understand each others' positions. Together with the new numerical limits, plaintiffs will be placed at an informational disadvantage from which they are unable to recover.

349, Valerie Shands: "Working for plaintiffs' firms, I know we value transparency above costs. * * * [W]e need to have that information to *know* that it is irrelevant or duplicative, and because its broad scope does occasionally turn up highly probative information." It is hard enough to get relevant information out of defense counsel as it is. "[T]he cost is worth it to achieve justice."

350, Pennsylvania Bar Association: Today, the proportionality factors "are rarely applied because of the notion of some that parties are entitled to discover all facts, without limit, unless and until a court says otherwise." But the Committee Note should emphasize that cost and burden are simply two factors to be considered along with the others. Part of the risk is that cost is the first factor listed.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Proportionality is particularly important with respect to ESI. In employment cases, "plaintiffs' counsel use electronic discovery requests tactically, to pressure the defendant into settlement or to lay the groundwork for a spoliation claim."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: The Committee has long recommended proportionality. But suggests that the Committee Note alleviate an ambiguity by stating that the reference to the importance of the issues at stake calls attention to the fact that importance is not measured solely in monetary terms.

357, Joanne S. Faulkner: "For a \$1,000 consumer protection case, defendants will surely argue that the consumer should be entitled to no discovery." This will thwart the purposes of consumer statutes that often provide a relatively nominal amount of statutory damages, but also provide for attorney fees. "'Monetary awards understate the real stakes.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Plaintiffs in nursing home litigation typically are unfamiliar with the court system. Defendants are represented by many lawyers and control the necessary information. The proposal "would impose a significantly narrower range of factors for a court to consider when determining whether or not to permit particular discovery." Nursing homes typically utilize written policies and procedures; the proposal would make discovery more difficult. In considering the importance of the issues and the importance of the discovery items, the court could inadvertently usurp the role of the finder of fact.

359, Andrew B. Downs: The Rule 26 amendments do not go far enough. The scope of discovery should be limited to what is material.

360, Robert Peltz: The proportionality factors will have to be applied by the court in every case. The standard is too amorphous to be enforced fairly. Tremendous burdens will be imposed on district judges. And a ruling in one case will be much less significant precedent for other cases because a unique balancing of factors is required for each case.

361, Caryn Groedel: Proportionality will have a chilling effect on discovery and the plaintiff's ability to prove the case.

362, Edward Hawkins: Proportionality "will only encourage rule breaking plaintiffs and defendants to withhold evidence." Current Rule 26 provides protection enough.

363, Dean Fuchs, at request of NELA-Georgia Board: Proportionality will encourage defendants to file motions to narrow the scope of discovery, hoping the court will deny plaintiffs access to the evidence they need to prove their claims.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Placing on plaintiffs the burden of proving proportionality is harsh; their resources are generally more limited than defendants' resources. "With little or no information, upon what basis can the plaintiff argue the importance of the issue, the importance of the discovery in resolving it, and/or whether the burden or expense outweighs the likely benefit?"

365, Edward P. Rowan: The subjective weighing of cost and benefit will work an injustice "if a judge opines that discovery should not occur."

368, William G. Jungbauer: Replacing discovery relevant to the claims or defenses with a five-factor proportionality test, moved from 26(b)(2)(C)(iii), changes a shield to a sword, "shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden."

369, Michael E. Larkin: The change "flips the burden of proving the utility of discovery on the party seeking the discovery." It will result in parties opposing discovery without having a burden to show why, generating more motion practice. And the addition of "allocation of expenses" to Rule 26(c)(1)(B) makes the change to proportionality unnecessary.

372, J. Burton LeBlanc, for American Association for Justice: Proportionality is examined at great length. The first statement is that introducing proportionality as a limit on the scope of discovery can be viewed as changing it "from a practical consideration to one that renders critical information off-limits merely because it may be expensive to retrieve." That will fundamentally alter the scope of discovery. (1) The amount in controversy is misleading; many cases are in federal court because Congress made federal law to support claims that seek small damages, or only injunctive or declaratory relief. This problem may not be resolved by considering the importance of the issues because there is no indication of the extent to which any particular court will rely on the importance of the issues. (2) Who determines how important an issue is? The court is not likely to have enough information to make this determination at the outset of the case. (3) As for the parties' resources, when a small plaintiff sues a large corporate defendant, whose resources determine this? Can the defendant argue for limited discovery because the plaintiff's resources are limited? (4) Defendants will argue in every case that the discovery is not important in resolving the issues. Without discovery, there will be virtually no information to support the court's determination. (5) Balancing likely benefit against burden or expense will support an argument in every case that discovery is too burdensome. It will create an incentive to preserve documents in formats difficult to access. "The proportionality test gives defendants a

step-by-step formula to argue that critical relevant information should not be produced"; the argument will be made in every case.

If moving these factors into the scope of discovery is not intended to change the rule, as some have suggested, why make the change? The Committee Note says the revision limits the scope of discovery. The change "likely will be interpreted as a substantive change." The present rule, further, requires the court to make a determination that discovery should be limited; the proposed rule imposes an insurmountable burden on the party with fewer resources and less access to relevant information. Nor does the argument from Rule 26(g) persuade. The Rule 26(g) certification is made to the best of the party's knowledge, information, and belief formed after a reasonable inquiry. The party requesting discovery does not have to prove the requests are not unduly burdensome or expensive; the proposed rule likely will impose that burden.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as defining the scope of discovery under present Rule 26(b)(1), and urges that the multi-element test of proportionality should not be substituted. The test is so subjective that a party could file a non-frivolous challenge to almost any discovery request. This tactical motion practice will have disproportionately negative effects on small business and other plaintiffs. In trademark, copyright, trade secret, and occasionally patent litigation it may be difficult to prove actual damages; if only injunctive relief is sought, the stakes may seem small. There is no need to further restrain discovery. The complaint will already have survived heightened pleading standards. Plaintiffs have little economic interest in pursuing voluminous discovery when the amount in controversy is relatively small. Varying standards will develop across the circuits, "further eroding uniform application of justice and the federal rules." Present protective order practice, and the authority to limit discovery under the same factors in present Rule 26(b)(2), afford protection enough. The default limit in 26(b)(2) should not be amplified as a default limit on discovery.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope. It incentivizes a defendant to claim production is too costly, "shift[ing] the burden to the plaintiff to attempt to explain why evidence the plaintiff has never seen is sufficiently beneficial to outweigh the costs unilaterally alleged by the defendant." In asbestos cases this "will result in the inability of a large number of sick and dying people to prove their cases."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "[P]roportionality is the comparison of two variables, and it cannot be asserted when the variables are unknown. Defining the scope of discovery using a proportionality standard without requiring the party in possession of all the information needed to evaluate proportionality to disclose it" will lead to uninformed rulings. Defendants regularly overstate the cost of responding. "Elevating proportionality from a protection against abuse to a barrier to access will only incentivize such overstatement because the proposed changes do not require defendants to back up such claims." In product liability cases, for example, liability is often "revealed through email communications between employees rather than the testing and design documents."

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): With proportionality, "plaintiffs would be faced with the impossible task of arguing that the likely benefit of unknown information outweighs the also-unknown cost to the defendant to produce it." The change would provide another tool for corporate defendants to avoid producing relevant information, a tool that is guaranteed to be abused.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery

cooperatively and collegially, not as a club to inflict unnecessary costs. Mandating proportionality is desirable. Rule 26(b)(1) generally has it right, but factoring "the amount in controversy" should be placed at the end, and all the factors should be introduced by adding "and also factoring" after the call to consider whether the burden or expense outweighs likely benefit. Surely a party should not be required to take a \$50,000 discovery step in a \$75,000 case. But if this factor is first in the list, "a court may be too likely to require unnecessarily expensive discovery steps in cases involving high amounts in controversy." The rule text, or at least the Committee Note, should explicitly state that the cost of discovery should not exceed or be disproportionate to the amount in controversy, and a large amount in controversy alone should not justify discovery when the burden or expense outweighs likely benefit.

379, John M. Gallagher: The subjective factors considered in determining proportionality invite every judge to apply a personal concept, and would require numerous mini-trials on the factors.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proportionality factors should remain in 26(b)(2)(C), to be invoked on review by the judge. Moving it enables a litigant to refuse to provide discovery if it determines in its own opinion that the request is not proportional to the needs of the case. "At least in our cases, this change would only benefit defendants." Most of the clients of these Legal Services Organizations are indigent, holding claims likely to yield small money damages. "Even cases with relatively limited remedies of[ten?] involve complex facts and proof."

381, John H. Beisner: Imposing a strong proportionality requirement is a marked improvement over the "anything goes" approach. It will help winnow overbroad requests and curtail abuse. January Hearing: p. 61: This is not a radical change. It cures the relative obscurity of a rule that has not produced an avalanche of motions, and will not. Nor will making it more prominent change the burdens. A requesting party already is certifying to proportionality under Rule 26(g). A motion will generate a discussion in which both parties have to contribute. The plaintiff declares the amount in controversy. Each party speaks to available resources. The requesting party speaks to the importance of the discovery. The responding party speaks to the burdens.

383, Alan B. Morrison: (1) Must requesters factor proportionality into their requests? May the responding party object to almost any request on this ground? Or is the provision directed only to judges? This language was directed to judges in (b)(2)(C)(iii). It would help to make a new sentence after "claim or defense" on line 9 of the published rule. The sentence would direct the judge to take into account the factors listed. (2) Delete "the scope of discovery is as follows"; it is unnecessary and confusing. (3) What difference is there between "proportional" and "whether the burden or expense * * * outweighs its likely benefit"? The other factors are not independent tests, but factors or considerations. Say first either "proportional" or the "outweighs" test, then direct the judge to consider the factors. (4) What is meant by "the importance of the issues at stake"? Is the focus on each issue, or on the overall claims? If on each issue, what if some issues are routine but there is a liability or damages issue that is of great importance but the discovery does not bear on the important issue? If the focus is on the claim, "is a constitutional claim always more important than a statutory or common law claim? What if there are several claims, and discovery bears on only some of them? If this factor is to balance the amount in controversy factor, it might be revised to address "the nature and extent of any non-monetary relief sought." (5) The importance of the discovery in resolving the issues is similarly ambiguous. It could be fixed as "the importance of the discovery in resolving ~~the~~ [an][a significant] issues to which it is directed." (6) Proportionality and scope are the same; 26(b)(2)(C)(iii) should be "is ~~outside the scope~~ not permitted by Rule 26(b)(1)."

384, Larry E. Coben for The Attorneys Information Exchange Group: The proposals alter the playing field "by placing expediency above relevancy." The "reasonably calculated" sentence has defined the scope of discovery for more than 60 years. Proportionality changes this. "Each factor will benefit defendants at the expense of plaintiffs who need the information." Congress has created many claims that can be brought to federal court regardless of the amount in controversy. How will the court resolve the monetary value of the case — will experts be called? How is a court to determine the importance of the issues, or the importance of the discovery to resolving the issues? Subjective judgment will be called for, and there will not be enough information to make the judgment. Looking to the parties' resources may lead a wealthy defendant to argue that discovery should be limited because the plaintiff is impecunious — a victim's ability to pay for the needed information should not be a determining factor.

The proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether discovery should be limited to whether discovery should be permitted.

Again, how is the court to judge the accuracy of the parties' submissions? Should it, for example, consider that the case before it may be one of many similar cases, so that the burden of assembling the information should be compared to the needs of all the similar cases, and the costs spread across all of them?

386, Arthur R. Miller: Moving 26(b)(2)(C)(iii) to become part of the scope of discovery effectively converts it to an independent limitation on the scope of discovery. The five criteria are highly subjective and fact dependent, with a dangerous potential to reduce the scope of discovery. It is likely to produce a wave of defense motions that will be difficult to decide "when the challenge comes before the discovery itself." There is no empiric support for this change, nor is it justified. January Hearing, p. 36 at 38: Proportionality "is a major shift in the balance of discovery." 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Professor Miller extensively with approval. 572, John Kirtley: Adopts Professor Miller's testimony to a Senate Committee, "as edited by me."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Proportionality "is particularly important in litigation where the burden of discovery is asymmetrical, i.e., where one side, almost always the defendant, faces far greater expense in responding to discovery." The enormous expense of ESI discovery makes this all the more important.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Moving proportionality up from 26(b)(2)(C)(iii) "is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean in each individual case."

393, Robert Redmond: Proportionality is important. Negligible claims have been settled because a party noticed a Rule 30(b)(6) deposition. A corporate deposition takes a small business owner away from his work for days at a time. Proportionality is the only reasonable means to prevent this type of tactic.

394, Thomas Crane: Proportionality is a concern in representing employees in discrimination cases. The amount in controversy can fluctuate, depending on whether a fired employee finds new work. Employers have the bulk of discoverable material; they resist discovery, I file a motion to compel, and they become cooperative. The system works now.

396, Steven J. Twist: "[T]he civil justice system is dysfunctional." The costs of discovery drive dispute resolution. Proportionality, together with eliminating subject-matter discovery and the "reasonably calculated" provision, is a much-needed reform. This will not shift the burden — whoever bears the burden on the scope of discovery today will continue to bear it after adopting proportionality. Rule 26(g), further, already imposes the burden of ensuring proportionality on both the requesting and responding parties.

398, Shira A. Scheindlin: (1) Proportionality "invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional * * *." This could become a common practice * * *." That will mean the requesting party must make a motion, at considerable expense. (2) The rule does not specify which party bears the burden of proof. "[I]t would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party." (3) Addressing five factors in every motion will be burdensome and not informative. The requesting party says the case is worth \$1,000,000, the responding party says it is worth \$10,000: how is a court to choose? The responding party says it will cost millions to produce, the requesting party says this is an exaggeration: must the court appoint an expert to determine the true burden? How is a court to balance burden and expense against benefit of producing materials that have been identified only in a very general way, at the beginning of the case? Judge Easterbrook and others have observed that proportionality is doomed: judges cannot prevent what they cannot detect, they cannot detect what they cannot define, and they lack essential information to define what is abusive. (4) The current rule works well, as shown by the FJC study. (5) Proportionality has been available for years. It is not often raised. When it is raised, it is at a time in the case when parties and the court have developed significant information about the case that allows intelligent disposition of the objection. Proportionality may be usefully approached early in a mega case, but not in other cases. (6) Rule 26 was amended in 2006. "It is too soon and too often to once again revise this rule and further contract the scope of discovery." This is part of "a continued and systematic effort to respond to a big business complaint that the American system of litigation is somehow bad for American business and reduces our competitive advantage * * *." 0469, Edward B. Cloutman III: Adopts Judge Scheindlin comments by reference. 470, J. Derek Braziel: agrees with Judge Scheindlin's "Careful analysis and comments." 472, Christopher Benoit: Wholeheartedly supports Judge Scheindlin's perspective, as well as those of Professor Arthur Miller and Honorable James C. Francis IV. 476, John Wall: Concurs with Judge Scheindlin. 477, James Jones: Agrees wholeheartedly with Judge Scheindlin. 492, David Wiley: Agrees with Judge Francis and Judge Scheindlin. 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Judge Scheindlin extensively, with approval. Hon. Lois Bloom: Approves Judge Scheindlin's comments. Most problem cases are dealt with by hands-on management.

399, Edward Miller: Moving proportionality to (b)(1) is a modest edit, but will encourage judges and parties to maintain a pragmatic perspective. Proportionality will be an important improvement; the overbroad scope of discovery defined by present (b)(1) "is a fundamental cause of the high costs and burdens of modern discovery." But the rule should be strengthened further by adding a requirement that information be "material" to be discoverable.

400, Gregory P. Stone: Modestly emphasizing the existing authority to insist on proportionality will assist in combating spiraling discovery costs. The ratio between pages produced in discovery and pages used at trial shows that extensive discovery does not aid the parties in preparing their cases. The protests that there is an undue emphasis on the amount in controversy overlook the direction to consider the importance of the issues at stake. "[F]ederal judges and magistrates are well positioned to divine the true stakes in each case — whether important public rights or potential settlement value."

402 Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: Of 78 students, 58 opposed the change. It invites parties to decide for themselves what is proportional; disputes will occur routinely, and a party may decide unilaterally on how extensively to search for discoverable materials based on biased views about what is proportional. The burden of seeking court intervention is moved from the party opposing discovery to the party requesting discovery; "it is better for the truth-seeking function of litigation to err on the side of too much discovery rather than on the side of too little." Parties may take advantage of the subjective nature of the calculus to burden their adversaries with the costs of obtaining court intervention [and because it is subjective, the motions will often be "substantially justified" so as to escape sanctions under Rule 37]. Parties with little pecuniary but substantial non-pecuniary interests at stake, parties with fewer resources, and parties with less ability to obtain information outside of discovery, could be systematically disfavored.

403, Donald H. Slavik for AAJ Products Liability Section: The proportionality factors are subjective and will lead to ancillary issues. Must a plaintiff make a record offer of proof of the amount in controversy? Must there be evidence of the parties' resources? The importance of the issues is highly subjective. The importance of the discovery cannot be known without knowing what the information is. And not knowing that important information actually exists makes it difficult to show that the benefit outweighs the cost. It will almost always be the plaintiff who must carry the burden of showing that these factors justify discovery. February hearing, p 14 at 17: Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The introductory comments decry the cost of discovery and the use of discovery to gain leverage in litigation and force settlement. The costs seriously undermine the jury trial system. Hourly billing is not to blame — clients demand efficiency, litigation budgets have become the norm, and alternative fee arrangements are used more frequently. Civil defense lawyers often ask courts to limit the use of discovery. "Federal discovery practice, in its current form, is the largest component of the increasing costs and is staggeringly wasteful and inefficient." Thus it is time to look for changes that will not encourage excessive motion practice but will bind practitioners by the rules to narrow the scope of discovery without judicial oversight. The IAALS/ACTL recommendation to adopt proportionality for e-discovery points the way to adopting proportionality generally. The proposal "provides a proportionality requirement that has been completely lacking in modern discovery, and DRI strongly supports" it. Prior efforts to limit the scope of discovery, such as the 2000 amendment, "have not produced a different mindset among the bench and bar. These historically broad notions of discovery and relevance could prevent the proposed amendment from fulfilling its potential." That risk can be avoided by requiring that the matter be "relevant and material" to a claim or defense. The DRI comment "contains an excellent discussion of the associated costs and negative impact e-discovery" has. The 2006 amendments did not go far enough.

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) The "drastic change" adding proportionality "would have severe consequences." A party could refuse to provide discovery by deciding the request is not proportional. This would enable defendants to avoid producing critical information plaintiffs need. It will be especially detrimental in civil rights, constitutional, and discrimination cases in which information is asymmetrical. Plaintiffs would be forced to use limited time and resources on unnecessary motions and appeals. The five factors would be litigated for each piece of information.

406, Troy A. Tessier: Clarifying the proper scope of discovery is an important improvement to the current rules.

407, David J. Kessler: (1) "While courts, responding parties, and requesting parties will always value cases differently, proportionality should still be a limiting factor." (2) The five factors will incentivize counsel to carefully consider their discovery requests. (3) The fear that proportionality will stimulate motions is unfounded. Parties can and do attempt to limit discovery under Rule 26(b)(2)(C) now. This mirrors counsel's obligations under Rule 26(g). Bad actors will always seek to lengthen and complicate discovery by motion practice, but moving proportionality to the scope of discovery will give them less ground to stand on. (4) Rule 26(b)(2)(C)(iii) should be eliminated as redundant; retaining it "could lead to mischief and confusion" in implementing Rule 26(b)(1). (5) The Committee has been requested to encourage the use of advanced analytical software in the Committee Note. "I regularly use such technology." But the decision on how to respond to discovery requests should be left to the parties. How they meet their discovery responsibilities is their responsibility. They should not be pressed to use technology they do not want to use, nor need to use. Nor is there any need for encouragement. "The logic and reasonableness of advanced analytical software is winning the day."

408, Elliot A. Glicksman for Arizona Association for Justice: "A plaintiff seeking discovery will have the burden of proof on proportionality." Defendants will resist even clearly relevant discovery. Application of the five factors will lead to inconsistent rulings, endless delays, and collateral litigation. The change will transform federal courts from notice pleading to fact pleading, undercutting a plaintiff's ability to discover facts needed to prove a claim.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Proportionality will increase discovery disputes and the time required to resolve them. The factors are so vague that defendants will invoke them in every case. (1) Looking to the amount in controversy will require evidentiary hearings, or at least extensive presentations, on the injuries in the case (with multiple examples, including such matters as axonal shearing in traumatic brain injury cases, leading to the need to understand secondary biochemical cascades, all involving differing expert interpretations of neuropsychological testing). And should the amount in controversy focus on each case in isolation, or is the determination affected by a showing of numerous injuries or by the consolidation of cases? Is the value of a case affected when there are catastrophic injuries but "difficult liability"? (2) The importance of the issues is hopelessly vague. Importance to whom — plaintiff? defendant? society? How many defendants? How severe the injuries? If some defendants settle, do the issues become less important? (3) How can the plaintiff show the importance of the discovery before it has the discovery? And discovery that does not establish an essential element of the claim still may be important to present the full context, the big picture, as part of persuasion. (4) Burden or expense also is undefined. The plaintiff will not have access to information about the defendant's financial health, and will need discovery on that. 448, Robert D. Curran, tracks 410.

414, John R. Scott: Proportionality should help reduce overreaching discovery demands.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: NASCAT members are involved in the complex, high stakes, contentious cases described by the Advisory Committee and FJC as leading to expensive discovery. But that shows only that discovery is expensive, not that it is disproportionate. Before 2000, except in districts that opted out (?), discovery proceeded apace. But in districts that opted out of mandatory discovery (? disclosure?), defense counsel were essentially encouraged to challenge and defensively parse virtually every request. Such behavior required court involvement. Rule 26(b)(1) proportionality

will fundamentally change the very nature of discovery, inviting litigation of "each of these seven factors in every single federal civil case." The rules already provide means to rein in abuses; Rule 26(b)(2)(C)(iii) already enforces proportionality. Moving proportionality into the scope of discovery will require a plaintiff to justify its requests in advance, without the benefit of knowing what relevant information is in a defendant's possession. The defendant, who knows where the requested information resides, can tailor its objections based on cost. Defendants often are not looking for ways to reduce costs of producing, but to avoid producing. Plaintiffs need discovery to reveal the sources of information not previously known to exist.

420, Daniel A. Edelman: Blends protests about deleting "reasonably calculated" and "subject-matter" discovery into the protest about proportionality. Proportionality will shift the burden to the plaintiff to prove the information it seeks outweighs the burden. That cannot work when the information is almost exclusively controlled by the defendant, so the plaintiff cannot show the benefit. Defendants will take even more aggressive positions than they take now, and will abuse the standard. The result will be greatly increased motion practice. "At a minimum, the defendant shall bear the burden of proof and be required to apply to the court for avoiding discovery on this ground."

421, Louis A. Jacobs: (Writing as a retired professor and long-time employment law practitioner:) The present rules encourage the common practice of cooperative discovery in employment cases. (1) But relocating proportionality to become part of the scope of discovery frontloads it. "[T]he fact that the language is relocated matters." That is why relocation is proposed. The Committee should say so if it means to preserve the law that shifts to the party resisting discovery the burden of adducing specific facts to demonstrate the discovery is beyond the proper scope. If it means to change that approach, it should say so. But still "[t]he proportionality factors tilt against plaintiffs in most employment litigation." Leaving it in Rule 26(b)(2)(C)(iii) forces a motion by the party resisting discovery, and a motion must be preceded by informal efforts that will tell the party requesting discovery the facts that bear on the burden of providing it. If the plaintiff has the burden, the employer will not have much incentive to provide as much information. (2) Damages ceilings for federal statutory discrimination and retaliation claims set the amount in controversy too low to justify extensive discovery. (3) "The importance of the issues at stake depends on the value assigned to equal employment opportunity, protecting whistleblowers, or vindicating constitutional rights. Because that value resides in every case, proportionality can hardly assign it high import." Importance is more likely to reside in the number of plaintiffs. "Proportionality has been rejected in the attorneys' fees context precisely because it undervalues the importance of vindicating civil rights." (4) Looking to the parties' resources is another makeweight. Courts are not likely to count it against employers that they invariably have vastly greater resources than former employees suing them. (5) The importance of discovery in resolving the issues in employment litigation cannot be overstated, so this factor is really just a threshold to cost-benefit analysis." Proportionality will come down to this cost-benefit analysis.

423, Ralph Spooner: "Discovery abuse has grown * * * in the last 15 years. Discovery should be proportional [to] what is at stake in the litigation." Too often the cost of discovery forces parties to resolve a case.

433, Ryan Furgurson: Proportionality "emphasizes the balancing of interests that should take place in any discovery dispute, and is a positive step * * *."

443, Grant Rahmeyer: "Changing the scope of discovery under Rule 26 is an absolute abomination. * * Changing the burden of proof on discovery destroys litigation. It allows

companies to hide documents then claim that the plaintiff isn't 'hurt enough' for us to bother to look for documents." The result will be "mounds of briefs just to get leave to file discovery," followed by more briefs on motions to compel.

445, Gerald Acker, for Michigan Assn. for Justice: This ambiguous standard will mean that discovery will depend on the luck of the draw of judges. Some judges, for example, have likened employment disputes to the divorce cases of federal courts; they will not be sympathetic to the discovery needs of those cases. Nor can a judge determine the importance of a case, or of proposed discovery, without knowing what the discovery will yield.

446, Stephen Aronson: Discovery should be narrowed "to only that truly necessary to address the complaint."

449, Christopher D. Stombaugh, for Wisconsin Assn. for Justice:

(1) As Professor Miller testified to Congress, the proposals lack any empiric justification. Tort case filings are falling.

(2) Relevance and proportionality are contradictory. "If evidence is relevant, how can it not be proportional"?

(3) The proposal makes it clear that the proponent of discovery must show relevance and proportionality. The effect will fall most heavily on important cases of public policy.

(4) Now, by moving proportionality from (b)(2)(C)(iii), the rule directs that courts must limit discovery.

(5) All of the proportionality factors are subjective. Plaintiffs barred from relevant discovery will have little chance of prevailing on appeal.

(6) Looking to the amount in controversy, "given that there is already a monetary threshold for federal jurisdiction in most cases, * * * raises numerous problems, some of which may rise to the level of constitutional issues." Do punitive damages caps limit discovery? Or, as under Wisconsin law, limits on the amount a family can recover in a death case for loss of companionship and society? Does discovery depend on whether one plaintiff sues, or ten cases are consolidated?

(7) Looking to the importance of the issues invites subjective judgments. These questions should be decided more at the pleading stage, not in limiting discovery.

(8) "There should be no dispute that discovery is important to resolve any dispute." And who is the discovery important to?

(9) The parties' resources raises questions — if the plaintiff is represented on contingency, should the attorney's assets be questioned? Will statements of resources be required? "[T]he lack of resources should never be a factor in determining justice.

(10) "The value of evidence cannot be ascertained until it has been obtained and reviewed." This factor, as the others, will generate, not limit, litigation.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Including a proportionality requirement delineates necessary parameters to discovery and remedies the overbroad scope of discovery as defined in the current rule." But a materiality requirement should be added to force the parties to focus on what they really need.

456, Niels P. Murphy writing for eight lawyers: Proportionality is a good idea, but the historically broad notions of discovery and relevance are a factor that could thwart realization of the purpose to reduce the present overbroad scope of discovery. "and material" should be added.

457, Carl A. Piccarreta: "the proposed rule change will undoubtedly have judges acting as referees in evaluating five factors on a repetitive basis." Leave Rule 26(b)(1) alone.

455, Andrew Knight: Supports the amendments to 26(b)(1) to "significantly reduce the wasted effort and great expense of responding to discovery served only to harass."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports incorporating proportionality in (b)(1), but with several suggestions to improve clarity and operation. (1) The Committee Note should state explicitly, in suggested language, that moving these considerations to (b)(1) "is not intended to modify the scope of permissible discovery." The factors should be applied just as they have been. (2) A court may place improper or differential weight on specific factors, such as the amount in controversy or the importance of the issues. The importance of the issues may justify broader discovery even when the dollar stakes are low: "This dynamic is implicated by a large swath of the Department's work * * *." It is also affected by asymmetric information cases, in which the quantity of information available to the defendant is far greater than the information the government has. "Federal agencies also have limited resources to apply to individual cases, and such constraints, which include protection of the public fisc, may warrant imposing limits on discovery." (p. 4 recommends specific note language.)

460, Jo Anne Deaton: Proportionality will reduce the use of discovery "as a tool for 'economic blackmail.'" This technique is used by plaintiffs in employment matters to increase potential fee recoveries, and in product liability cases "where deposition costs, including expert discovery, is used as a hammer to force settlement."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Changing proportionality to define the scope of discovery "may on occasion generate inequitable results." This is an amorphous standard. Early in the discovery process, it may be difficult to determine how beneficial discovery will be in resolving the issues. The amount in controversy and the importance of the issues at stake "will likely be the predominate factors," and the parties will on occasion significantly disagree about the amount or the importance. The other proposed changes to the discovery rules, further, may make litigants more inclined to invoke present 26(b)(2)(C)(iii). "If parties more freely file motions invoking the existing proportionality standard in light of these changes, then there is less of a need to realign the available scope of discovery." It might be better to amend Rule 26(b)(1) "to specifically refer to proportionality as an important limiting principle that should be invoked in appropriate cases."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The comment on proportionality essentially renews the Rule 16 comment: the proportionality analysis should not be conducted without an in-person conference with counsel to discuss the court's views.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Proportionality "will foster greater communication among counsel and allow for more effective case management."

468, Karen Lamp: Proportionality will "allow necessary and relevant discovery without requiring the parties to devote substantial resources to producing routinely requested overbroad discovery that in many instances will never even be read."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: The first part of the comment details several pilot projects and state court rules that adopt proportionality as a limit on discovery. Utah Rule 26(b)(2)(F) includes, as one factor bearing on proportionality, whether "The party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information." Utah Rule 26(b)(3) directs that the "party seeking discovery always has the burden

of showing proportionality and relevance." In the second part, commenting on the published proposals, the "attempt to bring a proportionality evaluation to document requests" is applauded, with this further observation: "With specific reference to electronic discovery, we recommend that a proportionality determination should 'take into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.'"

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: Proportionality is subjective. The five factors "are quite limited in nature." Although the cost of responding can be shown, neither party will be able to objectively describe the value of the proposed discovery, nor can the court make a rational determination, having no idea as to the substance of the evidence. Parties will hide behind expense to avoid producing even relevant and admissible evidence that reasonably should be produced. The results will be catastrophic in cases of asymmetric information.

478, Joseph Goldstein: The proposals "are long overdue." "[T]he rules of discovery are routinely abused for the sole purpose of forcing a settlement of a dubious claim."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: As Professor Miller testified, the proportionality proposal is a threat to the jugular of the discovery regime. The scope would be changed from relevance to proportionality. Defendants would be able to avoid producing relevant information a plaintiff needs to prove the case, especially when the cost of discovery is expensive relative to the amount of damages or requested relief. "Civil rights litigants will be the ones most hampered." The gap between the party who controls the information and the one who needs it would widen. And there would be "a massive increase in aggressive collateral discovery motions."

480, James Wilson: Strongly supports, which "will potentially provide a much-needed and common-sense improvement" to reduce runaway discovery costs.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Proportionality provoked the most detailed discussion at the conference. (1) Many plaintiffs' attorneys feared a significant and detrimental limitation of discovery. There is a risk that this will become a subjective standard, administered differently by different judges who have different "know-it-when-you-see-it" visions of proportionality. Many also feared this would shift the burden to the party requesting discovery, and that it is difficult for that party to show proportionality when the responding has all the information about the nature, location, and types of requested information. They feared disproportional effects on some kinds of cases, including "civil rights" cases. (One participant from Colorado offered the anecdotal impression that the Colorado pilot project with proportional discovery has not had the effect of limiting the parties' ability to get needed discovery.) (2) Most defense attorneys supported proportionality. It will refocus the court and parties on the importance and usefulness of requested discovery. "To the extent the changes bring the court into the process * * * this is a good thing." This will move away from boilerplate discovery and discovery sought for tactical benefit. And Rule 26(g) already obliges requesting parties to honor proportionality. (3) A judge thought this will encourage and increase judicial involvement. Another suggested that "for judges who are actively managing discovery, this would not change the equation at all." Plaintiff and defense attorneys agreed that increased judicial engagement is a good thing that changes for the better how the attorneys approach a case. "Unfortunately there was also agreement that active judicial engagement was the exception." (4) Some participants thought a different phrase should be substituted for proportionality: "relevant to any party's claim or defense and consistent with the needs of the case, considering * * *" (5) There was broad support for moving "the amount in

controversy" further down the list; some suggested that if it is removed entirely, "the resources of the parties" also should be removed. (6) A broader proposal was to tie proportionality analysis to the stage of discovery. Discovery could be staged, with initial discovery focused on what is needed for settlement, then on motions for summary judgment and responses.

494, Charles R. Ragan: Participated in the IAALS conference, and proposes the substitution of "consistent with the needs of the case" for "proportionality."

499, Beth Thornburg: Proportionality, subject-matter discovery, and "reasonably calculated" proposals are addressed together (along with the proposed numerical limits). (1) Empirical studies show that discovery works well in most cases; the problems are confined to 5%, or at most 10% of all cases. High stakes cases, complex cases, and contentious litigators will continue to arise no matter what is done with the rules. If large firms and hourly billing continue, that impetus to costly discovery also will remain. Nor is it shown that high costs in these "worrisome" cases are too high as a normative matter. (2) Across-the-board changes are not likely to succeed. More focused reform, based on empirical study of the problem cases, is more likely to succeed. Account should be taken of a study indicating that plaintiffs tend to use discovery to explore the fundamentals of a case, while defendants tend to believe in a more retaliatory model. Past attempts to cabin the problems of the atypical cases have failed. So it is quite unlikely that complex cases will be limited to 5 depositions or 15 interrogatories. (3) Forces outside the procedure rules will persist. Reasonable cooperation is "devilishly difficult to mandate." Many common types of cases "are particularly polarized," and lawyers come to identify with their clients and see only one side. There is a "dramatic lack of trust," and even a feeling of entitlement to use whatever strategies might be necessary to thwart opponents. Small wonder that more judicial involvement is what is most requested by lawyers on both sides of the docket. (4) The proposals will create new problems. Eliminating "subject matter" discovery leaves an unclear claim-or-defense scope that may be infected by arguments that, just as for pleading under Twombly and Iqbal, "conclusions" do not count in defining the claims or defenses. The uncertainty will be magnified by eliminating the "reasonably calculated" language and incorporating proportionality. (5) The result of all of this will inappropriately limit the exchange of information. (6) There is a particular risk that moving proportionality into (b)(1) will lead to a result not intended, imposing the burden of justifying discovery on the requesting party. At the least the Committee Note should make it clear that this is not intended. It would be better to cast proportionality as a defense in the rule text: discovery extends to anything relevant to claim or defense "unless the party opposing discovery proves that the requested discovery is not proportional to the needs of the case, considering * * *."

519, J. David Stradley: In a bad-faith settlement claim against an insurer, discovery of the adjuster's personnel file showed he had been promoted for using "the low and slow method of negotiating," the very wrong claimed. That discovery would not be allowed under the proposal.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Advances the arguments generally made by civil rights plaintiffs, taking the perspective of disability discrimination actions. In commenting on "the parties' resources," it notes that it often litigates against municipal defendants. What counts as the defendant's resources? The amount budgeted for this action? The amount budgeted for the particular facility or program at issue? The entity's entire budget? These budgets result from political decisions.

524, Joel S. Neckers: Class action plaintiff lawyers have an incentive to propound needless discovery to run up the hours they can claim in attorney fees.

525, Victor M. Glasberg: For plaintiffs' civil rights litigation, proportionality "would have to take into account the life circumstances of the plaintiff and what success would mean to him or her."

528, James Ragan: The problem is that defendants produce thousands of pages of irrelevant documents and either object to producing relevant documents or hide them in the tens of thousands of others.

566, David Addleton: "Proportionality, if considered at all, ought to focus on disparities in power and economic resources between litigants and operate to handicap rich and powerful litigants to level the playing field in our courts * * *."

579, Chet Roberts: To further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefit of the discovery substantially outweighs its burden or expense.

599, Bradford A. Berenson for General Electric Company: The comment provides specific case examples of multi-million dollar discovery expenses. In civil discovery, "boiling the ocean is the norm." The company's adversaries drive up discovery costs to exert settlement pressure; they cast a very broad net in hopes of supporting a claim of spoliation or discovery misconduct, particularly when their case is weak on the merits; and, since requests carry no marginal cost, they hope for an offchance of discovering something that may have some marginal use. The scope contrasts markedly with the scope of inquiry undertaken in internal investigations, where the company does only what it needs to answer an important legal question for its own internal purposes. That is sharply focused, quick, and inexpensive. The proposed Rule 26(b)(1) revisions will not bring a tradeoff of "just" disposition for "speedy and inexpensive" disposition; to the contrary, they will advance just dispositions and reduce cost and delay. The present scope of discovery is counterproductive. In addition, the change will further the purposes of proposed Rule 37(e) to reduce the pressures to over-preserve.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Similar to the concerns expressed by many comments that fear disadvantages to plaintiffs and advantage to defendants.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proportionality proposal. Making this part of the scope of discovery, not a mere limitation, "is a significant change in theory and practice." "Relocation * * * underscores the obligation on the part of the discovery proponent to tailor its demands to the needs of the case, and squarely places the burden of defending the scope of those demands on the proponent rather than the recipient."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no showing that lawyers or judges fail to read past (b)(1) to find present (b)(2)(C)(iii). The parties are required to observe these requirements now through Rule 26(g); there is no need to highlight them by relocating them. The amendment creates a risk that the present language will be read more restrictively, and will be misinterpreted to place on the requesting party the burden of showing the request is not unduly burdensome. This risk arises precisely because the factors are already established and familiar; that is why so many of the comments perceive the change as one that makes the overall discovery standard more restrictive than it currently is. An alternative would be to suggest discussion of the proportionality factors at the 26(f) conference. 2078, Judith Resnik for 170 added law professors: supporting this comment.

650, Craig Miller: Proportionality should not apply to oral depositions; it will only lead to stonewalling, refusals to answer questions, and motions.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors narrowing the scope of discovery, including moving the proportionality factors.

677, Noah G. Purcell for Washington State Attorney General's Office: Strongly supports proportionality. "The state is particularly vulnerable to overreaching discovery demands by opponents due to the state's huge ESI repositories. Private parties often erroneously assume the state has unlimited financial resources to respond to discovery."

720, Phillip Robinson: It is unfair to limit discovery by a plaintiff who did not elect a federal forum, but got there by removal. The list of factors should be revised: "considering the amount in controversy and which party sought the federal forum."

729, Stephen B. Burbank: A major change of course is likely from "the proposal to transmogrify proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself — its status since 1983 — into an integral part of the scope definition." The argument that this will not change the burden in discovery disputes is fallacious. Given Rule 26(g), courts now presume the legitimacy of discovery requests and the burden is on the opposing party to demonstrate the opposite. The change will not only increase transaction costs. It also may prevent a party, because of the transaction costs of discovery disputes, from securing discovery necessary to its claims or defenses. Those who discount these risks reflect "inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs." Proportionality will replace burdensomeness as the preferred objection. And this is exacerbated by moving proportionality to the scope of discovery — now it is likely to be faced after discovery is well advanced, so the judge has an informational basis for making the determination. When it is part of the scope of discovery, the judge will be called in at the outset, when there is no sufficient informational basis to make an informed decision.

787, Richard Wynkoop: "Colorado has been under a pilot project for a couple years now that ties proportionality to discovery. It doesn't work. Rather than streamlining litigation it increases it because 'proportionality' has no definition."

799, Mark S. Mandell: "Cases are not static. They exist and develop in a continuum of understanding." Proportionality will impede the flow of information that will redefine the proper scope of discovery, wearing down plaintiffs and hiding relevant information.

850, Henry Butler for Law and Economics Center, George Mason University School of Law: Reports on a survey of 357 state and federal judges conducted in January, 2014. The responses show that the reforms needed to respond to the explosion of discoverable material "has already begun organically, as three-quarters of the judges have started taking costs into account at least some of the time when ruling on discovery issues. However, the judges are looking for more guidance and further codification in the Federal Rules of Civil Procedure * * *."

915, Andy Vickery: "Unlike most of my colleagues in the plaintiff's bar, I do not view" proportionality "as necessarily draconian. In this, as in most civil justice matters, it depends on the judgment and discretion of the trial judge."

916, Steve Garner: "Imagine writing an appellate brief about a case you were not involved in, without benefit of the record, the testimony or any of the exhibits. That is the burden this rule would place on the party seeking discovery."

922, Pamela Davis for Google Inc.: "The positive impact of proportionality and cost-shifting are already palpable in those district courts that have employed similar measures to control the scope and expense of discovery." Examples are those courts that apply the e-discovery model order created by the Federal Circuit advisory committee.

933, Jennifer Mathis for David L. Bazelon Center for Mental Health Law (and others): Although these considerations must be taken into account under Rule 26(b)(2)(C), "having the party from whom discovery is sought make these determinations is very likely to frustrate legitimate discovery."

934, Hon. Anna J. Brown: Experience from 22 years as a trial judge, 15 as a federal judge, gives great concern over the proportionality proposal. It is wholly unnecessary in light of existing authority to control discovery under Rule 16 and 26(c). And it "will undoubtedly spawn needless, expensive, and time-consuming satellite litigation."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes the proposal. It will deny discovery in cases where counsel consciously overreach under the current rule. (1) The FJC findings that discovery ordinarily is proportional reflects what happens when counsel act in good faith and courts diligently exercise oversight and authority. The rule is addressed only to the uncooperative minority, who might better be controlled by encouraging stricter enforcement of the rule against speaking objections, and by requiring greater clarity in responses to interrogatories and document requests. (2) Much current concern reflects discovery of ESI. It arises from the distrust engendered when a producing party refuses to disclose the means used to search ESI. That problem could be addressed by requiring open discussion prior to production, or disclosure of the means of search with the production, or instructing courts that work-product protection should be narrowly construed in this setting. (3) Summary procedures for resolving discovery disputes are effective — frequent status conferences, pre-motion hearings, submission by brief letters. (4) The small minority of lawyers who create problems should be discouraged by being held to public account; courts should be encouraged to threaten or impose sanctions more frequently than they have in the past. (5) The concept of proportionality is not a standard; it is vague, and will be applied differently by different courts.

1025, Senator Jeff Merkley, Senator Ron Wyden: Proportionality "would risk denying * * * harmed persons access to the documentary proof needed to develop their judicial case * * *." "Civil rights litigants will be particularly hampered by these changes," given the "severe imbalances in access to relevant information. A proportionality standard would only widen the gap between the party who controls the information and the one who needs access to it to pursue justice." And it shifts the burden of production to plaintiffs, entirely upending the system of discovery. A defendant need only object that a request is proportional to force a plaintiff to show that its request meets the proportionality tests.

1028, J. Brad DeBry: The 2011 Utah move to proportionality "has not accomplished its aims, it has made litigation more difficult and expensive, and it has caused a host of ancillary litigation and disputes * * *. To the fullest extent possible, we try and stipulate around the new rule changes because of the burden and lack of effective discovery." Any adoption of proportionality for the federal rules should be postponed for a few years to study the effects in other jurisdictions that have tried similar schemes.

1054, Assn. of Bar of the City of New York: A majority approves adding proportionality and moving the factors to (b)(1). This change is appropriate in light of the substantial increases in discovery, both of ESI and of other forms of information. Properly applied, the principle can aid individual and small-firm litigants as well as large entities. The move from (b)(2)(C)(iii) will make it clear that proportionality applies to initial demands. But the Committee Note should make clear that the amendment does not shift the burden of proving proportionality; that the rule is not intended to shift the playing field in favor of one set of parties or against others; that it is not intended to effect an across-the-board reduction in the scope of discovery, and that in many cases the amendment will have no effect at all; that the amendment is designed for the distinct minority of cases where proportionality is not already being applied in practice. It also should be made clear that all factors must be considered, not only the amount in controversy, and that initial proportionality calculations are subject to recalculation as the case progresses.

1107, Jacob Inwald for Legal Services NYC: Fears that proportionality "will create a presumption that cases brought on behalf of low income individuals and groups, although they may have very substantial impacts on the lives of the plaintiffs and involve complex legal and factual issues, may be deemed undeserving of thorough discovery simply because the monetary sums in controversy are modest * * *."

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: The discovery proposals may preclude plaintiffs with meritorious claims from having access to justice. More often than not, the parties have asymmetrical access to relevant information. The barriers to access have already been raised by Supreme Court rulings on arbitration, class certification, and heightened pleading. The proportionality factor has been opposed by a broad cross-section of well-respected public interest organizations: "This fact alone should warrant a reexamination." Proportionality, moreover, has an overwhelming substantive impact if it is made an independent limitation on the scope of discovery. The problem is exacerbated by several of the factors — many important rights are hard to value in dollars, and the difficulty is compounded when considering injunctive relief; the importance of the issues is highly subjective; and it is difficult to weigh cost and burden early in the discovery process.

1147, Joseph D. Garrison: Plaintiffs oppose the proportionality proposal because they perceive that proportionality will impose no limits on discovery in mega cases, while cutting off discovery needed by individual plaintiffs to establish claims of low dollar value. It is difficult to define proportionality through the proposed factors. "The definition of proportionality which has been part of the Rules for years has perhaps been so widely overlooked because its definition is so subjective. To elevate it to the position of importance that it will have, i.e., the equivalent of relevance, with almost complete absence of empirical data verifying what it actually means, is an elevation too soon." Empirical investigation is important, and it must be sophisticated. If proportionality works in Utah and Colorado, it may not work elsewhere. In Connecticut, "the plaintiff and management employment bar * * * is closely knit and cooperative, but I regret to say that when a large New York City firm represents a defendant in Connecticut, the culture of cooperation changes to a much more adversarial process." It may be better to explore the possibilities of improving cooperation, "by Rule if possible."

1157, Edward H. Rippey for Covington & Burling: Supports proportionality, but urges deletion of "the parties' resources." "[W]e believe that discovery limits should apply equally to litigants regardless of real or apparent wealth. Litigation between parties with grossly asymmetric means should not give rise to overly broad and unduly burdensome discovery requests simply because one of the parties has sufficient means to subsidize the other's requests." (The meaning of this is uncertain: it seems to suggest that a poor party should not be able to have discovery that would

be allowed a wealthy party; perhaps the implication is that a poor party should not be allowed to impose the costs of discovery on an adversary when a wealthier party would be allowed the same discovery only on paying part of all of the costs of responding.)

1204, Utah Supreme Court Committee on the Civil Rules of Procedure: For two years, the Utah rules have required proportionality in discovery. They begin with expanded initial disclosures that are subject to a continuing duty to supplement: disclose a brief summary of the expected testimony of each fact witness, and a copy of each document, the party may offer in its case-in-chief. Then cases are assigned to one of three tiers, with different presumptive limits for discovery. Tier 1, in which all parties' claims for damages are \$50,000 or less, allow 3 hours for all fact depositions, no interrogatories, 5 requests to produce, 5 requests to admit, and 120 days to complete discovery. Tier 2, for cases between \$50,000 and \$300,000 (and also cases seeking only injunctive relief) have 15 total fact deposition hours, 10 interrogatories, 10 requests to produce, 10 requests to admit, and 180 days to complete discovery. Tier 3 cases have 30 total fact deposition hours, 20 interrogatories, 20 requests to produce, 20 requests to admit, and 310 days to complete discovery. The factors that bear on proportionality are similar to those in proposed Federal Rule 26(b)(1), adding — to address asymmetric information cases — "taking into account the parties' relative access to the information." The Utah rule states that the party seeking discovery always has the burden of showing proportionality and relevance, but in practical effect this "is really a designation of who goes first." There is an expedited process to resolve discovery disputes; most are decided quickly on letter briefing and with a telephone conference. The National Center for State Courts has done three surveys of Utah attorneys. Many are reserving judgment, but a growing number believe the reform is having its intended effect. Adoption of similar principles in the Federal Rules would encourage other states to move in the same direction — and many states are currently considering discovery reform.

1220, Nancy Gertner, for Legal Momentum (formerly NOW Legal Defense and Education Fund): Whatever the Committee intends, moving proportionality from (b)(2) to (b)(1) will convey a message that the party requesting discovery has the burden of justifying it. Civil rights cases have not involved abuses of discovery. But the defendants hold all the information. The rationale for the proposal is identical to the rationale for Twombly and Iqbal -- to reduce the transaction costs of litigation for defendants who have done no wrong, while ignoring the obstacles placed in the paths of plaintiffs who have been wronged. Defendants in employment cases have been extraordinarily successful in winning summary judgment. And with discovery now limited to "plausible" claims, matters will only get worse. The proportionality test will require the court to make judgments at a time when few if any judges fully understand the merits of the case.

1263, ARMA International: ARMA is an association of more than 27,000 professionals engaged in records and information management. The comment mostly addresses preservation. "A core principle of information governance is that documents have a life cycle." The introduction of proportionality to Rule 26(b)(1), eliminating subject-matter discovery, and eliminating the "reasonably calculated" provision, will all indirectly ease the burdens of over-preservation. The scope of preservation, for example, has been tied to the possibility of subject-matter discovery. So of "reasonably calculated." "When practically any piece of information could be considered 'relevant,' a records manager is left second-guessing otherwise reasonable and efficient data retention policies." "At its heart, proportionality is about 'value and cost,' something that is intrinsic to information governance and records managers."

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Concurs in establishing proportionality as the standard. But suggests that if a request is unduly

burdensome, the court should not simply forbid the discovery. Instead, it should consider conditions that would allow the discovery to proceed, including a condition that the requesting party pay part or all of the costs of production.

1294, Stephen Watters for National Association of Manufacturers: Strongly supports proportionality and the factors. Also supports deletion of the "reasonably calculated" provision.

1339, Sandy D. McDade for Weyerhaeuser Co.: Strongly supports moving proportionality into (b)(1). The parties should have the initial responsibility to consider proportionality — "The court's resources are too precious, and the detailed decisions required for proper ESI preservation too numerous, to have a court undertake these tasks on the motion of a party." Proportionality, moreover, arises in confronting the duty to preserve information before any litigation is filed, "far ahead of the actual discovery phase of a case." The present rule, focusing on action by the court, has no positive impact on these preservation decisions.

1356, Catherine C. Carr for Community Legal Services of Philadelphia: Vigorously opposes the proportionality language, expressing concern that "the 'amount in controversy' is likely to be the one most frequently relied on, and is therefore the most dangerous." Legal Services cases typically involve quite low amounts in controversy. "Yet the issues are of paramount importance to our clients — whether they can save their homes, or their jobs, or have enough money to survive."

1360, Evan S. Stolove for Fannie Mae: Approves deleting the "reasonably calculated" and "subject-matter" provisions, and moving proportionality into Rule 26(b)(1). The proportionality element "would require the responding party to come forward with sufficient facts to show that requested discovery does not violate the proportionality test."

1366, corrected in 1388 Jonathan Marcus for CFTC: The "parties' resources" factor could impede civil prosecutions. "Individuals who orchestrated Ponzi schemes, for example, often have few resources because they have lost substantial money (their own as well as their customers'). This asymmetry of resources should not serve as a barrier to the CFTC's ability to engage in discovery." (A reminder that at times a plaintiff sues a defendant who lacks resources to respond to a money judgment.)

1368, Hon. Donald W. Molloy: "Our district is a trial court. We are not an administrative court predicated on disposition of cases by motion practice." The proposals will inevitably shift trial "to an administrative process," first on the pleadings, then to challenges to proportionality in discovery, then to a challenge to experts, and finally to summary judgment. "The latest amendments create an even greater paradigm shift than did the 1993 and 2000 amendments to the civil rules, a shift that seems to have a purpose to push litigation back into the dark ages of ambush and arcane procedure * * *."

1376, Hon. Charles E. Schumer: This comment springs from a hearing before the Senate Judiciary Subcommittee on Bankruptcy and the Courts. The rules have been amended five times since 1980 in an effort to curb perceived discovery abuses, but seem to have failed. Is there any reason to believe that another amendment will succeed? It may be better to encourage judges to take a more active role in limiting discovery. The factors identified in considering proportionality "include some level of subjectivity, at best, and are weighted towards the defendant, at worst." As Judge Scheindlin has commented, the result will be to encourage defendants to withhold information on the basis of a unilateral determination of proportionality. That forces a plaintiff to move to compel, from the untenable position of having to prove the

importance of material she has not seen. The inexorable result will be a shift in the burden of production, and not just a barrier to entry but what Professor Miller calls a stop sign. Civil rights cases may face the greatest threat of unwarranted roadblocks because they often involve relatively small amounts of money; the importance of the issues may be overlooked. Contingent-fee attorneys may not be able to afford motions to compel. Proportionality may exacerbate the Catch-22 created by the *Twombly* and *Iqbal* decisions — discovery is needed to plead the case, and the ability to get discovery will be subjected to the five-part proportionality test in almost every case.

1411, Jerome Wesevich for Texas RioGrande Legal Aid (and many additional Legal Aid organizations): "The Committee should be much more specific about when it expects small amounts in controversy to be decided on less than full discovery." "[A] valid \$10,000 claim should always justify \$50,000 in discovery costs." And the costs need not be \$50,000. It is the defendant's choice to hire a \$500 per-hour lawyer rather than a \$100 per-hour lawyer. Defendants pay for luxuries we cannot afford, such as real-time transcript screens. They pay third-party vendors to scan and recognize text in their documents; we do that ourselves. Defendants control the costs of discovery because they have most of the information to be discovered. The Committee should consider adding a statement to the Committee Note for Rule 1, recognizing that the new limits on discovery are based on the expectation that litigants will cooperate in an honest effort to ensure that all information needed to decide cases is available to the parties. (This comment is endorsed by 1560, Arthur N. Read for Friends of Farmworkers, Inc.)

1434, Su Ming Yeh for Pennsylvania Institutional Law Project: "The scope of discovery on the 'importance of the issues at stake' could be problematic due to the unpopularity of our [inmate] clients."

1437, Dimple Chaudhary for Natural Resources Defense Council: Proportionality may require NRDC "to prove or refute arguments about the value of the environmental and public health protections it seeks to uphold, which are often difficult to monetize."

1451, Michael Buddendeck for American Institute of Certified Public Accountants: Adding teeth to the current proportionality requirement "is consistent with the recommendations of multiple commentators and legal analysts." And it is also desirable to eliminate subject-matter discovery and the "reasonably calculated" provision.

1453, Timothy C. Bailey: "I can find no legal precedent that the cost of the truth preempts the discovery of the truth."

1512, Jeanette Zelfhof for LEAP: The perspective is that of "a legal advocacy network comprised of ten direct civil legal services providers in New York City." They strongly oppose proportionality, for fear of the impact on all of their cases, which typically involve either very low money claims or injunctive relief only.

1527, Ross Pulkrabek: Experience with proportionality in the Colorado pilot project persuades him to oppose the proposal. A responding party can get away with repeated objections, forcing needless work; judges are reluctant to impose sanctions for this. Some Colorado lawyers like the pilot project rules, but these rules include features missing from the federal rules that help, including mandatory and early initial disclosures, comprehensive expert disclosures, and a ban on expert depositions.

1535, Valerie M. Nannery & Andre M. Mura for Center for Constitutional Litigation: Details the familiar arguments against the proportionality proposal, and proposes that proportionality be left where it is in Rule 26(b)(2)(C)(iii), while making it "part of judicial management by explicitly referencing it in Rule 16. This would foster early attention to the concept of proportionality."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports proportionality, but urges that "the parties' resources" be eliminated. This factor bears on burden as it now appears in 26(b)(2)(C)(iii), but it does not fit a proportionality calculation — it might imply that more discovery is permitted against a wealthy party.

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports proportionality. New York "has approximately 1,700 open cases in federal district court alone." "e-discovery is extremely expensive." "Courts generally see municipalities as 'deep pockets' despite myriad demands on their budgets." In practice, the balance "has often tilted in favor of more (expensive) discovery in the chimerical hope that it will be of significant benefit to the merits." Proportionality will "strick[e] a realistic balance between the needs of a given case and the parties' resources."

1567, Eric Angel, Chinh Q. Le, & Christopher Bates for Legal Aid Socy. of D.C.: In small-dollar cases, proportionality could raise undue limits on discovery in actions against "government agencies with staffing or budget constraints." They might credibly argue that even a small request for documents imposes undue burden or expense, requiring Legal Aid to justify the request.

1572, Hon. Dennis James Hubel: Rule 26 gives all the discretion a magistrate judge needs to embrace and enforce proportionality. It is wrong to shift it to (b)(1) because the shift will suggest to lawyers a major sea change in discovery, generating substantial litigation while they feel their way along the new rule.

1585, Dante A. Stella: This comment devotes 5 pages to Rule 26(b) that are too rich to summarize in fewer than 4 pages. There is extensive discussion of "discovery on discovery," related to "meta discovery." It is urged that the rule text should explicitly address phased discovery as a partial solution to excessive "pro forma" discovery. Shortcomings in technology assisted review mean that it is not a cure-all for the expenses of discovery. Eliminating "subject-matter" discovery and moving proportionality into Rule 26(b)(1) are applauded.

1588, Leigh Ferrin for Public Law Center: Proportionality will complicate every discovery motion, making matters even more difficult for pro se litigants who will be hard-put to articulate the reasons that make their requests proportional.

1594, Richard R. Burke for Utah Assn. for Justice: Urges that experience with the Utah discovery rules adopted in 2011 should not be taken as a guide to federal discovery. The proportionality requirement is set into a 3-tier system. The limits on discovery are so tight that counsel routinely stipulate around them, even in face of uncertainty whether they have authority to do that. Utah explicitly imposes on the requesting party the burden of establishing proportionality; absent clear language to the contrary, the proposed federal rule might be read this way.

1597, Laura Zubulake: As plaintiff in the Zubulake case, reminds the Committee that an individual inspired the case that established the standards for e-discovery. "Limiting depositions, requestor party pay, and proportionality (depending on how it is handled) have the potential to

make it more difficult for individuals to pursue justice."

1608, Jonathan M. Redgrave: "[U]niform application of proportionality is a key missing ingredient to the realization of the promise of Rule 1 * * *." Enhancing proportionality is not an inherent benefit to defendants. "Proportionality, when properly understood, is the holistic understanding of what a case 'means' and the tailoring of the discovery scope to address the needs of that case." Judge Scheindlin "has shed critical light on the need for *the parties* to take initial ownership of the proportionality dialogue." Often the parties fail to provide sufficient grounds for the court to divine a fair resolution. Proportionality "will indeed require greater attention by the parties, more work by their counsel and more case management by the district court at the beginning of a matter. But more work at the outset of the case can yield far greater dividends * * *." The parties must make an effort to have early discussions and resolutions of disputes in terms of relevance and proportionality.

1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: Rule 26(b)(2)(B)(iii) is being utilized. It has been cited in more than 100 opinions in the last 6 months. "In our experience, almost every conversation with opposing counsel regarding discovery issues includes a discussion about the burdens of the proposed discovery and how to minimize those burdens." ESI has not increased the burdens; "the parties should be incentivized to utilize the available tools to more efficiently manage ESI," including many computer-based tools. The proposal will "encourage producing parties to overstate their burdens and strong-arm unilateral decisions regarding search methodology to arbitrarily limit the scope of discovery." Proportionality will be interpreted as effectively shifting the burden to the requesting party — "Any amendment should not reward or encourage blanket and unsupported assertions of burden, but encourage parties to engage in cooperative problem solving on how to expedite discovery." Nor will amending Rule 34 to require specifically stated objections cure the problem — specificity is not likely to reach the necessary details of the burden associated with each request, including information about electronic systems and data resources. The current rule is working. But if proportionality is to be adopted, it should include language to clarify that the burdens have not been shifted and to require the producing party to provide adequate information about the burdens of responding. And it should be made clear that a party's decision to maintain a disorganized system should not become a basis to limit discovery.

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "The concept of proportionality is critical to restoring a balanced approach to discovery." We frequently face "all documents" requests designed as a deliberate effort to pressure our clients to settle. But the Note should make clear that a high demand for damages does not automatically justify costly discovery — the amount in controversy informs the balance of cost and benefit, but is not the only concern.

1634, Ben E. Dupre: Consumer protection cases involve no physical injuries, no real damage. The factors will be used to deny discovery that is essential to expose "the lies, the cheating, and the stealing" business practices that affect many beyond the plaintiff.

1680, Patrick Oot: Illustrates vendor costs for ESI discovery services. Research "reveals great variance in both cost and responsiveness." We need much more emphasis on the reasonable inquiry certification standard under Rule 26(g). "Requesting parties have far too much adversarial oversight into the discovery practices of the producing party, and are demanding a close-to-perfection standard of performance in discovery when the actual standard is a reasonable inquiry. Reasonableness is far from perfection." Requests, responses, and court orders that demand "every and all" documents be produced "completely and entirely" are a matter of

concern.

1685, Stewart W. Fisher & Carlos E. Mahoney: "We also expect governmental and corporate entities to use the proportionality standard to resist depositions of elected officials and corporate officers."

1703, Hon. Michael H. Simon: Applauded Rule 26(b)(2)(C)(iii) proportionality when it was first added, and has applied it when ruling on discovery disputes. It should be available only on motion by a party or on the court's own action. Moving it to the scope of discovery opens the door to responses that purport to be complete but that omit relevant and potentially damaging information because the responding party has made a unilateral determination that full discovery is not proportional to the needs of the case.

1726, M. Megan O'Malley: "[M]aking proportionality a condition to even obtaining discovery goes against the very principles and values of our judicial system."

1878, Roger L. Mandel: The proportionality approach may violate the Rules Enabling Act. Congress has created rights and conferred federal jurisdiction without imposing any amount-in-controversy limit. This proposal "allows courts to decide whether certain cases over which they undisputedly have jurisdiction are 'important' enough or 'significant' enough to proceed by allowing them to prevent persons who cannot proceed without discovery from obtaining that discovery on the subjective basis that the requested discovery is not justified by the uncertain cost of discovery."

1896, Margaret L. Wu for the University of California: The University is the third largest employer in California and the fourth largest health-care provider. It supports proportionality as a means to "fairly provide the parties with the information they need to resolve a particular dispute while minimizing the waste of resources that could be better devoted to supporting the University's public and educational mission."

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: The IPO supports the proposed amendments to Rule 26(b)(1), including proportionality. "Discovery in patent infringement matters is often prohibitively expensive. Some parties (including both patent holders and accused infringers) use the threat of this expense to extract settlements in cases for reasons other than the merits of the case."

1913, National Assn. of Consumer Advocates: Defendants' motions for protective orders against burdensome requests are fairly routine in litigation over financial transactions with low-income consumers. They "are typically weighed expeditiously and with the appropriate level of care by judges." The responding party bears the burden of proving the request should be disallowed. The proposal unnecessarily shifts the burden to the party with the least information about the volume of documents involved and the costs of producing them. Worse, the proposal intentionally narrows the scope of discovery. It devalues claims that seek few dollars but involve matters of public importance and that may expose bad corporate practices and change bad corporate behavior. The importance of the issues is subjective. And the test will be applied at a time when the potential benefits of discovery cannot be assessed.

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Opposes because proportionality "(1) disproportionately affects some parties more than others, (2) overlooks the costs discovery imposes on the requesting party, and (3) ignores the non-pecuniary public benefits of civil rights litigation." So it would be wrong to allow more discovery when a highly

paid employee claims discrimination than when a poorly paid employee claims discrimination. The importance of the public interests involved in civil rights cases is reflected in many rulings that an award of attorney fees need not be proportional to the amount of the judgment.

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: Approving elimination of subject-matter discovery and the "reasonably calculated" formula, and approving proportionality, suggests that in applying proportionality "courts can and should take into account the global aspects of a case. The fact that documents and other information are maintained abroad or are not in English may justify a narrower scope of discovery * * *." Key-word searches may not as relevant in the semantics of many other languages as they are in English.

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: "[T]he five part proportionality test provides instructions on what language to use in order to circumvent a discovery request."

2018, Justin Browne: To satisfy the proportionality factors — to show the importance of the issues, the importance of the discovery, and the benefit of discovery — the requesting party will be forced to explain why they need what they need, giving opposing counsel critical insight into mental impressions and strategies well beyond what emerges in typical case management discussions.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. Proportionality is already utilized by many courts.

2073, John Sadwith for Colorado Trial Lawyers Assn.: Opposes the proportionality proposal. Some members would support it because they favor the Colorado Pilot Project rules. But there are important differences. The Colorado Project requires mandatory initial disclosures 21 days after filing a pleading; that allows for early identification of issues and any deficiencies in discovery. It also helps to counteract the negative aspects of the proportionality standard. In addition, the Pilot Project requires comprehensive expert disclosures and prohibits expert depositions, significantly reducing costs and delay.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: The civil rules were adopted in 1938 to provide access to the courts. The proposed amendments will limit access by civil rights litigants; "[r]obust discovery is especially vital in civil rights cases as a defendant holds most or all of the evidence * * *." The proportionality requirement will shift the discovery process "from one intended to give injured parties access to justice to one that would allow defendants to avoid producing critical and relevant information * * *. Defendants would be able to hide behind the excuse of 'burden' and withhold documents that are critical to the plaintiff's case." Proportionality reviews will inevitably lead to disputes that waste the time and resources of both parties and the court.

2110, Miriam Hallbauer & Richard Wheelock for LAF: (Noted because, as a group devoted to representing or assisting disadvantaged persons, they agree with several of the proposals. Not all.) Proportionality has the potential to arbitrarily decrease discovery in civil rights cases. It may devalue the importance of the rights claimed by persons whose personal damages are small, and also in cases seeking only injunctive or declaratory relief.

2146, John J. Rosenthal: (1) A materiality standard should be added. "[R]elevancy alone can no

longer be the standard, as there is simply too much information available, and the costs of discovering such information is negatively impacting parties (of all sizes) ability to prosecute and defend actions. Proportionality must become more central in defining the scope of information subject to preservation and discovery." (2) "Preservation" should be added to the preamble to Rule 26(b)(2)(C) and to (b)(2)(C)(i), so as to authorize a court to limit preservation that is unreasonably cumulative, duplicative, etc.

2155, Patti Goldman for Earthjustice: Add environmental protection plaintiffs to the lists of those who fear the Rule 26(b)(1) and (c) proposals.

2197, Scott C. LaBarre, for the Disability Rights Bar Assn.: The proposed changes in Rule 26(b)(1) "have the potential, if adopted, to prevent the effective enforcement of important rights of our most underserved citizens."

2205, David E. Hutchinson: A new "consideration" should be added for determining proportionality: "whether the discovery or preservation at issue involves a reasonably tailored protocol on the available technologies for data management and the volume of data covered."

2229, David J. Beck (former member of Standing Committee): Strongly supports the proportionality proposal.

2336, Michael R. Boorman: Similar to quite a few comments that approve proportionality as a means of curtailing "exploitation by discovery," including "discovery on discovery" -- "our opponents interrupt the pursuit of relevant facts in order to attack a defendant's *process* for responding to discovery requests (rather than the *outcome* of that process) in order to uncover a purported basis for a motion for sanctions due to some contrived deficiency in that process."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions, and a board member of DRI.) Discovery costs drive settlement. Adopting proportionality will help to reduce discovery costs; although the concept is in the rules now, courts continue to issue orders that are too broad. It is important to also revise the "reasonably calculated" provision.

November Hearing, Jeana M. Littrell: p. 15 ff: The criteria of proportionality are embodied in present Rule 26(b)(2)(C)(iii) and (g). The requesting party now has the burden to ensure and certify that requests are proportional. Moving this to the most prominent part of the rule is the best way to educate judges and litigants. The emphasis on proportionality will become increasingly important as there is more and more "discovery on discovery" — even before beginning discovery on the merits, parties seek extensive information about information systems and details of preservation capabilities and efforts. Typically this discovery is disproportionate. Nor will this disadvantage plaintiffs in employment discrimination cases — they must first take a claim to the EEOC, which has investigative powers and subpoena powers far broader than civil discovery. The argument that the change will shift the burden of showing proportionality to the requesting party misses the mark — Rule 26(g) imposes that responsibility now.

November hearing, John C.S. Pierce p. 22, ff: As chair of DRI trial tactics committee, favors the right to jury trial. Expensive discovery often forces settlement of cases that should go to trial. Proportionality is a good concept. "How much are we willing to spend to find needles in haystacks, these peripheral, marginal facts that really don't bear on the substance of a case"?

November Hearing, Altom M. Maglio: p 29 "Almost every discovery request will require a hearing on proportionality." Defendants make proportionality objections now by the often default response that a request is overly burdensome. The defendant has to explain why it is burdensome. By shifting the proportionality calculation from a limit on discovery to the scope of discovery, the new rule will require the plaintiff to explain why the request is not overly burdensome to the defendant — and the plaintiff can do that only by having discovery on discovery. This process will create a perverse incentive for a defendant to make it as burdensome as possible to locate and collect potentially incriminating information.

November Hearing, David R. Cohen: p 32 Trials are disappearing. "[T]he main reason is the expense, and the main driver of expense is the cost of discovery." Cases settle "because the discovery costs are out of proportion. It's not about the merits anymore." My practice group has 65 attorneys devoted to discovery. Our experience reflects the surveys — less than 0.1% of the documents we produce are typically used as exhibits in depositions or trials. My firm has invested in predictive coding technology, but "we frequently can't use it because we can't get the other side to agree." When there are many related cases pending in different courts, we often do not try to get agreement because we know we cannot get it from that many counsel and judges. "Plaintiffs have very little incentive to agree to that technology if it's going to reduce the burden on the defendant because they know that this is great leverage for them * * * and that leads to settlements." Proportionality is already there in Rule 26(g), "but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks' attention."

November Hearing, Paul D. Carrington: p 56 The Competitiveness Commission wanted to get rid of Rules 26 through 37 "because it costs a whole lot of money, and it makes American business less profitable, and consequently we can't compete as well in the international global market." p 63: the underlying purpose seemed to be "to make American business more competitive by protecting it from liability."

The Enabling Act has its roots in the deep troubles of the American legal system at the end of the Nineteenth Century. Roscoe Pound identified the need to convince everyone their rights would be enforced. That was the purpose of the Civil Rules. Efforts to economize can jeopardize someone's interests. The cases where it seems obvious that a lot of money is wasted on discovery tend to be big cases with big enterprises on both sides. Hourly billing has contributed to this. "So the proportionality question is less of a problem than it is sometimes presented to be." We should be cautious about trying to save on discovery costs at the expense of making individual rights harder to enforce. The concern that individual plaintiffs are being denied access to federal court because of the costs of litigating, as compared to being denied access by limitations on discovery, meets "my sense * * * that the individual plaintiffs are not the ones who are complaining very much about the cost of presenting their cases or defending themselves." Apart from episodic cases, the FJC data suggest there is not a serious problem with excessive costs in civil rights cases.

The often lamented costs of discovering electronically stored information may be balanced by "the fact that the same engineering that produces the technology also produces ways of tracing and tracking and getting information out of a huge pile of documents." And document review can be outsourced overseas.

Countries succeed when ordinary citizens have a sense that they have some role, some participation, some sense of mutual commitment. The Civil Rules were designed to do precisely that.

366, Paul D. Carrington: Proportionality will weaken private enforcement of many public laws and further diminish the transparency of the judicial process.

November Hearing, Jonathan M. Redgrave: p 70 The proportionality test is present now in Rule

26(b)(2)(C)(iii) and 26(g). The current proposal "gives meaningful life to the promise of proportionality envisioned by the 1983 amendments." The 1983 effort failed for three reasons. "[P]artisan courts quite frankly ignore the proportionality factors altogether." When parties argue proportionality, they miss the point by failing to focus on the discovery device and whether it's worth the candle — they just cite to a factor. And, since there is no consistent approach, courts tend to default to the view that reversal does not follow for allowing too much discovery. The proposed changes reinforce the need to consider proportionality in every case. Proportionality is "party and position neutral. Proportionality helps those seeking discovery as much as those seeking to limit discovery. What the rule does is require lawyers to do their jobs better." It is not a new tool given to large corporations to beat down individuals. It "will help those requesting parties better translate what they need for their claims to articulate why the discovery they seek from a large entity is proportional." I agree with Professor Carrington that we need a rule set that everyone believes gives them a fair shake in court. Proportionality is consistent with this. It is infinitely elastic. If you can justify enormous discovery, you can have it.

November Hearing, Paul J. Stancil: There are two core problems with proportionality. "[I]t's unlikely in the extreme that * * * judges will be able to make any meaningful assessment of the likely value of the proposed discovery." Typically the problem will arise in cases that involve "significant informational asymmetry." The proponent of discovery will be least likely to demonstrate the likely benefit. Judges will rely on their own prior views of categories of litigation, and that is dangerous because those views are likely to be unreliable. To be sure, proportionality is required by Rule 26 now. But "it turns out to be very difficult to move judges to change behavior." The proposal "very deliberately in a very high profile way make[s] this issue of proportionality much more salient to judges and to litigants to some degree."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 (The statements about proportionality also apply to revising the "reasonably calculated" sentence and reducing the presumptive limits in Rules 30 and 33.) These proposals increase costs and the burden of litigation, impairing the ability of litigants to gather evidence from defendants and third parties. Plaintiffs in antitrust cases face information asymmetry. Others control information about the product, market, and alleged conduct — particularly pricefixing. This evidence is dispersed among far-flung third parties. The need for discovery is exacerbated by recent decisions that raise the barriers to class certification, requiring discovery on certification issues. And the Class Action Fairness Act brings into federal court cases that involve the laws of multiple states.

Under the present rule, a party resisting discovery as too burdensome must bear the burden of showing the burden. The proposed rule imposes a multifactor proportionality standard that will place a heavy burden on the party seeking discovery to satisfy proportionality. And proportionality is unworkable at the outset of a complex case — a party who lacks information needs discovery to show that discovery is proportional. The result is to protect larger parties who have a monopoly on information. 1166 is a text for his testimony.

November Hearing, Peter E. Strand on behalf of the Defense Research Institute: p 119 Addresses 26(b)(1) in general terms, and also by applauding revision of the "reasonably calculated" provision. The proposals should be adopted, with the modifications suggested by Lawyers for Civil Justice. We have lost focus on jury trial; today we focus on trial by litigation and trial by discovery. In patent cases, a troll comes in. They demand all documents for all time over everything you have ever done related to all your products. "[I]t will cost \$10 million to produce 100 million documents. And the first thing your client says is how fast can we settle this." "By eliminating that reasonably calculated language, you are focusing the issue on what is the claim about." Another example: a Rule 30(b)(6) deposition notice regarding ESI processes. "[W]e're

going to spend \$100,000 fighting about ESI discovery right off the bat."

November Hearing, Dan Troy: p 123: (General Counsel, GlaxoSmithKline): "[T]he U.S. legal system harms the U.S. competitiveness in the world marketplace." "[O]ur annual U.S. external litigation case costs have been as much as 50 times higher than our non-U.S. costs." If we can opt out of courts by ADR clauses, we do so. Courts are too expensive, too burdensome. But if we cannot get an ADR clause, we often litigate in the United Kingdom, because it is less burdensome, less costly. "[O]ften in certain kinds of complex cases, I'm a lot better off in front of a judge than I am in front of a judge and a jury." "[O]ur system is the ridicule of the world."

"The current overly broad scope of discovery * * * creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at trial." In one recent federal MDL we produced 1.2 million documents; 646 were included on the plaintiffs' exhibits list. The proposed changes are good, but should be strengthened by adding a materiality requirement. It is difficult to define materiality, but "we know it when we see it. * * * [It] does have a sense of there's something important as opposed to being trivial." Present Rule 26(b)(1) is interpreted to reach anything that could potentially be relevant. Would this simply make document review more costly, by adding a further layer after identifying everything that is relevant and responsive? Well, it could work by shrinking the massive amounts of information that each side is dumping on the other. Plaintiffs' lawyers do not want that much information dumped on them. It becomes a needle-in-the-haystack problem.

(In response to a question whether it would help to expand initial disclosures to require identification of information harmful to a party's position, refused to endorse any specific approach. But did urge "a much more focused approach to discovery.")

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: The proposals give defendants more tools to avoid discovery. Proportionality "shifts the discovery process from a focus on relevancy to an economic calculation." Each of the five factors will become the focus of collateral litigation. Defendants already argue burden and expense in almost every case, but codifying this factor gives the argument added credibility. And it upends incentives for defendants to preserve documents in an easily accessible format. An example is provided by a recent 6-year qui tam litigation that involved 25 fact depositions, 5 expert depositions, and the files of 350 nursing home patients to prove fraud by billing for services so deficient as to be essentially worthless. That was expensive and a burden for the defendants, but essential to prove the case. Relocating this factor will make it more complicated and challenging for plaintiffs to meet. It works to discuss proportionality in a Rule 16 conference, but it should not be emphasized by codifying it at the beginning of Rule 26.

November Hearing, Wayne B. Mason: p 142 Focuses mainly on eliminating the "reasonably calculated" language, but ties the same arguments to approving proportionality as a way of restraining massive discovery. "The proportionality, those five factors, I don't see how that increases the burden and expense to plaintiffs."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 Proportionality will increase disputes and litigation. It depends on "five subjective and very fact-dependent criteria." Adding materiality would make it even worse. The Institute litigates constitutional claims against governments. The government defendant will resist discovery "based on its own subjective belief that the request is not proportional to the action." Relocating proportionality shifts the burden — under the existing rule a defendant must prove a request is disproportional, while under the proposed rule a plaintiff must prove the request in fact is proportional. Although Rule 26(g) requires a requesting party to consider burden and expense, it "comes into effect where the signing the discovery requests indicates that you are aware of all these factors and

you're considering them." This means you have determined that the requests are relevant to the claims or defenses and do not trespass into discovery of the subject-matter of the litigation that is available only on court order. The revisions will invite more disputes, requiring judicial intervention. It is not clear how Rule 56(d), allowing time for more discovery before disposition of a motion for summary judgment, would work with the proposed rules — now, summary-judgment motions usually happen after discovery is closed. But it does not seem that Rule 56(d) would be an adequate safeguard, or it would come into play a lot more often.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Moving proportionality up, "make[s] it so that that burden is placed on the proponent of the discovery at the outset."

November Hearing, Andrea Vaughn: p 173: Defining proportionality by the amount in controversy will put low-wage litigants at a distinct disadvantage in litigation for nonpayment of wages. This is in direct conflict with the remedial purpose of the Fair Labor Standards Act. Although this is in the present rules, moving it into the scope of discovery enables parties to resist discovery, "whereas now it would be a question for the court." Yes, litigators would agree that discovery is a collaborative process. In the District of Maryland a discovery motion must be preceded by very extensive discussion among the lawyers, and by an exchange of briefing. But the change allows defendants to resist discovery from the onset. They can do that now, but the difference is that this will make it easier to resist discovery.

November Hearing, Alexander R. Dahl (Lawyers for Civil Justice): p 191 Discovery costs too much. It is abused. Those who say they oppose proportionality are really afraid of not having proportionality. The point of proportionality is that in each case, a party requesting discovery give thought to the case and claims and confine discovery to what is related to the claims and defenses. The concern that somehow the burdens are changed by bringing proportionality into the scope of discovery is surprising. What will happen is what happens now: requests are made, they are resisted, and a motion is made either to compel or for a protective order. As a practical matter, there will be no difference.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 See the general discovery summary. Favors the proposed changes.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 The risk of proportionality is that discovery will be more limited in employment cases involving low-wage plaintiffs than in cases involving high earners. Much less discovery will translate into a higher rate of dismissal on summary judgment. And the Committee relies on statistics that show that at least 80% of all cases involve five or fewer depositions; that shows there is no serious problem with disproportionate discovery.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 Moving proportionality up to the scope of discovery will allow courts and lawyers to focus on the issue early in the case. Proportionality will not eliminate meritorious claims. It will address problems of expensive and extensive discovery at the beginning as lawyers, or lawyers and a judge, craft a discovery plan. It will reduce the use of discovery for leverage, encouraging discovery as a search for truth. This will not provide a new range of tools for objections and satellite litigation. Now, and under the rule as proposed, an objecting party is responsible to show why a request is burdensome or not proportional to the needs of the case. Ultimately, the objections will narrow the focus of the discovery, much as we do now in, for example, negotiating the scope of topics to be covered by a Rule 30(b)(6) deposition.

November Hearing, John P. Relman: p 253 Typical individual discrimination claims — housing, lending, disability, employment — involve damages of \$50-60,000. The defendant will almost always say it costs more to search the e-mails, to examine the loan files, than the amount of the claim. But the discovery is essential. (An example was offered of a housing discrimination claim in which the plaintiff offered a cosigner, to prepay a second month's rent as security, then to prepay a whole year's rent. The offered reason was that they did not do that. After the court ordered discovery the files proved this was pretext — they did do that.) Moving proportionality puts the plaintiff at the mercy of the defendant — in every case the plaintiff will have to fight for the discovery, and will have the burden to show the value outweighs to cost. "I think this sets civil rights back."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Relevance now defines the scope of discovery. Limiting it by proportionality will lead to a dramatic reduction that will be particularly harmful to civil rights plaintiffs. Discrimination has become more subtle and sophisticated, so that plaintiffs face an even higher burden in relying on circumstantial evidence. Focus on the amount in controversy is particularly troubling because it will be used to minimize the significance of the civil rights cases that often do not involve large sums of money. The present rule places review for proportionality squarely in the hands of the judge, and federal judges do this job well. There are no empirical data or research showing that civil rights cases are categorically prone to exorbitant discovery costs. Nor has that been our experience. The proposal, indeed, is likely to have the unintended consequence of making discovery processes longer and more costly through greater motion practice. We rely on individual plaintiffs to enforce the civil rights laws as private attorneys general. We should not undermine that function.

November Hearing, Wendy R. Fleishman: p 273 (Speaking for New York State trial lawyers, and AAJ members involved with toxic tort, environmental tort, and product liability litigation.) There is no evidence that the proportionality mechanism in Rule 26(b)(2)(C)(iii) is ineffective. In many instances a Rule 16 conference addresses any issues of abuse of discovery. Moving proportionality into the scope of discovery will, like *Daubert*, generate a plethora of new motions and discovery disputes by encouraging defendants to make more objections. Defendants have huge amounts of money. Individual and small-business plaintiffs do not. "We cannot know the value of a piece of information until we get the information." We got the critical information in the Vioxx litigation only because the judge "used Rule 26(b)(2)(C) to control that discovery." If this becomes part of the scope of limitation, not a judge-managed device, "the plaintiffs would have to show that the information was available, that the information existed. And without doing the discovery, they couldn't show that * * *." Defendants will say it is not proportional. If such cases are aggregated through the MDL process, then "the position of power changes." But the Vioxx cases were not aggregated, and there were many small claims.

November Hearing, Patrick M. Regan: p 278 Concerns with proportionality are explained by discussing the proposal to reduce the presumptive number of depositions to five. The summary appears with Rule 30(a).

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: Proportionality, and the numerical limits on the numbers of requests under Rules 30, 31, 33, and 36 will have a disproportionate and unfair impact on private civil-rights plaintiffs. Congress counts on private attorneys-general to enforce the civil rights statutes. The overwhelming majority of civil-rights actions are brought by private plaintiffs. The Supreme Court has limited access to courts by recent substantive and procedural rulings. "[I]nformation asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." The crisis facing the federal

judiciary would be better approached by confirming pending judicial nominees.

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297
Includes Rule 26(b)(1) in lamenting the unfair burdens the proposals will place on civil-rights plaintiffs, joining it with a more detailed statement opposing the numerical limitations in Rules 30, 31, 33, and 36.

January Hearing, Joseph D. Garrison (NELA): (1) Moving up proportionality will mean that the rote objection becomes "proportionality." It may be administered by requiring the requesting party to show proportionality. That is wrong. The requester should have to show relevance; the objector should have to show lack of proportionality. It will work only if administered that way. (2) The factor looking to the amount in controversy should be stricken, or at least put last in the list. To be sure, this is an appropriate consideration in cases that involve only money. But employment cases involve much more. Suppose similarly wrongful discharges of an employee making \$500,000 a year and one making \$30,000 a year. The case may be more important to the one making \$30,000 who faces foreclosure, losing a car, going on food stamps, and embarrassment. Those of us who know what we are doing look to the value of a case before taking it. Doing \$60,000 of discovery in a \$30,000 case is six times as much as should be. We can be effective for a client only if the case is effective for us as well.

January Hearing, Timothy A. Pratt for Federation of Defense and Corporate Counsel: p. 26
Moving proportionality to the scope of discovery is "critically important." Administering it will not be a question of burden of proof. p. 34: "This is a balancing of the interests with both parties contributing information that will allow the court, if they can't reach an accommodation mutually, to decide what the level of discovery ought to be allowed."

January Hearing, Jon L. Kyl: p. 45, at 48: "[M]oving the proportionality language * * * will be very helpful."

January Hearing, P. David Lopez (EEOC): p 68 The EEOC often seeks nonmonetary relief. "This is a law enforcement function and it is something that cannot be monetized."

January Hearing, Kaspar J. Stoffelmayr: p 88: Discovery is proportional now in many simple cases. It is not in a very important group of large cases where the disputes are asymmetrical. But in other large cases, where the discovery burdens will be symmetrical, large corporate parties tend to get by with far less discovery.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery. Elevating proportionality "could give them another tool to engage in resistance to legitimate discovery requests."
2196, James A. Ferg-Cadima for MALDEF: Elaborates the views stated in the Saenz testimony.

January Hearing, Michael R. Arkfeld: p. 104 Very few cases even discuss proportionality. Litigants do not realize it's there. Moving it up will generate more motions, raising the costs for requesting parties and decreasing access to justice.

January Hearing, Jocelyn D. Larkin: p. 125 Proportionality will impede institutional reform litigation. The important relief is injunctive, not monetary. The amount in controversy is not relevant. And the importance of the issues at stake lies in the eye of the beholder. 1413, Jocelyn D. Larkin for Impact Fund and others: Systemic institutional reform cases "are especially

vulnerable to a defense strategy of obstruction and delay." Often they begin on behalf of only one or two plaintiffs; it is only through discovery that larger policies or systemic breakdowns are uncovered. Proportionality will complicate every discovery motion. Some may believe that the absence of any monetary claim should be counted. The importance of the issues is subjective.

January Hearing, Quentin F. Urquhart for IADC: p 133 Adding proportional as a word, and moving up the factors to become more prominent will "bring a needed degree of pragmatism." Proportionality "isn't just dollars." The inquiry should not "front-load" examination of the merits. Who is right, who wrong, should not be explored at that stage. Lawyers can rationally discuss the importance of a civil rights case, or a purely economic case, in terms of what they are arguing, not who will prevail.

January Hearing, Elise R. Sanguinetti: p. 151 Representing individuals in wrongful death and catastrophic injury cases, proportionality is a radical change. The amount in controversy in a wrongful death action may be limited. Now we generally can reach agreement with defense counsel on the discovery we need. Proportionality will require us to negotiate through the factors; defendants will claim retrieval from storage is costly. The same is true for the importance of the issues, and the burden-benefit analysis. I prefer California courts now because discovery is so open. If proportionality is added, "I'm very concerned about what's going to happen in the future.

January Hearing, Kathryn Burkett Dickson: p 160 Think of proportionality in terms of employment plaintiffs. "I represent female farm workers who are sexually assaulted in the fields, all the way up to corporate executives." The executives "can give me informal discovery" — the names of people, how things are organized. Farm workers generally do not know even the last name of their supervisors. "[I]t's the people at the bottom sometimes who need the most discovery."

January Hearing, Larry E. Coben, Attorneys Information Exchange Group (AAJ Sub group): p 169 Moving up proportionality will change the burden of proof. The plaintiff will have to show the importance of something it does not know, and the court will have to rule in equal ignorance. Consider the design of an automobile fuel system. You need information about system designs for other models, and often generic design guidelines that apply to all vehicles. Suppose, for example, you had a client with a minor burn injury; proportionality could foreclose discovery of information supporting the claims of many victims, many seriously injured or killed.

January Hearing, Paul D. Weiner: p 177 Proportionality is the bedrock principle of any contemporary system of justice. It should apply to preservation not only in proposed Rule 37(e), but also in Rule 26(b)(2)(C): "the court must limit the frequency or extent of preservation and discovery"; "the discovery or preservation sought is unreasonably cumulative," etc.; "the burden or expense of the proposed discovery or preservation," etc.

January Hearing, Hon. Derek P. Pullan: p. 205 (1) None of the factors in the proportionality calculus is primary. (2) Utah Rule 26 was amended two years ago to require that all discovery meet the standards of proportionality, and at the same time beefed up initial disclosures to include a summary of the testimony of each witness a party may call and a copy of each document it may use. In addition to the factors in Federal Rule 26(b)(2)(C)(iii), Utah adds the "opportunity to obtain the information, taking into account the parties' relative access to the information." This factor is intended to address the problem of asymmetric information. (3) The Utah Rule also expressly provides that the party seeking information has the burden of showing proportionality and relevance, no matter whether it is a motion to compel, a motion to strike, or a

motion for a protective order. But it is a "burden of proof soft" — some information bearing on the factors may be more readily available to the responding party. (4) Cost-shifting orders may be entered to ensure proportionality. (5) Beyond that, Utah has divided discovery into three tiers, with presumptive limits that are deemed proportional. Anything beyond these limits is called "extraordinary discovery." Some federal courts have adopted pilot projects or local rules that require proportionality. (6) Without proportionality, "[p]arties with meritorious claims but modest means are denied access to the courts. Specious claims settle to avoid the discovery bill." (7) The IAALS is undertaking a survey of experience with the new rules: younger lawyers really like the changes; many are reserving judgment; a high percentage "have not realized their fears"; a lawyer recently told me he is more and more advising clients to file in state court because discovery costs are more predictable. (8) This is a cultural shift; continuing efforts are made to educate judges.

January Hearing, Richard B. Benenson: p 316 A pilot program in Colorado State courts requires court and parties to address proportionality at all times, beginning with the first meet-and-confer and the initial case management conference, and continuing. "[T]he process is working." Requiring discussion facilitates proportionality, and continuing conversations. This is not one-size-fits all; in asymmetric information cases, the side without much information may need more discovery than the other side. In medium-size business cases, both plaintiffs and defendants benefit. Access to courts actually increases by reducing the need to resolve cases to avoid discovery costs rather than on the merits. (A survey of the program has started.)

February Hearing, Ralph Dewsnup, for Utah Association for Justice: Utah has had an express proportionality rule for two years. The rule goes far beyond the federal proposal. It lists 11 factors, without standards. Counsel often recognize the impracticality of the specific numerical limits, measured by tracks and the amount in controversy, and agree among themselves on more depositions or interrogatories. All a party has to do to halt discovery is to object on proportionality; then the plaintiff has the burden to show compliance with all 11 factors. The federal rules already have sufficient proportionality standards. People are not using the opportunities that exist. The problem is not so much proportionality as the lack of guidance on who has the burdens.

February Hearing, Maja C. Eaton: p 29 (1) Proportionality is important. It would be helpful to add a statement in the Committee Note that an MDL proceeding does not, without more, justify greater discovery on the common issues of liability simply because many cases are combined. What happens today is that MDL proceedings are seen as a carte blanche for unfettered discovery and a "gotcha mentality." (2) The proposal does not change a burden of "proof." Discovery disputes are more a matter of persuasion.

February Hearing, Michael O' Cowles: p. 47 Violations of Title VII and the FLSA are "often done through informal means and off the books." Discovery enables plaintiffs to pursue ancillary documents that color in the full extent of their claims. The burden of proving proportionality undoubtedly will fall on the requesting party. Often we do not know what it is we are looking for. The change will lead to greater discovery conflict.

February Hearing, John W. Griffin: p 57 In litigation on behalf of court security officers deemed unsuitable because they used hearing aids, and FBI agents deemed unsuitable because they had diabetes, we did not know at the beginning that the defendants acted under general policies. There were no written statements. It was only through extensive discovery that we uncovered de facto general policies. It was the discovery that made itself proportional. The defendants did not question proportionality. If they had, we would have been hard-put to get the necessary

discovery.

February Hearing, Mary Nold Larimore: p 68 Although it is true that proportionality is not getting enough attention because it is buried in 26(b)(2), the best reason for moving it to rule 26(b)(1) is that it is not simply something a party should invoke after discovery has gotten out of hand. It is an important part of the process that should be made part of the initial plan for appropriate discovery.

February Hearing, J. Michael Weston: p 87 The discovery process now is very contentious. The Rule 26(f) conference often is no more than a step on the way to a motion to compel. Good practice is illustrated by a recent class action in which the magistrate judge managed discovery, with limited initial discovery, a conference, another level of discovery, and so on until both sides understood the merits and settled. That is how it should work. Moving up proportionality, and eliminating "reasonably calculated," will be "an opportunity to get involved early on at the Rule 167 conference. I think more of them will be held." Magistrate judges will become more involved. And it gives criteria for resolving disputes.

February Hearing, Suja A. Thomas: p 93 The Committee recognizes that discovery is proportional in at least 85% of federal cases. It is a mistake to adopt a rule for atypical cases when the rule also will have an impact on typical cases. It would be better to move away from transsubstantivity and craft a special rule for the atypical cases that create the problems. But if a general rule is devised, Rule 37(a)(1) should be amended to state that the party requested to produce bears the burden of showing the request is not proportionate. And Rule 26(b)(5) should be amended to require a proportionality log. Adding something to the Committee Note is not adequate protection. The surveys that show greater lawyer dissatisfaction with proportionality seek opinions divorced from actual cases; the FJC closed-case survey is stronger research. 1185: Her written comment provides suggested rule text for 37(a)(1) and 26(b)(5), and elaborates on the themes stated in her testimony.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 Proportionality gives another battleground, another reason to withhold relevant evidence. Boilerplate objections are made to almost every request. This will add one more threshold motion. And it is unclear where the burden lies.

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 "Proportionality is not the standard right now. It's something I have to raise * * *." Under the proposal, lawyers will bury the courts with motions. Under the proposal, I can force the other side to file a motion to compel. "I would not just object. I would unilaterally withhold relevant documents based on my client's subjective evaluation of whether the documents are proportional to the kind of case we're in." So if the plaintiff's patent seems weak, I will say there are problems with the case and at this point only limited discovery is proportional. If the case comes to seem stronger after initial discovery, more will be proportional. "I like phased discovery like that." As an alternative to the proportionality language, consider E.D.Texas Rule CV-26(d): "what reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Moving proportionality up is desirable to make it part of the scope of discovery, not merely a limitation, and to provide clarity about what the scope of appropriate discovery is. "[I]t will not shift the burdens that are available right now."

February Hearing, John H. Martin: p 172 In the late 1990s Texas adopted as a limitation on discovery the proportionality language that then appeared in Federal Rule 26(b)(2), and placed it up front. Texas requires a party invoking proportionality to file a motion. This practice has not generated a lot of motions. It is discussed far more often in negotiations with opposing lawyers — and those negotiations work better with "the gray-haired lawyers" "than if we had somebody younger."

February Hearing, Michael M. Slack: p 193 Proportionality functions differently in the Texas rules. First, it does not have the primacy it does in the present proposal. Discovery works best by agreement, and by and large that happens. But the proportionality limit is there "for the parties and the court when agreement escapes reason." It facilitates collaboration among the parties and court; Texas courts provide status conferences every 30 days, and informal discussions. "I like phased discovery."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 We will need discovery to determine what is proportional. There will be fights to determine what is the amount in controversy, what is the importance of the discovery, and so on. "[E]very discovery request becomes a mini trial on the merits or class certification." And objections will be made when I attempt to get discovery of the IT structure when I need to show prejudice from the loss of ESI.

February Hearing, Donald J. Lough: p 248 The comments opposing proportionality show the need to reinvigorate this concept to the role that has been intended since 1983. "The burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof." Courts require both parties to discuss proportionality. There may be more motions during the break-in period, but the incentive to make motions will disappear "once it becomes clear what the rules are, and that they will be enforced."

February Hearing, Gilbert S. Keteltas: p 254 (1) Proportionality should not be raised for the first time in an objection. Proportionality is achieved by talking with your adversaries about what matters, who matters, what are the topics in dispute. When adversaries fail to cooperate, I walk them through the rules. "But it's harder work than it should have to be." It works by leaving room to reconsider proportionality as discovery proceeds. "In reality a lot of proportionality issues and objections will be addressed iteratively. Why don't we start small and get bigger? Maybe we don't know the answer today. We can work through it." (2) "The resources of the parties" should be omitted from the list of factors. "Litigants shouldn't be deprived of the benefits of proportionality simply because they have resources." (3) The fear of routine proportionality objections is countered by the need to meet and confer before making a motion, and by Rule 26(g) — the objection cannot be made unless it is reasonable.

February Hearing, David A. Rosen: p 262 The proportionality proposal, along with Rule 37(e), "would create * * * a path for protection of corporate interest at the expense of the rights of individuals damaged by corporate malfeasance."

February Hearing, Stuart A. Ollanik: p 266 "Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery." When we overcome the resistance and get the documents, we find that the reason for invoking cost was that the documents prove our case. "Proportionality is too subject to manipulation." And if the burden is on the plaintiff, the plaintiff lacks information on the burden of producing. "It's too easy for defendants to manipulate, misrepresent, inflate those costs, and hide very important relevant truths." 1164 supplements the testimony. Adds an example of a defendant spending a fortune to resist discovery of documents already produced in other cases. And some courts will combine proportionality with cost-

shifting, shutting down access to justice in valid cases.

February Hearing, J. Bernard Alexander, III: p 272 Moving proportionality to the front will let the defendant say this is a big deal. "In my [employment] cases, at the beginning of the case I don't know enough information oftentimes to be able to address why I need this information in detail." "Proportionality is just another arrow on the defense side * * *."

February Hearing, Susan M. Rotkis: p 296 Plaintiffs uniformly oppose the proportionality proposal. From the perspective of consumer credit-statutes cases, the proposal is one-sided. All five factors will establish a threshold that plaintiffs will have to fight to cross at the very front end. Congress created statutory damages and fee shifting to facilitate private enforcement; this proposal will impede it. Our judges and jurists can implement proportionality when it is raised on a motion to compel.

February Hearing, Ariana Tadler: p 325 Proportionality is unfair. It increases burdens on those who already have stringent pleadings and burdens of proof. It will inevitably lead to increased motions practice that actually thwarts effective case management because judicial resources are already stressed.

February Hearing, Brian P. Sanford: p. 356 The proportionality proposal assumes the problem lies in the requests made by plaintiffs. The problem lies instead in obstructive discovery tactics by defendants that force plaintiffs to settle for inadequate sums.

RULE 26(b)(1): ELIMINATE EXAMPLES

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees, but with caution. Some litigants will argue that deletion of these examples means that such matters are no longer discoverable. The Committee Note should reflect the Committee's view that discovery of such matters is deeply entrenched and that it continues to be available.

398, Shira A. Scheindlin: The examples are useful to encourage early identification of sources and persons with knowledge. It has governed since 1970, without causing difficulty. Eliminating it will lead lawyers to argue that the elimination means a difference. There is no harm in leaving it in.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The rule text illustrating examples of discoverable matter should be restored, or at least the Committee Note should include the advice in the Transmittal Memo stating that discovery of such matters "is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples."

487, Peter J. Mancuso for Nassau County Bar Assn.: "Since the concept is still recognized and supported, there is no reason to delete it." Removing it will incorrectly imply it is no longer valid.

494, Charles R. Ragan: It is imperative that the Committee Note explain the Committee's view that discovery of these matters remains proper. The proposal already has led to statements that it would eliminate "discovery about discovery," a grave mistake with respect to the need to identify potential avenues for eDiscovery.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": The Note should say that this is not a substantive change. It is only a measure to remove clutter.

995, William P. Fedullo for Philadelphia Bar Assn.: Agrees that discovery of these materials is so well entrenched there is no remaining need to list them in the rule.

1054, Assn. of Bar of the City of New York: Agrees, but urges the Committee Note should state that all of these things remain discoverable.

1209, Christopher Heffelfinger: The language proposed for deletion "is important so that Courts will understand that foundational discovery is fairly contemplated * * * and essential to obtaining admissible evidence, and ensuring that all potentially relevant sources of locations were searched for responsive documents." Consider the foundational requirements to treat the statement of a coconspirator as an admission, or the requirements to satisfy the business records rule.

1690, Vicki R. Slater for Council of State Trial Lawyer Presidents: "This language is not extraneous. * * * Elimination * * * will be used by parties and courts to deny the disclosure of these important, essential facts * * *."

1700, Craig Ball: "The standard practice of e-discovery is malpractice. Parties cannot safely assume their opponent is competent to identify and produce responsive ESI." It is essential to protect discovery of metadata. The language to be deleted does not expressly refer to metadata,

but it is the only anchor in the rules for essential discovery. Opponents already are arguing that the proposed amendment bars inquiry into metadata. The language should be preserved. And the Committee Note — or, better, rule text — should make it clear that matters relevant to any party's claim or defense include: "1. Discovery of relevant or functional metainformation; 2. Inquiry into a party's methods and processes used to store, identify, collect, process, search, review or produce information; or 3. Inquiry into forms of information and production or the use, operation and structure of relevant information systems."

1930, Andrew M. Pardiek: Lawyers will cooperate in discussing ESI discovery if a tool is available to make them reveal the details of their ESI systems. Take away this language and that tool may be weakened. "[P]ractitioners often do not find it manifest or obvious that a party can engage in discovery of meta-information."

2072, Federal Courts Committee, New York County Lawyers' Assn.: This proposal "removes language that appears redundant and unnecessary considering the fact that a party has to disclose any information relevant to a party's claim or defense."

January Hearing, Lea Malani Bays: p 283 (Represents investors in securities class actions.) Sets the importance of rule language allowing discovery of the existence, description, nature, custody, condition, and location of any documents against Rule 26(f) conferences discussing ESI. This language facilitates effective conference discussions. It is important to tailor discovery by exchanging clear, transparent information about the nature and capacities of ESI systems. What sources? Has deduplication been done? What about e-mail threading, concept searching, clustering, predictive coding? Is it useful to sample sources that are expensive to access? Remove this language, and responding parties will argue that none of this information is relevant to the claims or defenses in the action. Already panelists at eDiscovery conferences are saying that after this rule change, they will not have to provide any information about ESI systems. Information about the systems is essential to evaluate the proportionality of discovery. It would help, further, to expand the list of topics for discussion in Rule 26(f), a broader checklist of subjects that must be discussed. The specific-objection requirement proposed for Rule 34 will not do the job alone. 1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: similar.

RULE 26(b)(1): ELIMINATE SUBJECT-MATTER DISCOVERY

267, Lawyers for Civil Justice, by Alex Dahl: It is good to eliminate discovery relevant to the "subject matter involved in the action." The parties' claims and defenses provide a clear anchor, and a tie to what is potentially discoverable.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Eliminating the provision for extending discovery to the subject-matter involved in the action is good; it clarifies that discovery is delimited by the claims and defenses found in the pleadings.

289, Craig B. Shaffer & Ryan T. Shaffer: "As a practical matter, eliminating 'court-managed' discovery under Rule 26(b)(1) may have little effect on a party's ability to pursue reasonable discovery." This ties to the broad interpretation given to determining whether information is "relevant" to a claim or defense — relevance is found unless the information can have no possible bearing on a claim or defense, "if it reasonably could lead to other matter that could bear on any issue that is, or may be, in the case." The current proposals do not suggest a narrower or different standard for measuring relevance. But eliminating subject-matter discovery, along with the newly explicit focus on proportionality, may have not undesirable consequences in lawyer behavior in drafting and responding to discovery requests, as summarized with the discussion of proportionality. Removing subject-matter discovery eliminates a safety net that might be invoked to justify over-broad requests.

292, Lyndsey Marcelino for The National Center for Youth Law: Discovery of the subject matter should remain available as a discretionary tool "to retain the ability, upon a showing of good cause, without a consideration of proportionality." [This may mean to say that proportionality should be measured against the subject matter, rather than only the pleaded claims and defenses. Present Rule 26(b)(2)(C)(iii) limits subject-matter discovery.]

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees with the proposal. "There is no justification for the current system of two-tiered discovery — one tier party-controlled, and the other tier court-controlled."

328, U.S. Chamber Institute for Legal Reform: Supports elimination of the "subject-matter" provision. But one further step should be taken: discovery should be limited to information "not only * * * relevant, but also material to a party's claim or defense."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Redefining discovery to focus on claims and defenses will help reduce the excessive costs of discovery. It would help to further limit discovery by requiring that the information be material to any party's claim or defense. January Hearing, p 26: Again approves removal of "subject matter" discovery.

345, Kim Stone for Civil Justice Association of California: Applauds limiting discovery to claims and defenses, "and not to 'any matter relevant to the subject matter involved in the action.'"

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses deletion of discovery relevant to the subject matter involved in the litigation. This will help cabin excessive discovery, and may have a marginal benefit in reducing over-preservation.

349, Valerie Shands: Eliminating subject-matter discovery may reduce the number of "fishing expeditions," but this will be another bar to effective discovery of the information plaintiffs

need.

353, Kenneth D. Peters, John T. Wagener: Substituting proportionality for "any matter relevant to the subject matter" will reduce costs and burdens.

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: There is no evidence that the discretion to extend discovery to the subject matter of the litigation has been abused. Although it is difficult to foresee many circumstances in which distinguishing between claims and defenses and subject matter will be decisive, discretion should not be restricted absent strong reason.

356, Richard McCormack: It is good to make clear that discovery is defined by the claims and defenses identified in the pleadings. Discovery should be further limited by requiring materiality.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Protests deletion of the court's authority to order discovery of any relevant matter. This may mean to address deletion of the provision for discovery relevant to the subject matter of the action beyond the parties' claims or defenses.

381, John H. Beisner: "Limiting the scope of discovery to matters relevant to a party's claim or defenses is an important step to curtailing abusive discovery." Litigants too often seek information only tangentially related to the claims or defenses at issue.

383, Alan B. Morrison: Courts have been able to use "subject matter" discovery to avoid the need to decide on relevance. With the change, defendants will press the relevance point much harder and judges will be forced to decide it in the early stages when little is known about claims or defenses. Defendants will have an incentive to decline to produce on grounds of relevance. This can be fixed by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: Deletion of this language is not justified. Subject-matter discovery has been a safety valve that reduces the need to address relevance. Defendants will be motivated to contest relevance more aggressively. January Hearing, p. 36 at 40: the same.

390, J. Mitchell Smith for International Assn. of Defense Counsel: It is a meaningful improvement to limit discovery to what is relevant to the parties' claims and defenses. But historically broad notions of relevance counsel that this should be tightened further by limiting discovery to matter that is relevant and material.

391, Paul K. Stecker: The 2000 Committee Note says that discovery relevant to the subject matter was not intended to be an entitlement to develop new claims or defenses not already identified in the pleadings. But the distinction has proved unworkable. Defendants are often dissuaded from arguing that proposed discovery is not relevant to the claims or defenses because the plaintiff will argue there is good cause to explore matter relevant to the subject matter. Discovery is frequently ordered on matters far beyond the scope of the pleadings. The Colorado Supreme Court interpreted the identical Colorado Rule in DCP Midstream v. Anadarko Petrol. Corp., 303 P.3d 1187 (Co. 2013), noting that courts seem to apply broad relevancy principles that appear unchanged from pre-amendment practice. Rather than attempt to define the distinction, it took a practical approach, ruling that when judicial intervention is invoked the actual scope of discovery should be determined by the reasonable needs of the action. That is similar to proportionality, and the right approach.

396, Steven J. Twist: Eliminating subject-matter discovery as part of the proportionality revision is good.

398, Shira A. Scheindlin: "I have not heard any disputes regarding the scope of permissible discovery" since the distinction between claims and defenses and subject matter was adopted. "I suspect the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not." Eliminating this distinction will send a signal that the scope of discovery is being narrowed. There is no reason to do that. And some experts have claimed that restricting discovery to what is relevant to a claim or defense "might preclude discovery of significant metadata accompanying electronic records that is necessary to permit the use of technology assisted review."

402, Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: This change "will prevent legitimate claims and defenses from being raised." The claim or defense may never come to light, or it may come to light too late and either be precluded or become the subject of a costly second action. And it ignores the plight of parties who reasonably believe they have a claim but lack the information needed to plead it to the standards required by Twombly and Iqbal. It systematically favors parties who have better access to information outside the discovery process.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: It is better to require proportionality and relevance to the parties' claims or defenses "than being guided by the amorphous standard of 'relevant to the subject matter involved in the action.'"

407, David J. Kessler: Eliminating subject-matter discovery is appropriate. "[C]urrent Rule 26(b)(1) is often abused and discovery is allowed into tertiary issues of only marginal relevance * * *." Reducing the scope is necessary; a reactive approach that tries to find cheaper ways to produce is doomed to failure because the exponential increase in the amount of information defeats any ability to control costs once the data is discoverable.

408, Elliot A. Glicksman for Arizona Association for Justice: The proposal turns the focus of discovery from the subject matter of the litigation "to the specifics of often yet unknown but relevant and discoverable facts."

414, John R. Scott: Substituting proportionality for any matter relevant to the subject matter should help reduce costs and ease discovery burdens.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: "This deletion removes from a court's discretion the power to order discovery it deems relevant while not expressly connected to the four corners of a complaint." There is no clear dividing line to separate information relevant to the claims or defenses. In securities cases, for example, pre-class period discovery is often permitted to help establish a defendant's state of mind: that seems to bear on the claims or defenses, but why require that the line be drawn? Or in an action based on a false or misleading audit opinion, discovery of audit manuals is allowed: will that still be? One result will be that plaintiffs will draft still longer and more detailed complaints.

418, Harlan I. Prater, IV: Eliminating subject-matter discovery "would reduce the unnecessarily high costs and burdens of modern discovery."

427, John F. Schultz for Hewlett-Packard Co.: It is good to ensure that discovery is limited to the claims and defenses set forth in the pleadings. But this should be tightened further by requiring that the matter be "relevant and material" to the claims or defenses.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports elimination of "subject matter" discovery. "Creating a unitary standard for the scope of permissible discovery will simplify the discovery practice." (p. 4, n. 1, recognizes that the Department opposed separating out subject-matter discovery for a good cause showing in the 2000 amendments, but has concluded that intervening developments warrant the proposed amendment.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Limiting discovery to the claims and defenses, as opposed to the subject matter, "should help to reduce costs and discovery burdens."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: This comment provides a detailed opposition to the change, strongly recommending that it be abandoned. Very few discovery disputes now focus on the distinction between what is relevant to the claims or defenses and what is relevant to the subject matter. The parties know the court will decide what discovery is appropriate without paying attention to the distinction, and if pushed will decide that what is appropriate relates at least to the subject matter. In most cases, the present rule establishes a "distinction without a difference." But eliminating it will encourage litigious parties to make objections they do not make now. It also will encourage parties to plead broad claims that will become subjects of motions to dismiss on the pleadings. And it will work to the disadvantage of an inarticulate party who cannot explain why requests are relevant to a claim or defense. The 2000 Committee Note offered impeachment information as something properly discoverable "although not otherwise relevant to the claims or defenses"; the change may have the unintended consequence of curtailing such discovery. Time should be allowed to develop experience with the proposed proportionality provision before considering whether to abandon subject-matter discovery.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) Decisions applying the provision allowing discovery relevant to the subject matter of the litigation for good cause "suggest that courts have exercised their discretion sparingly and appropriately." (2) "It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims." In an action against an individual government official, for example, is discovery that would enable the plaintiff to find the facts necessary to impose liability on the governmental employer relevant to the plaintiff's claim? 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports limiting discovery to what is relevant to a party's claims or defenses.

729, Stephen B. Burbank: "The elimination of subject matter discovery (upon a demonstration of good cause) can only seem 'modest' or 'moderate' if one neglects the history * * * and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination would have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so."

785, J. Bernard Alexander III, Wendy Musell, for California Employment Lawyers Assn.: It is

quite normal and necessary to discover information relevant to the subject matter, although not to a claim or defense. Discovery may be needed of a defendant's computer systems or information hierarchies, though this is never relevant at trial. Information may be needed to test a claimed privilege.

797, Michael Murphy: Decries "attempts to discover information in a filed action that is not relevant to the filed action but may be relevant to some other matter being handled or considered by the same plaintiff's attorney in a different venue."

995, William P. Fedullo for Philadelphia Bar Assn.: "[T]he proposed amendment will not impair a party's right to obtain the discovery it actually needs, and it will protect the responding party or nonparty from the burdens imposed by discovery that, in the end, provides no benefit to anyone." Many courts and commentators have observed that the separation of subject-matter discovery from claim-or-defense discovery in 2000 "did not bring about a major shift in the scope of party-managed discovery."

1054, Assn. of Bar of the City of New York: A majority favors the proposal. "It is rare that a party expressly seeks discovery of matters that cannot reasonably be tied to the claims or defenses already presented in the case, and rarer still for the court to grant such discovery." Discovery "was never intended to provide an opportunity to seek evidence to support other claims that have not been alleged." But the Committee Note should say that leave to amend should be freely granted.

1413, Jocelyn D. Larkin for Impact Fund and several others: "There is no evidence that this language has led to excessive or unduly expensive discovery, but it serves as an important safety valve in rare cases. In systemic reform cases, the facts pertaining to the individual plaintiffs' claims may not encompass every aspect of a challenged policy."

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports. "The revised language would compel parties to articulate their need for specific discovery in light of practical considerations pertaining to the case and parties."

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "For example, if a plaintiff has not specifically alleged that the defendant was driving under the influence of drugs in the complaint, the new rule might limit discovery of mandatory drug tests and prevent discovery whether a driver was on drugs or had a history of driving on drugs."

1692, Jan M. Carroll for Barnes & Thornburg: Approves deletion of the "subject-matter" provision. "All too often, we have seen opposing parties seeking discovery that has no bearing on the present action, and instead is designed to develop theories for future litigation."

1703, Hon. Michael H. Simon: Subject-matter discovery has not created undue burdens for the court or parties. It should remain available in the court's discretion.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The distinction between information relevant to claims or defenses and information relevant to the subject matter of the action is unclear. The 2000 Committee Note shows that the actual scope of discovery should be what fits the reasonable needs of the action; "ultimately the distinction between the two tiers of discovery is irrelevant. The fact is that the maintenance of a separate category of discovery * * * is likely only to lead to additional satellite litigation." And it is difficult to see

why discovery not relevant to any party's claim or defense should be allowed."

2209, Richard Talbot Seymour: Recent interpretations of Rule 8 combine with Rule 11 to limit the allegations that may properly be made. Eliminating subject-matter discovery will make it much harder to uncover the information needed to plead a meritorious claim that cannot be pleaded without discovery.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 "The big change is moving away from being able to ask a judge for evidence that's relevant just to subject matter * * *." But "I've never sat down and argued with somebody about whether or not something is discoverable because it's related to subject matter. They always argue that it's relevant, and relevance is a very, very broad concept."

January Hearing, Jocelyn D. Larkin: p. 125 In litigation seeking reform of governmental and corporate conduct, discovery of the subject matter beyond the pleaded claims and defenses can be important. When the object is systemic institutional reform, "it may go beyond the specific facts of that person" who appears as plaintiff claiming one specific form and incident of discrimination. The Committee may contemplate a generous interpretation of what is relevant to claim or defense — a systematic practice of discrimination may help prove the individual claim. But the change will be read to narrow the scope of discovery.

February Hearing, Mary Nold Larimore: p 68 This change will go a long way to culling out the irrelevant custodians whose hundreds of thousands of documents are currently being collected and produced and reviewed.

RULE 26(b)(1): NEED NOT BE ADMISSIBLE — "REASONABLY CALCULATED"

Revealing misquotes: A number of comments quote the current scope of discovery as "relevant or likely to lead to the discovery of relevant evidence."

270, Ohio Association for Justice, by John Van Doorn: It is a mistake to delete the present provision for discovering relevant information that may lead to admissible evidence. Rule 11(b) recognizes the legitimacy of claims founded on a reasonable belief that reasonable opportunity for discovery will provide evidentiary support. The 1946 Committee Note recognizes that discovery that yields useful information is successful, even if it does not produce testimony directly admissible.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Striking the sentence allowing discovery of information reasonably calculated, etc., is welcome. "[B]oth practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material." The sooner it is deleted, the better.

290, Randall E. Hart: The premise in discussing the proportionality factor is that the "reasonably calculated" provision "creates a presumption of discoverability" that makes discovery flow smoothly. The multifactor proportionality test will undercut this.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The "reasonably calculated" provision "has been misapplied by courts and litigants to expand the scope of permissible discovery * * *." The Committee Note "should clarify that the deleted language was misconstrued and that is the reason for the deletion." The substitute language, focusing on information within the scope of discovery as defined by Rule 26(b)(1) is proper.

307, Hon. J. Leon Holmes: See the summary on proportionality. Opposes the change, in terms that seem to rely on the "reasonably calculated" provision to define the scope of discovery as Rule 26(b)(1) stands now.

309, Kaspar Stoffelmayr: Everyone understands that hearsay should be discoverable. But the "reasonably calculated" provision is repeatedly taken by courts "to articulate an extremely broad standard for the scope of discovery." Relevance is interpreted to allow discovery of anything except information that "has no possible bearing on the subject matter of the action." Materiality should be required.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): This proposal "helps focus discovery on relevant information and can stem the tide of overly broad document production."

327, Malini Moorthy for Pfizer, Inc.: Endorses eliminating the "reasonably calculated" language.

328, U.S. Chamber Institute for Legal Reform: This change is important. "[S]ome courts have found that information is presumptively discoverable as long as there is 'any possibility' that the information relates to the 'general subject matter of the case,' and that resisting discovery is only appropriate where the information sought has 'no possible bearing' on the issues pled in the complaint or those that may arise during the litigation."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: The "reasonably

calculated" standard is vague and overly broad. It has driven up the costs and time of discovery.

338, Steven D. Jacobs: Discovery works well now in civil rights and employment discrimination cases. Substituting "a proportionality rule for the broad and eminently workable 'reasonably calculated' standard[] will only serve to make the courts essential referees in the discovery process." There are no empirical data showing widespread abuse.

343, Doug Lampe for Ford Motor Company: "[P]arties justify their discovery requests by stating that such requests may 'lead to the discovery of admissible evidence' — all but ignoring the rule's express invocation of a relevance standard — and by identifying a policy expressed nowhere in the rules themselves — that discovery should be 'liberal and broad.'" Removing this troublesome phrase will require the parties to focus on discovery necessary to assert a claim or present a defense.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The reasonably calculated standard is well understood. "It does not permit limitless discovery." Lawyers understand this as the scope of discovery standard. Changing it will cause more problems than will be solved. Proportionality will become a boilerplate objection. "The reason that our present Rule works so well is that it recognizes the importance of permitting all potentially relevant information to be uncovered."

345, Kim Stone for Civil Justice Association of California: Applauds deletion of the "reasonably calculated" sentence.

351, Eric Hemmendinger for Shawe Rosenthal LLP: The "reasonably calculated" provision "is commonly misread as allowing virtually unsupervised discovery." The rule should be strengthened by requiring that requested information be material, not only relevant.

353, Kenneth D. Peters, John T. Wagener: Deletion of "reasonably calculated" "should further streamline the discovery process."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: The present standard is well understood and workable. Removing "reasonably calculated" "significantly narrows the scope of discoverable information," severely impacting the ability of those who most need discovery, typically plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: Removing the "reasonably calculated" phrase broadens the scope of discovery. The new language contains no limits. Proportionality does not provide any guide to what is relevant. And it will become the primary focus, with its five factors.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as the present definition of the scope of discovery. Substituting proportionality is challenged.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope.

381, John H. Beisner: "[B]oth courts and counsel have interpreted the 'reasonably calculated' wording in the rule in a manner" that broadens the scope of discovery beyond relevance and obliterates all limits. It should be deleted.

383, Alan B. Morrison: Couples this with the "subject matter" point: it may be acceptable to delete the "reasonably calculated" part, but this should be ameliorated by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: "What is the purpose of this change"?

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: The "reasonably calculated" language "too often allowed relatively unfettered acceptance of the need for further discovery." It is properly eliminated.

390, J. Mitchell Smith for International Assn. of Defense Counsel: The "reasonably calculated language" "has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery." Eliminating it would effect substantial reductions in unwarranted discovery.

396, Steven J. Twist: Eliminating the "reasonably calculated" sentence is good.

398, Shira A. Scheindlin: "There is no empirical evidence that this language has caused any real problems." The rule specifically requires that the information be relevant, meaning relevant to a claim or defense. "It does not expand the scope of relevance or create an exception that swallows the rule." This will be seen as another signal narrowing the scope of discovery.

399, Edward Miller: The "reasonably calculated" language "has erroneously been used to establish a very broad scope of discovery." This is a necessary and important change.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The "reasonably calculated" language "has become a common justification for discovery 'fishing expeditions.'" It also limits what Courts can do to restrict the volume of information sought. However, the use of this language in this fashion is erroneous. But "both practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material."

407, David J. Kessler: The Committee is right. "The current formulation of this rule has confused courts and parties, expanding discovery beyond what was intended" by the "reasonably calculated" sentence. "The fact that a party is seeking information that would not be admissible at trial should not prevent it from seeking discovery, but neither should it expand the scope of discovery beyond its defined limits." Indeed the case law reflects a growing trend "to pressure, or even order, responding parties to produce non-relevant or privileged documents to opponents for the sake of speed or cost-effectiveness." The idea seems to be that the availability of clawback agreements and Evidence Rule 502 mitigate the risks of privilege waiver. But these devices do not bear on the many other reasons for review and nonproduction, including withholding data privacy information, culling irrelevant data, and learning about the documents at issue." The Committee Note should state that documents that are actually privileged or not relevant are outside the scope of discovery, and courts should not compel production.

408, Elliot A. Glicksman for Arizona Association for Justice: The "reasonably calculated" language is "some of the most important language that courts have traditionally used to permit broad discovery." The Rule 26(b)(1) proposal significantly narrows the category of potentially discoverable materials.

412, Mark S. Stewart for Ballard Spahr LLP: "Discovery is not an unfettered right." Relevancy has been construed to encompass any matter that reasonably could lead to other matter that could bear on any issue in the case. That leads to such requests as those for "any and all documents" related to a particular topic. Litigants sometimes seek irrelevant data to expand the scope of the issues or to find evidence for other cases. They share general liability documents — in drug cases, for example, they seek documents concerning drugs not specifically relevant to their claims to supplement discovery in other cases or to create a basis for pursuing other cases. And the volume of discovery in multidistrict or coordinated proceedings may become a basis for allocating global settlement costs and fees among plaintiffs' firms. Requiring greater specificity in requests will force more fruitful negotiations about the proper scope of discovery. The "reasonably calculated" approach will be deflated. But to make sure, "materiality" should be an added limit on the scope of discovery, at least in the Committee Note.

414, John R. Scott: Supports abandoning the "reasonably calculated" standard.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

418, Harlan I. Prater, IV: The "reasonably calculated" language "is often erroneously used to establish an overly broad and costly scope of discovery." The proposed amendment preserves the original purpose to clarify that inadmissible evidence such as hearsay can be within the scope of discovery so long as it is relevant.

419, William R. Adams: The "reasonably calculated" language is unnecessarily broad, "and allows for improper 'fishing expeditions' by opponents whose theory of the case has either never been fully developed or, through discovery, has proven to be incorrect." Eliminating it will be a significant step toward reducing unnecessary costs.

421, Louis A. Jacobs: First suggests that "The Committee could remedy excessive discovery by removing the 'reasonably calculated' language; relocating proportionality is overkill." But later suggests that removing this language will hamper party negotiations about the scope of discovery. Starting with the view that discovery abuse is rampant would lead to deleting this sentence. But starting with the view that abuse is sporadic would preserve the sentence and the precedent interpreting it.

434, James Moynihan: The volume of material produced in discovery has grown at an almost incomprehensible rate. Elimination of the "reasonably calculated" phrase is particularly welcome, as is proportionality.

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: As both defendant and plaintiff, supports Rule 26(b), endorsing comments by Lawyers for Civil Justice, Bayer Corp., Ford Motor Co., and Pfizer Inc. Rather than repeat those comments, offers several examples of cases in which only a tiny fraction of documents produced in discovery were listed as trial exhibits. In one of the examples, 391,000 documents were produced; the plaintiff listed 805 as trial exhibits, and 146 were admitted.

445, Gerald Acker, for Michigan Assn. for Justice: The "reasonably calculated" standard is relatively objective, calling for discovery "to be directed at possibly locating admissible evidence." It should not be replaced by proportionality.

452, David Hill: Drawing on many years as CFO of various companies, supports focus on the claims and defenses, not any information that might lead to admissible evidence.

454, John Brown: Supports narrowing discovery to focus on the claims and defenses, not "searching for information that might lead to admissible evidence."

455, W. Michael Scott for CrownQuest Operating, LLC: The "reasonably calculated" provision is overly broad. Discovery should be limited to what is actually relevant and material to the claims or defenses.

456, Niels P. Murphy writing for eight lawyers: Eliminating the "reasonably calculated" provision "would help curtail unnecessary discovery and reign [sic] in the very broad scope of discovery erroneously brought about by this language."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Removing the "reasonably calculated" language is "intended to remove awkward if familiar language rather than change substantive standards." Additional language in the Committee Note could avoid the risk of uncertainty among practitioners, some of whom may see this as narrowing the scope of discovery. Suggested Note language: "Although the 'reasonably calculated' language is deleted because it has been misconstrued to permit discovery of non-relevant information without limitation, the scope of what is discoverable under the Rule remains unchanged."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Removing the "reasonably calculated" language "marks a significant change in the manner in which relevance is defined * * * and raises questions regarding the continued validity of numerous cases decided based on the existing standard." It would be better to retain it in some form, perhaps: "This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence." Supports abandoning the "reasonably calculated" standard.

467, Michael Freeman: (Tort counsel for Walgreen Co.): The "reasonably calculated" provision "has been broadly interpreted, resulting in significant discovery costs — particularly to corporate defendants." It is good to replace it with proportionality, a limitation that "is reasonable, open to fair interpretation and proper enforcement."

483, Kenneth Wittenauer: The "reasonably calculated" provision "has been broadly interpreted, resulting in significantly increased discovery costs — particularly to corporate defendants." Striking this provision, and inserting proportionality into the scope of discovery, are supported.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Defense lawyers at the conference noted that the "reasonably calculated" language "tended to overshadow the rule and distort the scope of relevancy."

501, Martin D. Stern: In both small- and large-stakes litigation, "reasonably calculated" leads to discovery that does not speak to any case issue; courts are hesitant to deny "since there is a plausible argument that it could somehow lead to admissible evidence."

524, Joel S. Neckers: "Reasonably calculated" "has created immense and unsustainable burdens." But the tradition of overly broad discovery is so well established that the amendments may not be effective.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no "documented problem" with the "reasonably calculated" provision. The Committee's concerns seem to rely on anecdotal impressions. Since

2000, the rule requires that the information be relevant. The amendment will suggest that there is an area of information reasonably calculated to the discovery of admissible evidence but is not relevant to the claims or defenses, hence not discoverable. This in turn will be read to narrow the meaning of what is "relevant." 2078, Judith Resnik for 170 added law professors: supporting this comment.

642, Cal Burnton: "[T]he only constants about company records are that things are not organized, easily found, or even generally known to exist." The "reasonably calculated" standard provokes searches far beyond what is warranted.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports elimination of the "reasonably calculated" formulation.

995, William P. Fedullo for Philadelphia Bar Assn.: The "reasonably calculated" phrase "has led to an overly expansive definition of the scope of discovery." It tends to creep beyond the original purpose to arguably expand the scope of discovery beyond relevant information and documents. (A dissent argues for retaining this well-developed concept.)

1054, Assn. of Bar of the City of New York: Supports "the objective of this change * * * to better express the scope of discovery that has always been intended." The Committee Note should observe that the amendment will not affect the discoverability of metadata relating to particular electronic documents or information about a party's computer system.

1206, Karen R. Harned for National Federation of Independent Business: "The typical NFIB member employs 10 people and reports gross sales of about \$500,000 per year." A 2011 report shows that in 2008 the total tort liability expenses of businesses with less than \$10,000,000 in revenue was \$105.4 billion, including all expenses and sums paid to plaintiffs. These businesses bore 81% of business tort liability costs, but took in only 22% of total revenue. Their concerns with litigation are different from the concerns of large enterprises. They lack the sophisticated legal advice that in-house counsel can provide. Federal litigation is inefficient, expensive and fraught with uncertainties that have nothing to do with the merits. The Rule 26(b)(1) proposals will provide some measure of relief, particularly deleting the "reasonably calculated" provision.

1228, William E. Partridge: In one case the defendant produced a document with one page missing from the sequential numbers. After many motions, confronting repeated denials that the page existed, the page was produced and proved to be the "smoking gun." The discovery would not have been allowed if the "reasonably calculated" provision had not been available.

1269, Robert L. Levy for 309 companies: 309 companies sign on to this comment. The "reasonably calculated" provision "has been abused by parties and misconstrued by many courts." Eliminating it will bring the scope of discovery back to the reasonable intention of the original drafters.

1608, Jonathan M. Redgrave: "This is a critical change." The reasonably calculated phrase "appears in over 2,400 reported decisions, although few have any discussion of the genesis or meaning of the language. Worse, many of the cases immediately equate the phrase with the concept of 'broad discovery' as a right, resurrecting notions of discovery that pre-date the limitations identified as appropriate in 1983 and 2000."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: The "reasonably calculated"

standard "has, in practice, been used to swallow any reasonable limits on discovery." "Far too often litigants have no explanation as to how the discovery they seek is relevant or conceivably admissible," but fall back on this refrain.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: Many forms of information that do not seem to bear on claims or defenses may be vitally important; the "reasonably calculated" provision enables discovery. "For example, a log book and toll booth receipt from a week before the collision may not seem relevant to what occurred the day of the collision, but have led trucking experts to the conclusion that log books were falsely maintained, which has led to further discovery to show the log books were false the day of the crash, or which have been used to show a pattern and practice of log book abuse."

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: Removing the "reasonably calculated" requirement broadens the scope of discovery "such that a litigant conceivably could ask for discovery that has no bearing on the issue at stake." [Misquotes the proposal as "Information within the scope of discovery, rather than "this" scope of discovery. That may account for the comment.]

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The "reasonably calculated" provision "has too often been interpreted to include any and all discovery that may somehow lead to finding some relevant information."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions; a member of DRI board.) Along with adopting proportionality, it is important to revise the "reasonably calculated" provision. It "is too broad to define." It leads to discovery orders that are too broad. An example is provided by a product liability action involving a medical device. FDA approval rested on predicate devices that are comparable in performance, but not in design or type of technology. But the court in such a case ordered discovery as to all of the predicate products as reasonably calculated to lead to discoverable evidence. That included dissimilar products and adverse events. In this case, all the predicate products were made by the defendant. In other cases, nonparties might be afflicted with the burden of such discovery.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 Revising the "reasonably calculated" provision is troubling for all the reasons that make proportionality troubling.

November Hearing, Wayne B. Mason: p 142 The most important proposal is the one that removes the language with respect to "reasonably calculated." Many lawyers mean it believes "you could pretty much have anything you wanted." This happens in state courts and in arbitration as well as in federal courts. Rule 26 has become an issue of leverage. "E-discovery has changed the world." Massive information is available, even from small businesses and individuals who have smartphones and tablets. Once you identify the documents they have to be reviewed for privilege, work-product protection, "and things like that." "Reasonably calculated" means I have to produce 2 million documents, while only two dozen of any significance wind up in trial. The same two dozen would be discovered with a narrower scope of discovery — any lawyer with the intelligence to pass a bar exam can frame requests that will lead to production. Predictive coding is a good idea, "but it is only one step and it is not the answer. * * * You can't get agreement on it. You can't afford to use it. And so, as a practical matter, it's used very little." And you still would have to review a ton of documents.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Taking out the

"reasonably calculated" language will increase corollary litigation.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 It is clear that the "reasonably calculated" provision was never intended to define the scope of discovery, but eliminating it and pushing proportionality into the scope of discovery "will allow us then to focus on proportionality as it relates to the discovery that is necessary for the type of case that is being prepared."

January Hearing, Jon L. Kyl: p. 45, at 47: "Many have misunderstood this language as really reflecting the real standard for discovery."

January Hearing, Quentin F. Urquhart for IADC: p 133 "Reasonably calculated * * * has really swallowed the entire rule," allowing discovery "based on the hope that this search might, quote, lead to, closed quote, some other type of information that might be admissible at trial."

February Hearing, Mary Nold Larimore: p 68 This change will go a long way toward focusing on what is important.

February Hearing, Michael J. Harrington: p 121 Offers examples of vastly expensive discovery, and offers support for Rule 26(b)(1) — the greatest benefit "is the changed language to get away from the old standard, which I think is very broad, and leads to excessive discovery." This seems to reflect not so much proportionality as either "reasonably calculated" or "subject-matter" discovery, or all of them.

February Hearing, Leigh Ann Schell: p 179 Moving away from relevance to the subject matter, and especially eliminating the "reasonably calculated" phrase, is important. "Reasonably calculated" was not intended to expand the scope of discovery, but it has been overused and overblown. The proposal is a return back to what was intended in the first place.

February Hearing, John Sullivan: p 231 "Reasonably calculated" generates "the hugely open-ended standard we have always had." Adopting a tighter standard is good.

February Hearing, Donald J. Lough: p 248 "The root of this over discovery problem is the reasonably calculated clause in Rule 26." The comments that oppose removing this language, arguing that it is the core standard of relevance, show that it is misconstrued. Courts too often delay a determination of relevance until it is too late — they punt on the discovery objections, and then at trial time the documents are excluded as not relevant.

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Endorses eliminating "reasonably calculated" because it "has turned into a giant loophole."

RULE 26(b)(2)(A): ALTER NUMERICAL LIMITS, RULE 36

No comments. See Rule 36.

RULE 26(b)(2)(C)(III)

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Discovery will be mandatorily narrowed if the court finds an item does not meet the rigors of 26(b)(1). "[O]ther vehicles for discovering those materials will be off-limits."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

RULE 26(C)(1)(B): ALLOCATION OF EXPENSES IN DISCOVERY ORDER

267, Lawyers for Civil Justice, by Alex Dahl: This is a small but important step toward the more important goal of revising the default "rule" that a producing party must pay the costs of responding. 540, Alex Dahl for Lawyers for Civil Justice: And the proposal should go further to recognize expressly that a protective order can protect against overly costly preservation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section agrees that this cost-shifting power is implicit in present Rule 26(d). But the rule text, or the Committee Note, should make it clear that allocating expenses does not alter the American Rule and does not authorize allocation of attorney fees incurred in connection with disclosure or discovery. Attorney fees are not the kind of expenses that should be allocated. And notes that "[t]he cases are not uniform on whether courts have authority under the Rule to shift costs associated with the search and review of accessible data." November Hearing: Michael C. Rakower, p 287: The Section does not think the proposal is intended to change the American Rule, but it might be advisable to say so in the Committee Note.

311, James Coogan: Individual plaintiffs may be saddled with immeasurable costs. This creates an incentive for defendants to increase costs.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): "[W]hen our clients have included cost-shifting provisions within their Rule 26(c) protective orders, opposing parties have asked for fewer documents and focused their requests * * *." "[T]he amendment explicitly encourages courts to take an active role in shifting the costs of discovery."

325, Joseph M. Sellers: Present Rule 26(c) authorizes cost allocation. It is a mistake to emphasize it further; if the proposed language is added, "the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources." And as with Comment 303, New York State Bar Association, it should be made clear that attorney fees are not among the expenses to be shifted to the requesting party — that would be an unwarranted departure from the American Rule. And three more points: (1) Cost shifting is unnecessary to deter excessive requests: the requesting party incurs costs to conduct depositions, and to review and analyze responses to interrogatories and documents. This is particularly true with electronically stored information — a party requesting it has ample economic incentive to make narrow requests. (2) The responding party is in the best position to control costs. If it bears the costs, it has every incentive to reduce costs; if it shifts the costs, it has less incentive to maintain records in readily accessible formats or to employ efficient search strategies. (3) Particularly in civil rights and employment cases, there is an asymmetry in the parties' resources and their access to evidence without formal discovery. If ordered to pay, a plaintiff may forgo discovery and be forced to proceed without the information.

328, U.S. Chamber Institute for Legal Reform: The root cause of our broken discovery system is the rule that generally the producing party bears the costs of producing. "This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself." The problem is exacerbated by electronically stored information. A RAND study found that the median total cost for ESI discovery among the firms who participated totaled \$1.8 million per case. The present practice deprives the producing party of its property — the money spent to produce — without due process of law. There is nothing but the plaintiff's unilateral allegation of liability, no judicial hearing. Even a hearing on

a motion to dismiss or for judgment on the pleadings does not provide the required process before inflicting these costs. The costs of discovery should be placed provisionally on the person asking for it, giving incentives for the optimal level of production. A safety valve can be incorporated for the unusual case considering "whether the party from whom information is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies." "This system would also facilitate greater and more direct court involvement in discovery."

Failing that, a more modest "solution would be presumptive cost-shifting for electronic discovery." The result would be narrower requests, reducing the prospect of infringing a defendant's due process rights. Or, failing that, "[t]he Committee might codify the factors articulated by" the ABA Section of Litigation Civil Discovery Standards, 29b.iv.A-P (2004).

343, Doug Lampe for Ford Motor Company: "In Ford's experience, judges are almost uniformly unwilling to consider meaningful cost-allocation proposals even in cases of clear discovery abuse." Defendants sometimes settle meritless claims to avoid the cost of onerous discovery demands. "Making explicit the provision for protective orders that allocate the costs of discovery would deter parties from engaging in abusive discovery tactics." The problem is illustrated by a specific case in which a state court ordered Ford to retrieve records from more than 1,300 other lawsuits and 1,200 witness transcripts, many involving closed cases and off-site archived records maintained by outside law firms. This effort cost \$2,000,000, and yielded nothing actually admitted in evidence at trial. The court allowed Ford to recover only the few thousand dollars incurred for reasonable copying costs.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: This will have a chilling effect on discovery. Individual plaintiffs have no way of assessing the cost of production. "Permitting cost shifting will encourage efforts to thwart discovery by making it expensive to locate and produce evidence and/or artificially inflating the cost of locating and producing evidence." The rule will discourage development and use of archival systems that reduce the cost of production.

351, Eric Hemmendinger for Shawe Rosenthal LLP: "Cost sharing is the best single method of forcing counsel to ask whether discovery is really necessary." Many employment plaintiffs have limited means, but "even partial cost sharing would cause counsel to engage in a cost-benefit analysis before conducting discovery." And it should be remembered that many collective and class actions "are essentially business ventures organized by plaintiffs' counsel."

353, Kenneth D. Peters, John T. Wagener: "This provision * * * will force parties to think twice before seeking large amounts of discovery which may prove marginally useful."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: The amendment is superfluous because the authority is already there. In nursing home litigation, it is common to be allowed discovery of incident reports documenting injuries only under a protective order. "[T]he proposed change appears to deliberately enumerate the awarding of costs as a formalized duty for the court." [This seems to say that costs must be awarded whenever a protective order is granted for any reason.]

360, Robert Peltz: Practices maritime law in S.D.Fla. A combination of a ruling by a Florida appellate court and forum-selection clauses in cruise ship contracts means that the overwhelming majority of actions by injured passengers must be filed in S.D.Fla. Passengers from around the

country can ill afford to litigate there now; adding responsibility for the defendant's costs in responding to discovery would make it economically impossible for many individuals with meritorious cases to bring them.

372, J. Burton LeBlanc, for American Association for Justice: Does not object, but the Committee Note should be expanded to say that these new words do not change the presumption that the responding party should bear the costs of producing discovery. Any more general "requester pays" rule should be limited to litigation between large corporations.

381, John H. Beisner: Writes at length to urge broad expansion of "requester pays." Due process interests are at stake in a system that enables one party to inflict the costs of discovery on another party without any pre-deprivation hearing. One approach would be to establish a general rule that each party pays the costs of discovery it requests, subject to adjustment by the court on considering such factors as whether the responding party preserved information in forms costly to retrieve, failed to provide relevant information during initial disclosures, or drove up the price of discovery through its litigation strategies. Alternatively, the rules might simply mandate that the court consider cost shifting in any case in which discovery of ESI is sought. The need for some such relief will only grow as third-party litigation financing expands. Investors in litigation are almost assured that they can recoup the investment because it is possible to impose such great discovery costs as to coerce settlement on terms that at least cover a plaintiff's litigation expenses.

383, Alan B. Morrison: Allocation of expenses can be a reasonable element of a protective order. But the Committee Note should make it clear that this should not be routine, but used only "where the losing party was unreasonable in either the making of an objection or pursuing the request."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Considering the cost of discovery will have a welcome tempering effect on the desire for additional discovery.

398, Shira A. Scheindlin: "[C]ost-shifting has crept into the rules and the more often it does, the more likely we are to see a change in the American system of litigation." In 2006 the Committee suggested that cost-shifting can be a condition for producing ESI that is difficult to access. The new rule, in combination with Rule 26(b)(2)(B), "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without." That should not become our default position.

414, John R. Scott: This proposal "will offer substantial relief from excessive costs of discovery. The mere existence of this rule will likely cause litigants to be more thoughtful in making their discovery demands."

427, John F. Schultz for Hewlett-Packard Co.: "The ability to allocate the expenses of broad discovery requests to the requesting party would likely reduce the scope of such requests and encourage greater cooperation by the parties agreeing to search terms or custodians and taking other measures to reduce the overall burden of discovery * * *."

428, Dave Stevens: Writes as owner of a small campground to support "increasing judicial authority to charge the plaintiffs for unreasonable costs they generate on such things as discovery."

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: This may be the most

important, and have the greatest impact, of all the proposals. "[I]f properly and routinely applied by courts, the amended rule should focus discovery on information critical to the parties' claims and defenses." "But the key is the application * * *." The authority exists now, and is seldom used. Change must include consistent application.

446, Stephen Aronson: The rules should adopt a requester-pays system to reduce unreasonable time and cost in discovery.

447, Charles Crueger: (This comment may interpret the proposal as a general requester-pays rule:) It is unwise to have the requesting party pay. The requester almost never knows what documents the other side has, and cannot predict whether the discovery will be worth the cost. The producing party has an incentive to maximize the costs of production. In large cases, the parties have an incentive to opt out of cost shifting. Much expense, for that matter, results from persisting in reviewing ESI as if it were paper; computer retrieval and review can be much less expensive.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Holding parties accountable for the cost of excessive requests encourages tempered discovery and reinforces the purpose of the amendments to Rule 26(b)(1)."

452, David Hill: Drawing on many years as CFO of various companies, urges that the requester should pay the costs of discovery, and further that we should switch to a rule that the loser pays the winner's costs.

454, John Brown: Favors confirming authority to allocate the costs of discovery to the requesting party, "because then the requester will decide to pay for information they need."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal. "The authority already exists, but expressing the authority in the Rule will clarify any uncertainty."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In some cases the parties have agreed by contract on who bears the risk of counsel fees and costs. Or a statute allocates the risk. But where there is no contract or statute, this proposal is likely to result in shifting the cost to the more affluent party. (The example is a bit puzzling: a large entity objects to the burden of a request by an individual plaintiff, but may be left to bear the cost of responding.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: "the mere presence of this rule will likely cause litigants to be more thoughtful in making discovery demands."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: In the first part surveying various state-court practices and pilot projects, it is noted that a New Hampshire pilot project included proportionality in addressing discovery of ESI, and provided that when a request is considered out of proportion, the court may determine the responsibility for the reasonable costs of producing the ESI. The comment on proposed Rule 26(c) observes that the cost of preserving and reviewing ESI generally should be borne by the producing party, but courts should not hesitate to arrive at a different allocation in appropriate cases.

487, Peter J. Mancuso for Nassau County Bar Assn.: The Note should make clear that "expenses" does not include attorney fees; a fee award would violate the American Rule.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference generally divided along party lines — plaintiffs oppose, noting the authority is already in the rule and fearing that the amendment will imply that shifting costs to the requesting party is the preferred outcome. One suggested that at least the Committee Note should state that the authority to allocate costs does not include attorney fees; the "American Rule" should be honored. Defense attorneys suggested the proposal does not go far enough. Attorneys seldom talk about how much it will cost to produce requested discovery and whether the costs make sense for the case. And one observed that the Committee Note does not say "should"; the purpose of the proposal is to facilitate conversation about the need and justification for proposed discovery.

499, Beth Thornburg: Cost-shifting has been limited to a handful of e-discovery cases that raise unique problems. It should be studied further before anything is done to encourage it.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses without further elaboration.

630, Jon Kyl & E. Donald Elliott: The "producer pays" system of discovery creates perverse incentives. Rather than create incentives that require judicial management, the rules should provide direct incentives for appropriate behavior. "Requester pays" for discovery does provide proper incentives, with needed exceptions for the poor and for exceptional cases. The Committee Note should provide examples that illuminate appropriate requester-pays orders. (1) If an administrative agency has approved the safety of a drug or chemical substance, a party who seeks to second-guess that determination should pay for discovery. (2) When the need for information is in doubt, judges today typically face a choice between allowing discovery and denying it. Requester-pays orders provide an intermediate option — a modicum of free discovery can be allowed, and beyond that allocating the costs to the requesting party creates the proper incentives. (3) When a claim or defense is barely above the pleading and Rule 11 standards, but implausible — unlikely to prevail — requester pays is appropriate.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors the proposal. "Cost sharing is an extremely important issue, and we commend the Committee's plan to focus in the future on potential cost sharing in lieu of the current presumption that the responding party should bear the costs imposed by discovery responses."

677, Noah G. Purcell for Washington State Attorney General's Office: "[S]trongly support[s]" the proposal. The possibility of bearing the financial burden of disproportionate demands "hopefully will encourage reasonableness."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal because it does not substantively alter the current rule. Courts have discretion to award expenses in addition to attorney fees. (A dissent urges that this amendment be postponed for consideration in the projected broader study of possible "requester pays" provisions.)

1040, Pamela Davis for Google, Inc.: Many courts and judges have adopted the recommendations for e-discovery created by the Advisory Council to the Federal Circuit. They include presumptive limits on the production of custodial e-mail data, coupled with cost-shifting for requests exceeding those limits. Google's experience is "that when appropriately employed, such rules reduce the burdens of discovery, without interfering with a party's ability to have its case litigated on the merits."

1164, Stuart Ollanik, for Public Justice: Resubmits a comment from March, 2013, submitted before publication. "One author of these comments has faced multiple situations in which parties responding to either discovery requests or subpoenas have presented wildly inflated cost estimates in seeking a protective order, and many other attorneys report the same thing." The proposal will add incentives to make it more expensive and difficult to access archived information.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that a more aggressive approach to cost-shifting is needed. The presumption that the producing party bears the costs incentivizes over-broad requests; indeed there is a perverse incentive. Asymmetry of information encourages excessive demands by parties who are not subject to countervailing requests. Due process interests are jeopardized by allowing imposition of staggering discovery costs without a preliminary judicial finding of wrongdoing. The rule should establish a presumption that the requesting party pays all or part of the costs of responding. "The presumption could be rebutted by a showing that: (a) the producing party has engaged in intentional, bad faith conduct designed to impede discovery or make production especially burdensome; or (b) the requesting party has established (i) an inability to pay all or a portion of the costs of its requested discovery; and (ii) that the discovery requested is vital or crucial to the litigation." Relevant factors could be discussed in the Committee Note — can costs be shared among a group of plaintiffs, as in MDL proceedings, an organized litigation group, or a class action; or is the lawsuit being financed by the plaintiff's attorney or a third party as part of a profit-making enterprise. The presumption likely would be rebutted on showing that a civil rights lawsuit was initiated by a non-profit organization or an attorney working pro bono.

1461, Larry A. Tawwater for AAJ: This proposal is unnecessary — courts clearly understand they have authority to order cost-shifting under Rule 26(c); see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). This proposal is especially problematic when combined with the proposed numerical limits on discovery — it will become routine to insist that the requesting party should pay for any discovery that goes beyond the presumptive limits. The same problem will arise from arguments based on the new proportionality concept. If this proposal is to be adopted, it should be balanced in several ways. The most important is to abandon the proposed numerical limits. Failing that, the Committee should clearly state that exceeding the presumptive limits is not itself a reason to impose cost-shifting. The rule text, or at least the Committee Note, should reaffirm the presumption that the responding party pays the costs of discovery. Language should be added to exclude attorney fees from "expenses." Language also should be added requiring courts to consider the relative resources of the parties and the intent of the party seeking a protective order, "to ensure that a party who can afford the cost of discovery doesn't simply use Rule 26(c) as a tool to crush its opponent."

1540, Benjamin R. Barnett & Eric W. Snapp: "[D]iscovery cost allocation should be the standard in most cases, rather than just an available remedy."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "When our clients have succeeded in including cost-shifting provisions in their Rule 26(c) protective orders, opposing parties have been far more likely to seek relevant discovery but not discovery that serves only to increase costs and impose additional burdens. We have seen this effect with Rule 45 discovery requests as well: when we offer the subpoenaing party whatever discovery they want as long as they cover costs, requests are dramatically narrowed to what the party truly wants and needs."

1732, J. Burton LeBlanc for American Assn. for Justice: "AAJ does not object to the

Committee's proposed change to Rule 26(c)(1)(B) *per se.*" But the Committee Note should make it clear that this does not change the presumption that the responding party should bear the costs of producing discovery.

2072, Federal Courts Committee, New York County Lawyers' Assn.: The 1970 Committee Note to Rule 34 noted that courts have ample power under Rule 26(c) to protect against undue burden or expense, by "requiring that the discovery party pay costs." "The Committee endorses the idea of limited cost shifting as it can reduce overbroad requests, yet cautions against a total abandonment of the American Rule." The Committee Note should state whether this includes cost shifting with respect to attorney fees entailed in fulfilling the discovery requests — presumably it does — and whether it permits allocation of costs "when the data is accessible for search and review but is excessively voluminous."

2146, John J. Rosenthal: Rule 26(c) should be enlarged to reach not only parties, but also a person "who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things." That would facilitate early resolution of preservation disputes by the court if the parties cannot agree.

2223, Megan Jones for the Committee to Support the Antitrust Laws: This proposal "will likely make stipulated protective orders a thing of the past. * * * Inevitably, before discovery even starts, the parties will be turning to the courts to determine who pays for what at a time when knowledge about what ESI exists is at its most basic."

November Hearing, Jeana M. Littrell: p. 16: This amendment is needed. Experience shows that judges are too reluctant to order the requesting party to bear the cost of discovery in appropriate circumstances.

November hearing, John C.S. Pierce: p. 25: Favors cost allocation.

January Hearing, Jon L. Kyl: p. 45, 48: Allocation "gets the incentives right." "[A] party who determines that he really or she really needs something should have the ability to get it if that party is willing to pay for it." This is not a general requester-pays rule, nor one that assumes that some core of discovery is free while anything more is requester-pays. But to be effective, the rule should explain how the power is to be used. Examples should be given. One example would be a presumption for requester pays when the litigation advances a position contrary to an administrative determination — for example, a determination that a drug is safe.

February Hearing, Mary Nold Larimore: p 68 The Committee Note in 1970 observed that the court has ample power to protect against undue burden and expense, including by a requirement that the discovering party pay costs. This proposal "is going to give judges the opportunity once again to put sensible cost allocation into place." An example is provided by a case in which we won an order allowing us to make available a document repository created by a co-defendant. The order set a price of 8 cents per page for access. Over more than a year, no one has made any effort to look at anything in the repository. "One of the best ways to find out the marginal value of these document productions is to assess the cost." But cost allocation should be routine.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p. 104 Some courts and litigants think courts already have this power. If the proposal is adopted, it should be made clear that the default rule is the American Rule that each party bears its own costs. One party should be made to pay another party's efforts to collect and analyze information only in extreme and unusual circumstances.

February Hearing, Donald J. Lough: p 248 In cost-sharing jurisdictions, "when we are able to present a bill to our adversaries for their fair share of the cost of discovery, they very quickly can make a decision about what they need, and what they don't."

RULE 26(d)(2): EARLY RULE 34 REQUESTS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems. (The comment is ambiguous as to which part of Rule 26(d) it addresses.)

292, Lyndsey Marcelino, for The National Center for Youth Law: Serving discovery requests before the Rule 26(f) conference is likely to improve discovery for this plaintiffs' advocacy group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports the proposal, agreeing that it would facilitate the Rule 26(f) conference. "The Section also does not believe that initial requests made before the Rule 26(f) conference are likely to be any broader than requests served after the conference, although that is a possibility." And over-broad requests can be appropriately narrowed at the conference or, if necessary, by the court. November Hearing: Michael C. Rakower, p 287: Repeats the support. Early Rule 34 requests will mean the parties can face actual, real-life issues during the Rule 26(f) conference.

381, John Stark: There is a need for much greater control of Rule 34 requests. Encouraging even earlier requests goes the wrong way.

383, Alan B. Morrison: (1) Supports the idea, but asks why it is limited to Rule 34. Rule 33 interrogatories and Rule 36 requests to admit will give a better idea of what the case is about. (2) Rather than include a complicated provision for the date of service, it would be better to provide: "(B) Time for Response. The time and place for a response to the request shall be stated in the scheduling order under Rule 16(b)."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ny benefit of the proposal's accelerated schedule likely will be outweighed by a lack of focus in prematurely promulgated discovery requests. Instead, the Department recommends amending Rule 26(f)(3)(B) to clarify that anticipated document requests are to be discussed during the 'meet and confer' process." That will accomplish the goal. The discussions are needed to develop a better understanding of what discovery will be relevant. Pre-Rule 26(f) requests "typically will be less tailored or more burdensome," leading to increased motion practice. The requests may be satisfied or narrowed by agreement as to initial disclosures or the scope of the dispute. And a party who delivers early requests may become committed to them. There is a particular risk with requests formulated before the parties confer on the proper scope of ESI discovery. Finally, the time to respond should be geared to the conclusion of the complete 26(f) conference process, not to the first 26(f) conference.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was not much discussion at the conference, but there was support. And some suggested that this approach should be extended to other forms of discovery.

494, Charles R. Ragan: Neutral, but the Committee Note should emphasize that the requests should be tailored to the claims and defenses, not the traditional "any and all re X category."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "[S]trongly opposes. We believe that it would aggravate rather than reduce the adversarial nature and expense of discovery." Requests will be framed without the advantage of initial disclosures or the Rule 26(f) conference. The proposed provision "will devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage. That, in turn, will lead to disputes at the Rule 26(f) conference that will actually impede the progress of the case."

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": This is not likely to streamline the process, but "most of us do not feel strongly about this change."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. This device is already permissible, and "gives the parties the opportunity to address substantive discovery issues concretely at the Rule 26(f) conference and, thereby, promotes a more efficient discovery process."

1054, Assn. of Bar of the City of New York: "This proposed change serves a potentially beneficial purpose with no practical downside." Often additional time will be needed to respond, but the parties and court should continue to be amenable.

1413, Jocelyn D. Larkin for Impact Fund and several others: This is "a small but important change because it allows the parties to immediately begin planning discovery and identifying concrete issues that may require early court intervention."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This is beneficial. * * * For parties who choose to take advantage of this rule change, it will make Rule 26 conferences more productive and focused." "

1481, George Dent: "In state court [apparently Alabama], we often serve requests for production with the complaint * * *." This "would make the conference more informed and productive."

1522, Michael P. Lowry: As a matter of professional courtesy, and to move the case forward, I often draft interrogatories, requests for production, and (if necessary) requests to admit and serve them on the parties before discovery opens. My letter explains that the answering party is not yet obligated to respond. When the discovery period opens I send a letter reminding them that responses are due in 30 days. The proposal should be expanded to include interrogatories and requests to admit.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1665, Laurie C. Barbe for Defense Trial Counsel of West Virginia: There should be a provision addressing discovery requests served before an action is removed from state court. The rule should be that discovery must be refiled after removal.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "[I]t is advisable to permit early Rule 34 requests, which may result in the discussion of more substantive discovery issues at the Rule 26(f) conference, promoting efficiency in the discovery process." The Committee Note should advise that the requests designate the form for producing ESI, lest the responding party begin to produce in a form the requesting party does not want, and allowing the parties to

better negotiate the form.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports as well designed to reduce costs and delay.

2141, Kevin N. Ainsworth: There is no reason to impose a waiting period, much less one with an anomaly that allows requests to be served without delay on any additional defendant that has been served. It should be simply: "A request under Rule 34 may be delivered before a Rule 26(f) conference."

2209, Richard Talbot Seymour: This proposal is well-taken. A further step would be to require the use of the discovery protocols in employment discrimination cases involving pretext analysis.

November Hearing, Jeana M. Littrell: pp 14-15: (From the perspective of defending employment actions.)The early exchange of discovery requests will support more efficient resolution of cases, with less ancillary litigation. It should be extended beyond requests to produce.

November Hearing, Paul J. Stancil: p. 83,84-85, 90-93 Plaintiffs will want to deliver early Rule 34 requests. But this disturbs the calm that otherwise remains up to the time of the Rule 26(f) conference. Early requests will start the meter running for defendants, as a way to expand the time available to amass the Rule 34 materials. Work will start immediately. That may stiffen the resolve to resist potentially valid claims or defenses, and may increase the temptation to file frivolous claims or defenses. The proposal will disproportionately advantage plaintiffs over defendants.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 26(d)(3): ORDER OF DISCOVERY — STIPULATIONS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal.

RULE 26(f): PRESERVATION, RULE 502 ORDERS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

281, Daniel Garrie: (1) There is no need to add preservation of ESI to the discovery plan. And it will not work because the timing of the 26(f) conference is too early to develop a preservation plan. Before that can be done, the parties must determine the universe of ESI that must be preserved, the software and hardware from which it has to be collected, and the form in which it is currently stored.

(2) Finds an implication that adding "under Federal Rule of Evidence 502" limits the scope of agreements the parties may reach with respect to privilege and trial-preparation materials. It "forecloses discussions of protection that don't fall under" Rule 502.

287, Lynne Thomas Gordon, for the American Health Information Management Association: The comment seems to focus on all of Rule 26(f)(3)(C). As with the parallel Rule 16 changes, the Rule 26(f) conference "is critically important and should not only involve counsel but also a qualified and credentialed HIM professional."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Adds to the reasons offered for supporting the parallel amendments to Rule 16(b). There are many preservation issues to be discussed. "Because the duty to preserve is triggered when a party reasonably anticipates litigation, it is almost impossible, if not impractical, for a party not to have begun making critical decisions regarding preservation before conferring with its opposing party." There is fertile ground for dispute. The discovery plan should discuss the issues on which the parties agree, and those on which they disagree. When they disagree, the plan should include a brief summary, devoid of argument, a brief statement of each party's position, and a proposed solution designed to foster agreement. This will put the court in a better position to usher the parties toward middle ground.

The reference to Evidence Rule 502 should refer specifically to a Rule 502(d) order, "to emphasize that the parties should specifically ask the court for such an order — as failure to do so will leave them only with the protections of Rule 502(b) and the case law * * *, rather than the more fulsome protections of a Rule 502(d) order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

494, Charles R. Ragan: These proposals are modest. Rule 26(f) is crucial in appropriately shaping ESI discovery. It will work better if the parties are required to prepare an executive summary stating, without argument, the issues they agree on and the issues that they do not agree on. That will provide a good introduction to the more detailed report.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, "and believes that it will encourage the use of Rule 502 orders."

1654, Kimberly Baldwin-Stried Reich: Supports "in the context of healthcare litigation."

RULE 30(a)(2) NUMBER OF DEPOSITIONS (ALSO RULE 31(a)(2))

(Many comments treat Rule 30, 31, 33, and 36 numerical limits together. Those that pick out Rule 30 as the main focus are summarized here without adding duplicate summaries for the other rules.)

261, David McKelvey: A business can get affidavits from its employees for summary judgment, while the 5-deposition limit will prevent plaintiffs from getting their testimony at all. Five depositions often are not enough even for expert witnesses.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Often it is necessary to take more than 10 depositions in product-liability actions, involving multiple officers in different branches of the defendant corporation. Five "is overly restrictive."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Many civil rights cases involve five or more defendants. Offers an illustration of suit against 8 defendants who placed a child they knew to be a rapist with an adoptive family, and who failed to notify the parents of any of his 12 other victims. 27 depositions were needed to secure the important information.

266, American Association of Justice Aviation Section, by Michael L. Slack: A presumptive limit of 5 depositions is "absurd in aviation cases." The present limit is too restrictive. The limit should be set to allow unlimited depositions of retained experts and unlimited Rule 31 depositions on written questions, and 10 oral depositions of other witnesses. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

267, Lawyers for Civil Justice, by Alex Dahl: The fears expressed by some, particularly those involved in employment litigation, are exaggerated. Rule 30 says the court must grant leave to take more than 5 to the extent consistent with Rule 26(b)(1) and (2). But the Note should be revised by adding the language in the Rule 33 Note: the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

270, Ohio Association for Justice, by John Van Doorn: This provides a general objection to presumptive limits that will increase inefficiencies, impose additional burdens, and encourage plaintiffs to craft broader requests to obtain the same amount of information while keeping within the presumptive limits. This reads on Rules 31, 33, and 36 as well; there is even a reference to Rule 34.

273, Cameron Cherry: A general statement that limiting the numbers of depositions, interrogatories, and requests for admission, and limiting the duration of depositions, will limit access to full justice.

274, James Jordan: "[W]hen was the last time you had a complex commercial case and could limit it to 5"?

276, John D. Cooney: Mesothelioma cases provide a good example of the need for more than 10 depositions. Reducing it to 5 is overly restrictive. In addition to multiple officers in different branches of a corporate defendant, it may be necessary to depose a plaintiff's coworkers to

preserve their testimony.

278, Perry Weitz: Depositions are critically important to gather evidence not only for trial, but as a prelude to settlement. The need for more than five is manifest. (Then a paragraph using mesothelioma cases as an example; it is verbatim the same as a paragraph in 276, noted above.)

279, Kyle McNew: For all the limits, Rules 30, 31, 33, and 36, decreasing the number will spawn more litigation. "This proposal exacerbates the problem by making the one-size-fits-all product smaller * * *."

280, Oren P. Noah: In asbestos litigation, there often are more than five defendants. Plaintiffs would have to pick which defendants to depose. And the problem will be vastly increased if the limit is applied to expert witnesses.

282, Susan M. Cremer, Chair, AAJ Federal Tort Liability and Military Advocacy Section: Medical malpractice cases under the Federal Tort Claims act commonly involve multiple health-care personnel and many experts. Examples are given of cases requiring well over 5 depositions per side.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Each of the revised limits in Rules 30, 31, 33, and 36 is welcome. They will help ensure proportionality in discovery. But other presumptive limits should be adopted for document discovery. So Stephen Susman suggests a limit to five custodians for the first round, followed by five more custodians for a second round, and more only for good cause.

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: Depositions and document requests are the most effective means of discovery. "Most rail law cases require more than five depositions, even excluding experts. * * * Responsible lawyers do not use the presumptive 10 if 10 are not warranted by the case." Reducing the number will create problems that do not now exist.

289, Craig B. Shaffer & Ryan T. Shaffer: Ties together the proposed numerical limits in Rules 30, 31, 33, and 36, suggesting that rule text should reflect some of the situations that frequently call for greater numbers of discovery events. (1) Some critics of the proposals seem to be inconsistent — they are willing to retain judicial discretion to expand discovery to the subject-matter of the action, but are unwilling to rely on judicial discretion to determine the number of discovery events. (2) Limiting a litigant to 5 depositions may often be unreasonable. Suppose an adversary identifies more than 5 witnesses in the initial disclosures? Or suppose there are several expert witnesses? What if witnesses necessary for trial are beyond reach of a trial subpoena? It can be argued that de bene esse depositions should not count against the limit, or perhaps that expert trial witnesses should be excluded. And the limit may need to be expanded if defendants, heedless of the uncertain impact of *Twombly* and *Iqbal* continue to plead boilerplate defenses in general terms. (3) In seeking relief from numerical limits, counsel should consider the interplay between depositions and interrogatories. Interrogatories are less expensive. But if a party plans a Rule 30(b)(6) deposition of an organization, it may be more difficult to justify an over-limits number of interrogatories. (4) A responding party's patently deficient or obfuscating responses may justify going over the limit, as a mirror of the Rule 26(b)(2)(C)(i) provision for limiting the frequency of discovery where the inquiring party has had ample opportunity to obtain discovery. Similarly, violation of the Rule 26(g) certification requirements may justify an appropriate sanction. [If the "sanction" is discovery above the presumptive limits, it may be wondered whether it need be called a sanction at all.]

292, Lyndsey Marcelino for The National Center for Youth Law: In a class action the Center had 11 plaintiffs who had spent from 10 to 14 years under the care of the State of Nevada. They had multiple caseworkers, doctors, foster parents and therapists. One, for example, had seven caseworkers and seven foster parents. Five depositions are not enough.

295, Andrew Horowitz: Recently completed 9 depositions in a single-plaintiff case under the Age Discrimination in Employment Act. The firm invested substantial time and court reporters' charges — it has an incentive to take only depositions that promise a reasonable chance of securing testimony important to the case. There is a risk that the court would not have granted leave to take 9 depositions, as it would regard the case as a "run of the mill" single-plaintiff case.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Drug manufacturers too often produce corporate representatives for depositions who do not know the information designated in the notice. They can "burn up the five available depositions with no useable information." Deposition transcripts are attached to illustrate this practice. "Oral discovery games are already too prevalent under the current rules."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: In pharmaceutical cases it is often necessary to take more than 10 Rule 30(b)(6) depositions of as many different departments in a single defendant.

299, Aaron Broussard: In 95% of the cases that meet the \$75,000 jurisdictional amount, each side will exceed 5 depositions.

300, Maria S. Diamond: Follows up pre-publication comments by offering an example of a recent case in which, following responses to requests to produce and to identify fact witnesses, a series of 7 depositions continually revealed information that should have been provided in response to the initial requests but was not. "This example is by no means unusual in my thirty years of practice as a plaintiff's personal injury attorney."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[T]here is no objectively reasonable basis to justify a reduction" from 10 to 5 depositions. (1) The empirical findings of the FJC belie any need. The numbers of depositions, and the median costs of discovery, are reasonable. (2) There is no showing that the present presumptive limit of 10 depositions has caused widespread problems. The FJC figures suggest that only 11% to 18% of the cases in the narrowed data base involved more than 5 but no more than 10 depositions; the change will affect only a small slice of current practice. (3) Deposition costs are almost always considered in deciding whether to take a deposition. (4) Depositions are often needed to ensure the use of testimony by a witness who is beyond the reach of a trial subpoena. (5) The provision in Rule 30(a)(2) directing that leave be granted to exceed the limit is scant comfort. The burden is on the party seeking to exceed the number, and it will be a burden to overcome a lower presumptive limit. This shifts the leverage in any negotiation. And it will be natural for judges to assume that they should be reluctant to grant leave to go above the presumptive limit. (6) The concerns of "some judges" expressed at the Duke Conference seem to rest in part on the comparison to criminal trials. But in criminal trials the government must disclose witness statements and exculpatory material to the defendant, and the government has effective investigatory powers. (7) The argument that ADR is effective without depositions "ignores the fact that depositions are, in fact, often used in arbitration." (8) That depositions are seldom used for effective impeachment overlooks the fact that one purpose of taking the deposition is to lock the witness into the testimony, so it cannot be changed. (9) "[A] single plaintiff suing multiple defendants already is given the presumptive equivalent of the

number of depositions as all defendants combined." {That is, one plaintiff gets ten depositions; ten defendants share ten, giving one each.} (10) The new proportionality requirement will provide sufficient new restrictions on discovery. Any further restrictions should be implemented by the court during the Rule 16 conference.

The Section separately notes that the Rule 30 revisions do not attempt to address unanswered questions that now arise. How to count Rule 30(b)(6) witnesses? Is it one deposition, or two, if the same person both appears as a corporate witness under Rule 30(b)(6) and is deposed in a personal capacity? Must leave be obtained to take a second Rule 30(b)(6) deposition of the same entity, and does it count against the limit? "[A]gainst whose side [should] third-party defendant depositions" be counted?

November Hearing: Michael C. Rakower, p 287: Renews the Section's questions. The data do not seem to support a reduction in the numbers of discovery requests in any of the rules. The problem of cost is not so much that any side is abusing the system, but rather that costs run up when "parties each take their fair share of depositions collectively." The Section has a cross-section of lawyers, who do not see an extensive amount of abuse.

307, Judge A. Leon Holmes: Opposes all the proposed numerical reductions. The present limits are sufficiently generous that E.D.Arkansas sees few disputes. But many cases cannot be adequately prepared for trial with 5 depositions and 15 interrogatories; those limits will give an advantage to the party with the information, and will generate discovery disputes.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Offers two generic examples of civil rights claims that require several depositions. Section 1983 claims challenging municipal policies and practices require several depositions to fully understand the issues. And claims brought under statutes with a burden-shifting practice require depositions not only to establish the prima facie case but also to rebut asserted justifications for the challenged conduct. Lowering the presumptive numerical limits will make a difference. Courts "impose a heavy burden on parties seeking to go beyond those limits," and parties will increase their resistance.

311, James Coogan: Many depositions are often needed because "[t]he complexity of modern corporate structures results in widely divided responsibilities for corporate functions." Increased disputes, costs, and delay will result from lowering the limit.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases a plaintiff always faces a need to take more than 5 depositions. Motions to take more will increase.

317, Steven Banks for the Legal Aid Society in New York City: (Background is sketched with Rule 26(b)(1) above.) Examples are given of a case challenging discriminatory enforcement of criminal trespass laws that required 35 depositions, and a case involving excessive force by correction staff that required some 140 depositions — and the number of depositions was accorded favorable consideration as helping support the class-action settlement. And employment cases often involve several individual defendants and several corporate defendants. Even in smaller employment cases, more than 5 depositions are needed — a particular example is cases involving trafficking of domestic servants, which often involve multiple defendants.

318, Brian Sanford: Increased summary-judgment practice makes it necessary to depose a witness for the summary-judgment record, when otherwise the witness would just be called at trial. Reducing the numerical limit is unwise. (319, Christopher Benoit, is verbatim the same.

320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: Usually 10 depositions are not enough in products liability actions. Mesothelioma cases are an example. Plaintiffs must depose multiple officers in different branches of the corporate defendant. Because of the long latency, retired officers and employees must be deposed. Coworkers must be deposed to preserve their testimony, lest they be too ill by the time of trial to testify. This concern applies to Rule 31 limits as well.

322, Michelle D. Schwartz, for Alliance for Justice: The changes in the limits in Rules 30, 31, and 33 "will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants." Frequently the evidence is in the defendant's hands. More cases will be dismissed before trial because plaintiffs cannot procure the evidence needed to proceed to trial.

323, Jonathan Scruggs, Alliance Defending Freedom: Opposes all of the numerical limitation changes, including the 6-hour time limit for oral depositions. The limits "will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations." The Alliance advocates primarily for First Amendment rights. It must identify a government policy, and prove that a particular official was personally involved, and in some case prove a required level of intent. "But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork." Plaintiffs need extensive discovery to cut through the bureaucracy.

324, Jonathan J. Margolis: Reducing the number of depositions is the most questionable of all the proposed changes. Some courts will begin by refusing leave to take more than 5. They will be affirmed because there is no abuse of discretion. The practice will spread. Most defense attorneys will come to resist any increase beyond 5, in part because they believe that adequate representation requires this course. There is no significant evidence that depositions are often so numerous as to be abusive.

325, Joseph M. Sellers: Lawyers engage in cost-benefit analysis now. It costs money to take a deposition. Adopting a one-size-fits-all limit is unwise. "In my civil rights and employment practice, I cannot recall a case against an employer in which depositions were conducted and we took fewer than six." We typically represent plaintiffs on contingency, and advance costs; we engage in only the discovery that is important. And employment cases typically involve plaintiffs who have little discoverable information, while defendants have most of the information necessary to prove the case. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

327, Malini Moorthy for Pfizer, Inc.: Endorses the limits in Rules 30, 31, 33, and 36. "Viewed through the lens of proportionality, we believe that parties will mutually agree on reasonable discovery limits * * *."

328, U.S. Chamber Institute for Legal Reform: Supports all the numerical limitations, and the 6-hour deposition that will streamline discovery without denying any party the ability to gather information for its claims or defenses.

333, Racine Miller: Addressing police misconduct and prisoner rights cases: there is no problem with excessive discovery. There are incentives to limit it. But there are cases that, in part due to information asymmetry and often due to the sheer numbers of witnesses, require more depositions, and "I have concerns about either getting consent from defendants or an order to enlarge discovery in every case where it would be necessary under the new rules." Ordinary

citizens can get to court only through contingent-fee attorneys, and by making discovery harder the proposals will make representation less accessible. They are completely one-sided; they "do not do much of anything to penalize obstruction in discovery."

334, Rose Weber: "[T]here are often numerous defendants in police misconduct cases and of course all must be deposed. Essentially these rules 'solve' a problem that doesn't exist, and by giving an unfair advantage to one side."

335, Rebecca Heinegg: "Regarding the proposed limitations on depositions, parties already have an incentive to minimize the number and length of depositions, as each side must bear the costs of each deposition[] taken. The new limits are also too low for many serious or complicated cases, and will have a disproportionately negative impact on Section 1983 plaintiffs [as in police misconduct cases], due to the inherent information asymmetry in these cases, and the high burden of proof that such plaintiffs must meet."

336, William York: Excessive discovery is not a problem. No worthwhile practitioner uses every single deposition, interrogatory, or request to admit "just because they are permitted." Some cases — including civil rights and immigration cases — require many discovery devices. Current incentives for self-limiting discovery are adequate. The lower presumptive limits are far too low for many serious or complicated cases. Government works in complex bureaucracies, "and getting to the truth of the matter in five, shortened depositions and only 15 interrogatories * * * would severely limit my effectiveness to litigate." Far from making litigation more accessible to everyday citizens, many clients seek attorneys on a contingent-fee basis; the changes will make representation less available. And the result will be more contentious motion practice.

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: All of the proposed numerical limits are welcome. "We fully expect * * * that parties will routinely agree to additional discovery where necessary and motion practice will not be needed." January Hearing: p. 26, at 31-32: Similar.

338, Steven D. Jacobs: The present numerical limits work. The presumption is that the initial disclosure avoids the need for more extensive discovery. The parties resolve most discovery disputes on their own.

342, Stephen C. Yeazell: Reducing discovery "in a number of cases would be a regrettable and unjust result." The reduced limits "will not work injustice in the hands of wise and impartial judges who are also skilled at managing litigation." But other parts of the proposed amendments "express implicit skepticism about how wise, impartial, and skillful these judges are. The asymmetrical limits will be most likely to have an adverse effect on cases involving claims against large institutions — public and private." Although not all cases have merit, it is important not to stack the deck against such claimants, as many of the proposed amendments do.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Less discovery will mean more trials in cases that should settle. It will have a disproportionate impact on the party with the burden of proof. Reducing the number of depositions sends an implied message that there are too many depositions — it will become more difficult than it is now to get permission to take 12 depositions in a case that needs that many. The Committee relies on data showing that 5 depositions are inadequate for as many as 23% of cases. The suggestion that the parties can be expected to agree when more than 5 depositions are needed "relies upon the faulty assumption that both sides will need more than 5 depositions."

In addition, account should be taken of the cumulative effect of all the reduced limits.

Deposition time is effectively reduced from 70 hours (10 depositions of 7 hours) to 30 hours (5 depositions of 6 hours). But the limits on the less expensive modes of discovery — interrogatories and requests to admit — will leave more work to be done by depositions.

347, Genie Harrison: The proposed limits will make litigation impossible for government employees victimized by first amendment retaliation, whistleblower retaliation, and other unlawful harms. "The illegal acts of governmental employers uniformly involve dozens of actors and witnesses * * *." In a current case a fight was necessary to get leave to take more than 10 depositions. The 20 depositions establish a slam-dunk case. Employers keep people quiet by implied threats of retaliation.

348, Stephanie Bradshaw: The proposed reductions in numerical limits in Rules 30, 31, and 33, together with the new limits in Rule 36, "are minimal, and would not result in a huge savings of time," but they "could be devastating to an information-starved plaintiff hungry for evidence to support his claim."

349, Valerie Shands: The upfront and incidental costs of depositions "ensures that their number almost always remains as low as necessary." The need to seek court permission to take more than five will spawn delay and additional costs.

350, Pennsylvania Bar Association: The default number of depositions should be 7 or 8. And for all the proposed default limits, there is a risk of "a new hesitancy among some judges to alter those limits." A "blind, unreasoned one-size-fits-all discovery plan" is inappropriate. The Committee Note should instruct that each case must be approached with an open mind, allowing more discovery where appropriate.

351, Eric Hemmendinger for Shawe Rosenthal LLP: (From the perspective of defending employment cases.) Five may not be sufficient in all cases, but it is the correct starting place for discussion. (The preface adds that attorney-fee provisions for most employment and employment litigation provide an incentive for plaintiffs to expand the amount of discovery.)

353, Kenneth D. Peters, John T. Wagener: The proposed reductions in time and length of depositions, and in numbers of interrogatories and requests to admit "will * * * cause litigants to carefully think about the evidence they need and go about obtaining it in the least intrusive manner."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Without specific comment, notes that the narrowing of presumptive limits "has the potential to increase satellite litigation about the scope of discovery."

356, Richard McCormack: Treating Rules 30, 31, 33, and 36 together, "It's about time this was done."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Litigation involving nursing home abuse or neglect often requires more than 5 depositions. Deponents often disclaim knowledge and imply that another potential witness is the one to ask.

359, Andrew B. Downs: "While I often take more than five depositions in my cases, I can justify" them. If I cannot justify them, they should not be permitted.

360, Robert Peltz: Five depositions are not enough even in a routine automobile negligence

action — the limit is exhausted by deposing the other party, the investigating police officer, two eye witnesses, and a single doctor. The problem is exacerbated when the limit has to be allocated between multiple parties plaintiff, defendant, or other. It is further exacerbated in courts that count each witness in a Rule 30(b)(6) deposition as a separate deposition. And the frequent circumstance that one party has almost all the necessary information is a further problem. The general provision for protective orders provides all the protection we need.

361, Caryn Groedel: The limit will adversely impact plaintiffs (in employment actions).

362, Edward Hawkins: Even routine cases require more than 5 depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: In employment cases defendants need depose only the plaintiff. The plaintiff needs to depose decision-makers, human resources personnel, currently employed witnesses who observed the discriminatory conduct, the corporation itself, and medical providers to the employee. In wage and hour cases plaintiffs need to depose payroll personnel, supervisors and coworkers who observed when the plaintiff was working, and IT personnel or records custodians. Five is too few.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Generally suggests that experience may not bear out the belief that judges will exercise sufficient flexibility to ensure fairness in discovery. Offers an example of a case that required depositions of 33 fact witnesses in addition to experts and Rule 30(b)(6) depositions to support a claim that the defendant's 2,500 miles of sidewalks lacked accessibility to persons with visual or mobility disabilities. And another case with more than 30 depositions to support discrimination claims arising from "property flipping."

367, Edward P. Rowan: "In even the most simple cases, fact witness depositions can exceed five depositions. This will violate Plaintiff's right to due process if he cannot bring testimony because of a deposition limit."

368, William G. Jungbauer: In FELA actions, 5 depositions are nowhere near sufficient to prove the negligence of a corporate entity such as a railroad. The defendant may identify multiple witnesses for a Rule 30(b)(6) deposition, "exhausting the plaintiff's deposition limit even faster." Defendants also may be disadvantaged. There may be multiple defendants — not only the railroad, but also the entity that controls a crossing. In an FELA case it would be rare to have five defendants, but when that happens there would be one deposition each. Relief will have to be sought from the court in virtually every case.

370, Thomas D'Amore: Addressing Rule 30, 31, 33, and 36 numerical limitations, says that often he cannot reach agreement with defendants on additional discovery. "The judge, when faced with reduced presumptive discovery limits, may be unlikely to grant me as much discovery as I need." "Depositions are often the most efficient and effective way to gather the evidence * * *." Many more than five are likely to be needed in, for example, a wrongful death case (the victim is deceased), or product liability cases. And restricting the number of depositions may make it impossible to survive the almost certain motion for summary judgment.

372, J. Burton LeBlanc, for American Association for Justice: FJC data do not support the proposed limits, as shown by the reexamination looking for cases involving more than 5, or more than 10, depositions per side. The reduction will have a particularly negative impact in civil rights, employment discrimination, qui tam, and intellectual property cases. Frequently a plaintiff does not even learn who the critical deponents should be until later depositions.

Experience with cross-examinations in criminal trials of witnesses who have not been deposed cannot illuminate the needs for civil trials. Depositions, moreover, serve to gather facts and prepare for trial, not merely to support cross-examination. Introducing the proportionality test will aggravate the consequences of reducing the number — the other side will always object that it is too burdensome or expensive to provide more discovery. This alone will make it much harder to get more than five depositions. The belief that more will be allowed when appropriate ignores the clear demonstration of "anchoring" effects: the rule presumption will become the received standard. The result will incentivize defendants to hide information.

Later, p. 24, adds an observation addressed to all the numerical limits: "most of the proposed amendments would essentially let judges off the hook for having to actively manage cases; when faced with such a marked increase in discovery disputes, judges who do not now manage will simply use the shorthand of the new Rules to limit discovery in most cases to the new limits."

373, Michael L. Murphy for AAJ Business Torts Section: "[T]en depositions would be barely adequate in many, if not most, civil matters." Speaking with practitioners, not a single one took fewer than 5 depositions in any of their cases, nor did any think those cases could have been adequately litigated with fewer than 5. There is no evidence that parties are intentionally taking unwarranted depositions; to the contrary, the incentive is to avoid unnecessary cost. And "there have been numerous reports of plaintiffs having a difficult time securing such an agreement [to exceed the rule number] from the defendants."

374, Christopher Placitella for AAJ Asbestos Litigation Group: "Depositions are the cornerstone of litigation." More than 5 are routinely needed for plaintiffs in personal injury litigation; defendants typically need fewer. "[D]efendants have the ready ability to refuse to stipulate or cooperate in allowing additional depositions," forcing plaintiffs to seek relief from the court. And without sufficient deposition discovery, both plaintiff and defendant are less likely to understand the strengths and weaknesses of their positions. That will deter settlement, leading to more trials.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: As plaintiffs' attorneys, there is no incentive to spend money on meaningless depositions. But depositions are used as an extremely effective and efficient way of gathering necessary information. Corporate depositions explain the reporting structure, identify core individuals who made the key decisions, and show how ESI is maintained and stored. A limit to 5 depositions would, in many instances, prevent plaintiffs from obtaining the information needed even to certify a class. At the least, the limit should not apply to complex, class action, multidistrict, or other aggregate litigation.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): 5 is too few.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: Treats Rules 30, 31, 33, and 36 together.

"Lowering the presumptive limits on discovery has the potential to severely hamper our ability to litigate to redress violations of federal laws. * * * [O]ur experience is that judges consider the current limits * * * as a fairly firm baseline when considering requests to expand the scope of discovery. We fully expect that the proposed limits would increase judicial resistance to increasing discovery."

381, John H. Beisner: Supports all the numerical limits. They will streamline discovery but still enable a party to gather information. The court can modify or alter the limits.

383, Alan B. Morrison: The reduction to 5 may be justified on its own, but not as a cumulative

matter of reducing the ability to gather needed information.

384, Larry E. Coben for The Attorneys Information Exchange Group: Although the parties can agree on, or the court can order, more than 5 depositions, "why propose a rule which will be applied as the exception rather than the rule"? Most cases require more than 5. Strict application will foster motion practice. The better approach is to allow the court to manage each case under Rule 16.

386, Arthur R. Miller: Plaintiffs have learned to live with 10, but they tell us both that they have no incentive to take unnecessary depositions and that 5 is not enough. Relying on court permission to take more simply generates motion practice, and permission will be made difficult because the proposal sends "a restrictive message regarding discovery to the Bench" that defendants will exploit.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Addressing Rules 30, 31, 33, and 36 together, welcomes the changes in the belief that in MDL and other complex litigation the parties will think harder about the "wish list" of discovery "and will tilt courts and special masters in the direction of imposing less onerous discovery."

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 30, 31, 33, and 36 proposals without further comment.

398, Shira A. Scheindlin: Disputes are rare with the 10-deposition limit. Parties in large cases routinely agree. The cost of resolving objections to the number will fall disproportionately on parties in smaller cases. Most lawyers believe the amount of discovery in their cases is just about right. This is a mistake.

399, Edward Miller: Addresses all the limits proposed for Rules 30, 31, 33, and 36 together. They will have a beneficial effect, encouraging parties to make discovery proportional to the true needs of each case.

400, Gregory P. Stone: The reduction will adjust litigant expectations, in line with the renewed emphasis on proportionality. Those who fear courts will become reluctant to increase the number overlook the direction that the court must grant leave when consistent with the scope of discovery. "[T]here is no reason to believe that litigants' general ability to reach agreement on an appropriate number of discovery requests will dissolve in the event that the Committee adjusts the presumptive number of interrogatories." Moreover, "it is in my experience uncommon for parties to agree to a downward adjustment"; better to start at 5, with room to move up.

403, Donald H. Slavik for AAJ Products Liability Section: Most product liability cases require four groups, often with more than 5 witnesses in each group: fact witnesses; a manufacturer's employees; experts; and damages witnesses. In dealing with large international defendants, it often is not possible to get agreement to go beyond 10. It will be at least as difficult to get agreement to go beyond 5, "given the clear message to judges * * * that even less than ten depositions are needed * * *." February Hearing: p. 14 Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: Treats all of the presumptive limits proposals together. They are "a welcome step in helping to reduce the overall costs and burdens of discovery in many cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Depositions are

the cornerstone of litigation. A plaintiff may join five or more defendants, and the defendants could refuse to permit more than five depositions, forcing recourse to the court.

408, Elliot A. Glicksman for Arizona Association for Justice: Addresses the proposed limits in Rules 30, 31, 33, and 36 together. "[P]resumptive limits, regardless of the number, often are the starting point for the maximum number a defendant will consider." The proposals will cause the greatest harm in cases that "are fact intensive, including civil rights, aviation, employment cases, commercial trucking, product liability and bad faith insurance cases."

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]here is no need to change the presumptive limit on the number or duration of depositions."

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The problem addressed by reducing to 5 depositions is not clear. More than 5 are routinely required in personal injury cases. More than 5 may be required on initial matters such as personal jurisdiction and forum non conveniens. There may be several witnesses on a Rule 30(b)(6) deposition; several fact-occurrence witnesses; experts on many subjects including the cause of the accident, the cause of injuries, the extent of injuries, "before and after" witnesses on such matters as loss of the enjoyment of life, the actual cost of future medical care, and so on. Expert witnesses commonly base their testimony on other depositions. The presumptive number should be increased to 15. 448, Robert D. Curran, tracks 410.

411, Richard Smith: Representing plaintiffs of limited financial means in environmental and environmental justice cases, it is common to involve numerous depositions on both sides, to make extensive use of requests to admit, and to use interrogatories up to the limit of 25. Reducing the numbers, and the length of depositions, will interfere with plaintiffs' ability to prosecute their cases, and will increase costs.

414, John R. Scott: Supports the presumptive numbers in Rules 30, 31, 33, and 36, and the 6-hour time for depositions. Counsel will be forced to focus discovery efforts. Abuse for tactical advantage will be avoided. In appropriate cases the parties can agree on more, or the court can so order.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing from 10 to 5 will have no benefit in complex litigation, but will require more court involvement. The real impact will be in the cases that now involve between 5 and 10 depositions — the FJC shows a considerable number. In complex cases today, negotiations up from 10 often fail, and plaintiffs are disadvantaged by the 10 limit.

419, William R. Adams: The presumptive numerical limits in Rules 30, 31, 33, and 36 are welcome. "It has been my experience that the limits currently in place are slightly excessive." If more are needed, a simple application to the court will get them.

420, Daniel A. Edelman: "In complex litigation involving multiple, obstructionist, corporate defendants, depositions are by far the most effective discovery tool [for] over-matched plaintiffs." Cutting the number will in many cases preclude the plaintiff from deposing witnesses with relevant and admissible testimony. "We suggest that five hour depositions be permitted for each corporate party and its officers and employees."

442, Christopher Wright: Treats Rules 30, 31, 33, and 36 together, including the 6-hour time for depositions. "These proposed changes seek only to hamstring a plaintiff's capability to prove his or her case." "I have yet to prosecute a medical malpractice case where discovery of fact witnesses included 5 or fewer witnesses."

445, Gerald Acker, for Michigan Assn. for Justice: Witness lists are almost never limited to 4 or 5. "Counsel should not be in a position of guessing which of a dozen witnesses" to depose.

455, W. Michael Scott for CrownQuest Operating, LLC: Treats all the proposed numerical limits, and deposition time, together. When more discovery is needed, the parties will routinely agree. The court can order it if the parties do not agree.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Begins with a general statement on presumptive limits. The proposed limits are "insufficient as a general matter for the type of cases in which the Department is involved." The current rules strike the right balance. The Committee should encourage the use of case-specific limits in implementing the proportionality principle.

Turning to depositions, many cases brought by the government involve nationwide investigations, scores of fact witnesses, large corporate defendants, many actors, and a need for fact-intensive showings. Cases brought against the government often share these characteristics. More than 10 depositions are often needed. Department attorneys generally do not encounter difficulty in obtaining leave of court, but there have been situations where courts have refused such requests or granted them reluctantly. These difficulties will become more frequent if the number is reduced to 5. Adversaries now often oppose an increase to 20 by arguing it doubles the limit. Reducing it to 5 will change the argument to opposing an increase that trebles or quadruples the limit. If the reduction goes forward, the rule text should be amended to state that exceptions should be freely allowed when appropriate. The Committee Note could offer examples "including public interest cases in which the government enforces statutory rights or obligations and other similar complex litigation," as well as cases involving multiple parties or expert witnesses.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "Lawyers may wonder whether it will be difficult for a party to secure a court order allowing depositions beyond the presumptive number." Courts may view the new presumptive limit as a screening device of an inflexible barrier. And one side may use the limit as a tactical device to stall and constrict discovery. It would be better to amend Rules 30 and 31 to expressly allow motions to limit the number based on the proportionality principle in Rule 26(b)(1).

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The limit to 5 depositions is the most troubling of all the proposals. (1) The Committee observations about criminal trials are inapposite. The government has vast investigative resources; the defense has Brady, the Jencks Act, and similar statutes. (2) Of course few witnesses are impeached at trial by depositions — very few cases go to trial, and at trial a witness is careful not to contradict the deposition. (3) Deposition testimony may conduce to settlement. (4) A deposition may be needed for a dispositive motion because the witness may be reluctant to provide a declaration. (5) A deposition may be needed to secure testimony at trial when the witness is outside the jurisdiction. (6) The limit "might become enshrined in practice as a ceiling rather than as a starting point." We often need more than 5. Our cases are often complex, involve multiple parties, and transcend state lines.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Treating all the limits, including

the 6-hour deposition together, they "will force counsel to be more focused in their discovery."
"We are confident that in an appropriate case, the parties will be able to agree to an appropriate number and/or that the court will properly decide applications for relief."

464, Douglas A. Spencer: Describes recent litigation that consolidated a wrongful death claim with two personal injury claimants. Initially there were ten defendants; discovery revealed more defendants the plaintiffs had not known of. The plaintiffs alone identified 12 expert witnesses. It is not uncommon to have ten or more experts even when there is only one defendant. Limiting the number of depositions and other discovery devices "would have tied our hands."

465, Neil T. O'Donnell: Frequently there are more than five defendants. And there are numerous witnesses of various kinds — eyewitnesses, witnesses as to an organization's supervision or policies, information technology providers, damages witnesses, and yet others.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The limit to 5 depositions, and the reduction to 6 hours, will simply lead to a great deal more law and motion time. The FJC study did not specifically identify depositions as a current and general problem. The same concern applies to Rule 31.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Treats the proposals for Rules 30, 31, 33, and 36 together. Plaintiffs "will have to waste limited judicial resources asking for additional" discovery.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support among the participants for decreasing the numerical limits on depositions. There is no problem with current limits. Decreasing the limit may be less efficient.

499, Beth Thornburg: The numerical limits will have an anchoring effect, inappropriately limiting discovery.

531, W Michael Wimer: The proposed limits would have defeated my successful discovery from a third party of documents the defendant intentionally hid.

588, Veronica Richards: Defendants commonly provide witnesses with limited information for a Rule 30(b)(6) deposition, necessitating "multiple depositions." (This is one of many comments that seem to overlook the statement in the 1993 Committee Note that a Rule 30(b)(6) deposition counts as one "even though more than one person may be designated to testify." The alternative explanation is that the party noticing the 30(b)(6) deposition gives up and relies on deposing persons designated in the notice.)

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Ten depositions commonly are not enough in catastrophic injury cases; indeed ten Rule 30(b)(6) depositions may be needed.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The ten-deposition limit works well. Reducing the limit will lead to more motion practice in cases where one party needs more than 5 and the other party sees a tactical advantage in attempting to limit the number. The number of depositions can be addressed in the initial scheduling order.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: All of the proposed numerical limit reductions are ill-advised.

Rules 33 and 36 are efficient, low-cost modes of discovery. The reduction in the number of depositions is the most ill-advised of the lot. No attempt has been made to show empirical justification — the reanalysis of the FJC study data shows that there is none. Nor is it safe to rely on gaining permission to exceed the limit. An express limit in a rule has an anchoring effect. Suppose a case legitimately needs 12 depositions. That is a 20% increase on the present limit of 10. It is a 140% increase on a limit of 5. Judges will naturally require a far stronger showing if the limit is reduced to 5. And if a party confronting the 5-deposition limit guesses wrong in choosing the first 5 deponents, an attempt to show that other deponents are more important to the case will encounter resistance from the appearance that the first 5 were not used wisely. 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports the limits proposed for Rule 33 and Rule 36, but opposes reducing the presumptive number of depositions. There is no need for the limit; in cases where more than 5 depositions are taken, they are rarely taken for frivolous or improper purposes. A too-low cap "would risk giving one side a powerful tool for limiting discovery unfairly," and will increase contested applications.

729, Stephen B. Burbank: Addresses the number of depositions and interrogatories pretty much together. "[T]he complex, high-stakes cases that, as empirical evidence consistently demonstrates, are most likely to occasion disproportionate discovery, will usually not be affected, because the parties will stipulate out of the limit. No, here the effects will be felt most often in cases with parties that have asymmetric discovery demands and asymmetric resources." "The need to manage down under the current Rules has not been demonstrated in enough cases to cause concern; District Court judges should not be given still more dubious management tasks that keep them out of the courtroom * * *."

786, Frederick B. Goldsmith & E. Richard Ogradowski: In Jones Act cases we cannot wait for trial to cross-examine the key fact witnesses. Crew members are itinerant — we videotape most crew member depositions. And our expert witnesses rely on the deposition testimony to establish the fact basis for their opinions. (Further, initial disclosures do little to obviate the need for full-on discovery.)

951, Frederick Schlosser: "I have witnessed and participated in trials in which effective cross examination through the use of depositions has been critical to the outcome of a trial."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. Many cases need more than 5 depositions. Full discovery enhances settlement. The reduced limit may encourage one party to refuse to stipulate to more. And there is a risk that the court may refuse to approve a stipulation. (A footnote decries the use of discovery cutoffs far too short for the case, increasing costs by the need to go full-bore to meet the deadline.) Encouraging case management is often beneficial, but judicial resources must be spared for substantive issues.

1025, Senator Jeff Merkley, Senator Ron Wyden: Addressing all the limitations, observes: "A plaintiff in an employment discrimination, product liability, or simple personal injury case must often conduct many depositions in order to fully understand an employer's policies, a product's makeup, or the cause of an accident."

1054, Assn. of Bar of the City of New York: Generally more than 5 depositions per side are needed, "and a party should not be dependent upon the reasonableness of its opponent or its ability to persuade a judge in order to be entitled to do the discovery it believes necessary."

Criminal cases are different — and defendants have the benefit of Brady and Giglio rules. Assuming that witnesses are rarely impeached by deposition testimony, depositions are vitally important in pre-trial preparation. If a party seeks an unreasonable number of depositions, relief is available. And if a 5-deposition limit is adopted, it should apply only to fact witnesses; a party may take 3 or 4 fact-witness depositions, only to have another party disclose several expert witnesses.

1109, Robert Kohn for Federal Bar Assn.: Reducing the number will increase the temptation for the deponent to "pass the buck," claiming that someone else is a better source of information. All parties share an incentive to reduce the numbers of depositions.

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: All of the proposed numerical limits impede access to justice and should be rejected.

1147, Joseph D. Garrison: The proposals shrink "the fundamental engine of the search for truth from seventy hours to thirty hours." "There is simply no strong empirical evidence, not even weak empirical evidence, that reducing the presumptive limit for depositions will substantially reduce the expense of litigation."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): Opposes. "Depositions are critical for both summary judgment and settlement purposes," and these are the chief ways of resolving federal litigation. There is no showing that the limit set at 10 creates any problems.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes, offering on behalf of defendants the arguments often advanced on behalf of plaintiffs.

1522, Michael P. Lowry: "The Committee's memorandum documented a belief among some judges that depositions are over utilized and offer limited value." In fact they are very valuable, even if not used to impeach a witness at trial. I represent attorneys against malpractice complaints. I do not agree, but there is a view that the standard of care requires an attorney to depose every witness; that weighs against the proposed limit.

1907, James Cudahy for National Court Reporters Assn.: Freelance court reporters, who do depositions, have a front-line experience that shows the importance of depositions in supporting equal access to justice. Neither number nor duration should be reduced.

1547, John P. Relman & Jennifer I. Klar: The present rule works. But if there must be some change, it should adopt a limit on the total hours for depositions — fifty hours per side would work better than the proposal.

1899, Craig Gurian for Anti-Discrimination Center: The faith that attorneys generally will agree to an appropriate number of depositions "has little to do with real-life practice. While there are some honorable exceptions, the fact is that the discrimination defense industry as a whole operates on the principle of minimizing cooperation, maximizing delay, and maximizing the cost to victims of discrimination of getting the discovery to which they are entitled."

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Explores at length the "anchoring effect" of suggesting a presumptive number. Even judges who fully understand the authority to permit a greater number will be influenced by "five" to permit fewer depositions than they would permit if the number remained at "ten." And emphasizes the lack of empirical support for the proposed reduction.

2058, Richard Broussard: The presumptive numerical limits in Rules 30, 31, and 33 are truly unworkable. They should be deleted. Even if a party is fortunate to find a judge who understands the need to gather information, it is necessary to disclose the exact intent of the request. "One need not be extremely naive to realize that informing a resourceful corporation what you want to obtain will assure that you don't obtain it."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Five depositions or fewer suffice for a majority of cases. A court is more likely to order an increase from five than to order a decrease from ten. The reduced limit increases the likelihood of settlement by encouraging earlier negotiation.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: All of the proposed numerical limits on discovery impede plaintiffs' access to the courts and generate added work for the courts and parties.

2130, Steven Skalet: The change should be in the opposite direction: "ten depositions plus two depositions for each party in any case with more than two parties."

2241, Robert J. Anello for Federal Bar Council: opposes.

November hearing, John C.S. Pierce: The numerical limits are desirable "to make lawyers sit and think about their cases at the very outset."

November Hearing, Altom M. Maglio: p.28 ff As a contingent-fee attorney in medical product cases "I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions." The first five depositions usually are used to show that the people identified as knowledgeable in response to interrogatories do not know about anything but marketing, and to identify the people who do have the appropriate knowledge and should be deposed. I often need more than ten depositions. I get permission, but it is a fight. The present limit of 10 is taken as a yardstick of what is supposed to be done in a typical case.

November Hearing, David R. Cohen: p 41 Most of the cases my firm handles — mostly for defendants — tend to be bigger cases. Very often there are more than 10 depositions. When shown good cause, most judges allow more than 10. Indeed, the parties usually agree when they know there is good reason. But it is useful to have a numerical limit because it gets people thinking. Contingent-fee attorneys do have an incentive to take only necessary depositions, but all kinds of commercial cases do not involve contingent-fee attorneys; "most cases that have 20 depositions can use far fewer."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 In § 1983 litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 As contingent-fee attorneys, we have an incentive to hold down the cost of discovery. In antitrust cases, which almost always are MDL cases, "dozens of depositions are often required to gather evidence from far-flung witnesses and to preserve testimony of witnesses that will not be available for trial." Experts play a very large role — one side may have more than five experts.

At a minimum, experts should be excluded from the proposed limit. Third-party depositions also should be excluded. And reducing the limit from ten to five "significantly alters the bargaining position of the parties." We get more than ten now, often far more. But if we are allowed 60 now, six times the presumptive limit, there may be a tendency to think that 30 is an appropriate number as six times a presumptive limit of five. And there are litigants who do not have the knowledge they need to rise above the presumptive limit. At the very least, the Committee Note should observe that courts should be expected to vary the presumptive limits in complex and large cases.

Finally, the rule "could include a clarification that the presumptive limit on depositions is per party and not per side."

November Hearing, Anna Benvenuti Hoffman: p 110 From the perspective of "serious police misconduct" and other civil rights cases — offering two examples of actions that followed DNA exoneration of wrongly convicted plaintiffs. One case led to an agreement to videorecord police interrogations, and the other to an audit of a crime lab. There is a strong incentive to keep costs down — the attorney has to carry them for years, and may never recover them. The cases often have to be proved through circumstantial evidence, elicited from "witnesses who generally will not talk to us outside of a deposition, defendants, other police employees, prosecutors, and witnesses who testified against our clients at their criminal trials." Although the needs that require many depositions will remain unchanged — judges will be looking at the same cases — the reduction to five "send[s] a strong signal that you think there's too much discovery." Judges will respond to that." 15 depositions would become three times the presumptive limit, not one and a half. And some judges are hostile to the plaintiffs we represent. Yes, five depositions may be sufficient for the simpler actions that involve less dramatic wrongdoing, but that does not help in the more complex cases. 1918 supplements this testimony.

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: In toxic tort and environment cases, there once were problems in getting the numbers of depositions needed to prove the case. But practice has matured; "we now generally enter into consent arrangements with the defendants concerning depositions." The concern is that reducing the number will make five the new normal, and it will be much more difficult to get the 25 that are the norm in these kinds of cases.

November Hearing, Wayne B. Mason: p 142 "I'm not here to talk about limits because I'm not exercised about whatever you decide on that * * *."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 The Institute litigates constitutional claims of plaintiffs and defendants that "are moderate in size." Typically they are resolved by summary judgment. Trials last one to five days. "Routinely they require more than five depositions, although rarely more than 10."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, we often litigate around labor broker arrangements or rental worker schemes. "These all have multiple employers, which often require several 30(b)(6) depositions" "to take out the facts around control that is required to show joint employment under the federal employment laws." Employers typically control the facts. The only way to get them is through depositions and interrogatories. Decreasing the numbers will leave numbers inadequate to generate the evidence a plaintiff needs to prevail.

November Hearing, Barry H. Dyller: p 183 "[A] limit of five depositions is a disaster." In government wrong cases we have to depose parties, eyewitnesses, supervisors, people involved

in making government policy, document custodians, medical providers, and countless others. This is necessary not only to survive summary judgment, but also to make a convincing case to a jury. And I want defendants to take as many depositions as they want so they can evaluate my case and decide whether to go to trial or to try to resolve it. I do not have empirical studies of how many depositions are needed, but personal experience suggests it is generally more than five. Federal judges are more than capable of stemming abuses. I have never had a problem in getting permission to exceed the limit, but I may encounter a problem — and changing from 10 to 5 "is a message to judges. You know, we want you to limit this."

November Hearing, John F. Karl: p. 208 Employment cases commonly require proof of intent. It is not possible to prepare for summary judgment and trial with only 5 depositions. In some cases, many depositions are required simply to identify the person who made the decision that is being challenged. You need to find corroborating testimony, and also conflicting testimony. Employment plaintiffs cannot afford the extra costs in seeking agreement for more depositions, or for asking court permission. When counsel is experienced, there is no trouble in getting agreement. But a case may be staffed with young attorneys who do not have authority to agree. "I hate to bother the judges." The fear that reducing the number will create problems arises from dealing "with a number of obstreperous attorneys who have given me a hard time on behalf of the institution that they represent." And some employment cases are document-intensive, increasing the number of people who must be deposed.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 Plaintiffs are interested in getting in front of a jury as quickly and efficiently as possible. "Running up the clock and running up the bill are classic defense tactics, not the plaintiffs' bar." The employer controls access to documents and people, and makes broad claims that every employee is represented so as to prevent the plaintiff from talking even with those who are willing. And gag orders in settlement agreements and severance agreements are common, as are broad confidentiality agreements covering even personnel policies and internal evaluation forms. Yes, it is possible to examine a witness at trial without a prior deposition, but to get to trial we have to survive summary judgment. "[S]o we practice defensive lawyering," taking many depositions to prepare for summary judgment.

One common problem is to identify who made the challenged decision. In one case we had to depose nine people to get the first clues — and many depositions remained for other matters.

"[Y]ou never get agreement to exceed the number of depositions in the rules from opposing counsel." They assert the client forbids agreement. And they pay no cost when they lose the motion to take more.

Judges who manage actively under the present rules address these problems. The proposed rules will not prod the other judges to take prompt actions on motions for more depositions. The motions will languish for months. Meanwhile, "we're afraid to use up our five, not knowing if we're going to get seven or eight or 12."

Motions for summary judgment often are supported by the affidavits of people who have not been deposed. A good rule would require advance production of affidavits a party plans to use on summary judgment, paving the way to depose the affiants. Or Rule 56(d) should be revised so that when the defendant has refused to agree to more than the rule number of depositions "you should almost presumptively get more discovery once you see what they put in their summary judgment motion, the people you haven't talked to, people haven't examined yet."

November Hearing, Jennifer I. Klar: p 227 In a recent employment case the initial disclosures listed many witnesses. I had to fight for permission to depose them — the judge "pushed very hard on why is your case so different" that you need extra depositions. The order limited the

depositions to two hours, and required me to pay for my transcript and the transcript for the other side. The defendant called the witnesses at trial — obviously they opposed the depositions while they intended to call them, "which is a gotcha that will happen more and more often if the number is reduced."

November Hearing, Robert C. Seldon: p 240 Describes two cases that manifestly required more than the five that would be allowed if "this awful rule were put in place." One involved retaliation against a whistleblower in the corrections department by generating a phony report that he beat up a first degree murderer. The other involved an employee who "was intentionally exposed to asbestos in the workplace by the Department of Commerce."

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 The five deposition limit is appropriate. Most cases will fit within it. In 20 years of handling hundreds and hundreds of cases, only once was it necessary to go to the judge to get permission to exceed the present limit; in all other cases, the question was resolved by agreement. There is no problem with the 10-deposition limit. But lowering it to five will encourage lawyers to think more carefully at the beginning of the case about how many depositions they need.

November Hearing, John P. Relman: p 253 For fair housing, fair lending, disability, employment discrimination, the limit will make it much more difficult for plaintiffs and will not affect defendants. The key to individual discrimination cases is to show pretext by showing surrounding circumstances. You have to show how similarly situated people are treated. Ethically, plaintiffs' attorneys are often barred from speaking with employees of companies. When multiple reasons are given for the adverse action, the number of similarly situated people increases. It even takes a deposition or two to find out who was the actual decision-maker. The defendant has access to all of its employees and can conduct informal discovery without restriction — one deposition of the plaintiff is enough. So the defendant has every incentive to insist on observing the presumptive limit. The fear of misuse by plaintiffs is misplaced — contingent-fee attorneys front the costs of litigation, and have no incentive to take unnecessary depositions. If there is to be any limit, it would work better as a limit on the total number of hours of deposition time. That would be more flexible.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Lowering the limit will make it harder for civil rights plaintiffs to get access to the discovery they need.

November Hearing, Patrick M. Regan: p 278 Rests on experience with between 300 and 400 federal-court cases, and trying more than 50 jury trials. Representing the estate of a young construction worker killed by a nail gun, with damages capped at roughly \$750,000, the first dozen deponents all said the gun was appropriate for use on construction sites. The 13th or 14th deponent testified that the manufacturer had recommended that the gun be used only in shipyards, where it is used to attach two-inch thick steel plates to each other. The case was resolved, with the great benefit that the guns were taken off construction sites throughout the country. "I would have failed the proportionality test." And if there were a presumptive five-deposition limit, the judge might have allowed seven; I would not have got to the 13th or 14th critical witness. There is no problem with the current limit of ten. Most of my cases involve more than five but fewer than ten. Defense counsel will not agree to go beyond five, because that would make trouble with their clients. So there will be work-making motions. Yes, I have lost cases, but that does not mean that the claims were nonmeritorious or that discovery would better have been curtailed. The current rules provide more than enough tools to curtail abusive practices. There is no incentive for contingent-fee plaintiffs' attorneys to take unnecessary

depositions. Yes, it would help to have the Committee Note explain that five is the norm, and that the rule is not intended to create a presumption that more than five are inappropriate. But it is better not to be subject to even discretionary limits when there is no need for them.

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: p. 293 Lists Rules 30, 31, 33, and 36 along with Rule 26(b)(1) in opposing further restrictions on discovery that will have a disproportionate impact on civil-rights plaintiffs, who commonly litigate in the face of information asymmetry. A more extensive summary is provided by Rule 26(b)(1).

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Most of the focus is on the proposed numerical limits in Rules 30, 31, 33, and 36. Federal courts are the last bastion of the disenfranchised. "There should be a compelling reason to roll back the protection," and there is none. The data show that across the board in federal court, most cases conclude with fewer than 5 depositions per side. But there are complex civil rights cases. An informal poll at the Committee found that in recent years no one had litigated a case through most of the discovery process that involved fewer than 10 depositions. Most of these were class actions. The debate over the efficiency of discovery appears intractable. The volume of criticism by corporate defendants has not diminished. Repeated changes in the rules, particularly the 1993 changes, have had a particularly significant impact on civil rights cases." "[C]ontentious litigation is in fact a good part of the reason that there are unnecessary costs in discovery." Early and active case management is a better solution. Letter motions, and hearings by phone, are being used to good effect.

January Hearing, Joseph D. Garrison (NELA): Keep the 10 limit.

January Hearing, P. David Lopez (EEOC): p 68 The numerical limitations are a blunt instrument, particularly in cases with asymmetric information. Over the past three years the EEOC took more than 5 depositions in over 40 percent of systemic cases, and more than 25 requests to admit. Many judges are flexible about the limits, "but not all judges." Cooperation among the parties is more likely in systemic cases because defendants also want to take many depositions. It is a greater problem in a case involving one or two workers and a great asymmetry of information.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery, even when they would prefer to be more cooperative. The presumptive limits may exacerbate these problems. Voting rights cases under § 2 rely on a totality of the circumstances test; successful litigation requires a great deal of evidence. Local laws governing immigration rights often are subject to facial attack, but an as-applied challenge looking at specific practices and policies used to implement a law that is unclear on its face again requires much discovery. Some judges, familiar with § 2 litigation, understand the needs for extensive discovery. "In other cases, it's a lot of education. It's a lot of argumentation that's required."

January Hearing, Jocelyn D. Larkin: p. 125 From the perspective of institutional reform litigation, 5 depositions are insufficient. Lowering the limit creates a new first-line defense that will impose transaction costs even if the limit is expanded. And it is much more difficult to plan discovery at the outset when you do not know whether the limit will remain fixed at five.

January Hearing, Quentin F. Urquhart for IADC: p 133 Supports presumptive numerical limits. The reduced number will add support to a lawyer in discussions with a client about discovery

limitations. It is "atmospheric." "It sets a tone for the parties to have discussions with their clients about do we really need all of this"?

January Hearing, William P. Butterfield: p. 142, 149: "When I have 40 parties in a case and when it says I can take five depositions, that is not a meaningful rule anymore."

January Hearing, Elise R. Sanguinetti: p. 151 The lower limit is a big problem in representing single plaintiffs in wrongful death and catastrophic injury cases. Now we attempt to work with the other side, "but I've run across roadblocks many, many times." We seek to hold depositions to a minimum because it is difficult to explain to contingent-fee clients that their recovery is reduced by the cost of the depositions.

January Hearing, Kathryn Burkett Dickson: p 160 The proposed numbers would work if discovery is phased — they are much like the agreements with defense counsel in employment cases, planning an initial phase of discovery to prepare for early mediation. They are not sufficient to prepare to defeat summary judgment or go to trial. Defendants always put on more than 5 witnesses, and they are beautifully scripted witnesses. Cross-examining them without a deposition will be wasteful; limiting discovery will not improve trial advocacy. Counting my cases over the last five years, the number of combined depositions [for both parties?] ranged from 22 to 28 for the cases that went to trial. Employers typically propose 18 to 38 trial witnesses, although they call fewer, usually between 10 and 15. And videotaped depositions are used for trial testimony: "It's not just discovery." And I have had difficulty getting permission for more than 10; indeed, in a recent case in which the defendant agreed that it was appropriate to have 10 to 15 depositions, the judge rejected the stipulation and set the limit at seven.

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section p 1 28: The problem with reducing the number from 10 to 5 is that it creates a mindset "where the young insecure litigator on the other side is going to get locked in and say you got your five and that's it."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Most routine employment cases today are resolved with fewer than 5 depositions. But it is good to reduce the presumptive limit because that will force the parties to have a discussion about proportionality.

February Hearing, Michael M. Slack: p 193 I just made a deal for 15 depositions. Drop the limit, and "I just don't get that deal. I get six or seven on the best day."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Practice has come a long way in cooperation. Lowering the presumptive limits could have a deterrent effect on cooperation.

February Hearing, J. Bernard Alexander, III: p 272 In a typical employment case that goes to trial, at least a dozen depositions are necessary. With a base at 10, there is little difficulty in getting them. If the base is reduced to 5, "it means that there are other things that we have to horse trade in order to get what we need." The rules are no problem when the other attorney is cooperating. They are a problem when there is no cooperation. Often you have to take depositions to get the proper witnesses — "I have oftentimes taken ten depositions in a day, one hour at a time, to get to 20, 25 deponents * * *."

February Hearing, Jennifer Henry: p 334 Five depositions should not be a problem. The lower limit will cause people to be more selective. If they want more than 5, that will happen by

agreement — I have been able to reach agreement in every case in which I have needed more than 10.

February Hearing, Brian P. Sanford: p. 356 In individual employment cases I always bump up against the 10-deposition limit. Many times the other side agrees to go over, but most of the time they do not. The last time I asked, the court denied permission to take more than 10. This is a real problem for employment cases.

RULE 30(d)(1): 6-HOUR DEPOSITIONS

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: A deponent's "custodial file" may contain 10,000 to 50,000 documents. Reducing the time for a deposition will eliminate questions on many documents "with discovery value." Often it is necessary to secure agreement to exceed the present 7-hour limit. And time limits encourage evasiveness, failure to cooperate, and failure to give straightforward answers.

266, American Association of Justice Aviation Section, by Michael L. Slack: Reducing it to 6 hours "probably will not make much of a difference in fact witness depositions." But it will make it easier for cagey expert witnesses to run out the clock, avoiding answers to crucial, case-dispositive questions.

274, James Jordan: "7 hours is often not enough in a complex commercial case; and lawyers tell their clients to drag it out so you get less info."

292, Lyndsey Marcelino for The National Center for Youth Law: The reduction in the amount of time, joined with the reduction in the number of depositions, may hurt the chance of getting beyond summary judgment and prejudice the outcome of trial.

296, William B. Curtis, for Reglan Litigation Group, AAJ: "[T]he typical deposition is filled with repeated and unnecessary speaking objections, questions being re-read, and other clock-burning delay tactics. If the deposition is artificially shortened by an hour, the manufacturer's lawyer will have an easier time 'running out the clock.'"

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Reducing the limit to 6 hours "would make it much more difficult to discuss documents in a deposition." And echoes 264, the AAJ Transvaginal Mesh Litigation Group.

299, Aaron Broussard: "I see no problem in decreasing the number of hours * * *, although this is not a major change." (Reducing it to 5 depositions is a major change.)

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "There are no facts cited to demonstrate what percentage of federal depositions extend past normal business hours, nor whether any parties or litigants cite such 'after hours' work as a major problem in litigation." Anecdotes about lunch breaks and comfort breaks do not mean much. Analogy to the 4-hour limit in Arizona overlooks the strictly enforced disclosure rules in Arizona. And the rule does not address the question whether excessive delays by counsel or by a witness to run out the clock should be counted toward the overall time limit.

317, Steven Banks for the Legal Aid Society in New York City: Seven hours are often needed in many of complex cases. And "[a] six-hour time limit would be especially onerous in our cases in which either or both of the parties need translation." In employment cases, "we have deposed non-English speaking corporate officers or managers * * *."

338, Steven D. Jacobs: Depositions rarely last 7 hours. "I'm curious to know the salutary effect that reducing that time by one hour is thought to have."

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Artificial time limits accomplish little. The time is not solely controlled by the questioner. "An evasive or long-winded witness and/or obstructive lawyer can easily turn a four-hour deposition into an 8 hour

deposition. * * * Time limitations on depositions can actually make depositions longer and more expensive by creating the incentive to cause mischief in order to 'run out the clock.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Depositions of corporate or management personnel in nursing home litigation are often detailed and slow-moving. Witnesses often respond with "I don't know" and "that depends" answers that must be unpackaged. Shortening the time limit will encourage such time-killing tactics.

362, Edward Hawkins: Depositions routinely last more than 6 hours, even in routine case.

363, Dean Fuchs, at request of NELA-Georgia Board: The reduction is unnecessary and will spawn more motion practice.

372, J. Burton LeBlanc, for American Association for Justice: Notes that the reduction to 6 hours is not as dramatic as the reduction to 5 depositions, but that in combination these changes would provide less than half the current time for depositions.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): Six hours does nothing to address the obstructionist tactics of defense attorneys to use up the limited time allowed now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions." And counsel improperly inject themselves into the deposition. They engage in lengthy speaking objections or instigate lengthy discussions regarding discoverability, relevance, and admissibility. They commonly instruct witnesses not to answer based on relevance or admissibility, "which is improper."¹

383, Alan B. Morrison: (1) Reducing it to 6 hours is appropriate. This works in many states. An extra hour at the end of the day is not likely to matter. (2) The cross-reference, here and in the other rules should be to 26(b)(1) alone; (b)(2) adds nothing.

374, Larry E. Coben for The Attorneys Information Exchange Group: 6 hours is a step in the right direction. Limiting the time for expert depositions to 4 or 5 hours would provide a significant saving for all concerned.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: A 7-hour day is quite lengthy, "causing even resilient witnesses to tire in the final hour." "Argumentative questioning" is still common — limiting the time will reduce the practice.

398, Shira A. Scheindlin: Reducing the time limit is worse than reducing the number of depositions. It will lead to disputes that must be resolved by a phone call to chambers. Lawyers will try to run the clock to protect a witness. This is an invitation to mischief and gamesmanship.

¹ Many lawyers in the Cohen & Malad firm wrote apparently identical letters (examined by comparing the first and last lines on each page). They are noted here only: Scott D. Gilchrist; Irwin B. Levin; TaKeena M. Thompson; Arend J. Abel; Brian K. Zoeller; Greg L. Laker; Melissa L. Keyes; Richard M. Malad; Jeff A. Hammond; Kelly J. Johnson; Julie M. Andrews; Michael W. McBride; Richard E. Shevitz; Lynn A. Toops; Edward B. Mulligan; Maggie L. Sadler; Jonathan A. Knoll; Gabe A. Hawkins; Vess A. Miller; and David Cutshaw.

400, Gregory P. Stone: "Adequate preparation and skillful questioning" is more important than an extra 60 minutes. Six hours will almost always be sufficient, and enable a deposition to be completed in single day, saving time and travel costs. This is true even for Rule 30(b)(6) depositions.

403, Donald H. Slavik for AAJ Products Liability Section: The need for more than 6 hours is graphically illustrated by products cases involving foreign defendants, whose witnesses often require translators. It takes at least three times as long as with witnesses that testify in English.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The duration should be extended to 8 hours. Depositions can be especially lengthy in document-intensive actions. In a Rule 30(b)(6) deposition, which can be used at trial, it is important to establish the authenticity, best evidence, lack of hearsay, and explanation of documents in order to get them into evidence. "In cruise line cases, for example, the corporate representatives provided are the same every time and are in-house lawyers in the claims department * * *. These representatives are experienced, skilled witnesses who are experts at avoiding and evading answers." 448, Robert D. Curran, tracks 410.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing to 6 hours "simply invites more gamesmanship than currently exists." (With an example.) Courts resolve these disputes, but reducing the length will only lead to more disputes.

420, Daniel A. Edelman: A general reduction in the time is ill-advised. Evasive witnesses and delay tactics by defense counsel abound now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions. And counsel inject themselves by lengthy speaking objections, or lengthy discussions of discoverability, relevance, and admissibility. And they commonly instruct witnesses not to answer on the basis of relevance or admissibility objections, "which is improper." (But concludes by suggesting that 5-hour depositions be permitted of each corporate party and its officers and employees.)

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Reducing it to 6 hours will not be an appreciable time saving. A protective order can be used when necessary to avoid undue inconvenience for the deponent. The full 7 hours are often needed to depose expert witnesses, party representatives, or key witnesses. And "disputes occur over the number of hours that other parties' counsel can question the witness." But if the reduction goes forward, the Committee Note should recognize that extensions often will be needed for such witnesses.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In multiparty cases, each party needs to interrogate the witness, "if only for a short time." As the time draws down, there will be disputes where one or more parties did not have time to examine the witness.

465, Neil T. O'Donnell: (Addressing a 4-hour limit) "[I]t will be very easy for intransigent witnesses to frustrate legitimate efforts to obtain information."

487, Peter J. Mancuso for Nassau County Bar Assn.: Little good is accomplished by reducing it to 6 hours. In commercial litigation, written exhibits are submitted to the deponent and are the subject of much questioning. The deponent's review of an exhibit is itself time consuming.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support at the conference for decreasing the hourly limits. This may make discovery less efficient.

607, Christopher Carmichael: Illinois state courts limit depositions to 3 hours "and that is generally considered to be enough time even in the most complex and high-stakes cases."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the 6-hour limit. "[S]ix hours of actual deposition time easily consumes a full day. The limitation should especially benefit non-parties who are being deposed."

635, Matthew D. Lango for NELA/Illinois: The 6-hour limit is a hardship for employees, who typically cannot interview the witnesses informally. And the limit will force the parties to spend more time preparing for the deposition in order to ensure retrieval of the needed information.

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position, unless the Committee Note is revised to encourage courts to reopen depositions plagued by speaking objections and other common delay tactics. Absent such supervision, the potential for running out the clock is unacceptably high.

1054, Assn. of Bar of the City of New York: "We do not believe that reducing the time limit by 1 hour will promote efficiency, nor do we see a demonstrated need for this limitation."

1109, Robert Kohn for Federal Bar Assn.: A one-hour reduction will not cause a significant reduction in costs. But it will "increase the perceived effectiveness of evasive witness behaviors and disruptive conduct by counsel that aim to run out the clock."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): "Under the current 7 hour limit, it frequently is difficult to complete the examination, including affording sufficient time for cross-examination, especially in multi-party cases." Experience with 4-hour depositions in Arizona affords little guidance, given the extensive initial disclosures required in Arizona, which "provide a framework for completing the depositions within the 4 hour limit."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Supports. "In Illinois state court, the limit is only 3 hours, and in our experience, most partes are able to complete depositions within that time frame, and will most often agree to a reasonable extension when the circumstances warrant."

2072, Federal Courts Committee, New York County Lawyers' Assn.: "The vast majority of depositions can be completed in six hours, and seven hours 'on the record' is extremely difficult to fit into a single-day deposition."

2255, Michael M. Marick: The 3-hour limit in Illinois works well.

November Hearing, Altom M. Maglio: p. 29 As a contingent-fee attorney in medical product cases, I bear the expense of depositions. "[O]nce I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours." p 31: When I find out a deponent is not the person with knowledge, the deposition is "fairly quick once you realize you've got the wrong guy."

November Hearing, David R. Cohen: p 41 "I think most depositions that take seven hours can be done in six * * *."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p 101 "[O]ftentimes seven hours needs to be split between multiple parties." We have shared time with the Department of Justice, or state attorneys-general, or with opt-outs.

November Hearing, Anna Benvenuti Hoffman: p 110 Most of the witnesses in our police-misconduct civil rights actions are hostile to us. "[T]he depositions are slow-going, with even basic facts conceded only begrudgingly." With lead defendants we often have to take more than 7 hours. "And frankly, a lot of that is because of the obstruction by both the defendants and the defense lawyers. They say they don't remember anything, they won't admit anything. There's lots of speaking objections, all kinds of things which are not permitted by the rules but which everyone does and you don't want to run to the court every single time * * *."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, an interpreter is often needed for non-English speakers at deposition. That doubles the time needed. The need to argue for exceptions could deter reliance on such witnesses at all. We have not actually had a judge deny a request for more time to meet this need. Typically we are able to come to agreement with defendants on the number of hours when an interpreter is needed.

November Hearing, Barry H. Dyller: p 183 Most of my depositions are less than 4 hours. But many are more. And reducing the time invites abuse. A deponent who was a corporate president paused 25 to 30 seconds after every question. "What is your name"? "and we would wait and we would wait and we would wait." "I think it's a waste of the judge's time for me to go and say, you know, Mr. Smith, you know, paused a lot, please, judge, make him come back."

November Hearing, John F. Karl: p. 208 The time limit is already severe, but we have learned to live with it. There is an incentive to run out the clock. In document-intensive employment cases you have to go over the documents with the witnesses, asking specific and precise questions. "And sometimes there's just obstreperous conduct on the other side." In one whistleblower case counsel made an average of 3.2 objections per transcript page, taking up time. Shortening it to 6 hours "runs the risk of encouraging this sort of conduct in other cases."

February Hearing, William T. Hangle, for Leadership of ABA Litigation Section: p 128 Supports the reduction to 6 hours. "[A]t 7:00 at night a witness is really tired."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 7 hours is not enough for a foreign language deposition — and usually the greatest extension we get is 2 hours. Then there may be three groups of plaintiffs fighting for the 7 or 9 hours.

February Hearing, Jennifer Henry: p 334 Texas has a 6-hour limit. Only once have I needed more than 6 hours, and then the parties agreed. The saying is that a good trial lawyer does not need more than 6 hours.

RULE 31: NUMBER OF DEPOSITIONS

266, American Association of Justice Aviation Section, by Michael L. Slack: There should be no limit on the number of depositions on written questions. They are useful to put records in admissible form, and dealing with other matters more efficiently than oral depositions. At the least, there should be a separate 10-deposition limit for Rule 31 that does not count any Rule 30 oral depositions against the limit.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30. A worthy idea. Amend the Note to add the Rule 33 Note encouragement to think carefully.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Written depositions are seldom used in nursing home abuse and neglect litigation, but they may be used to substitute for Rule 30(b)(6) corporate depositions. The reduced limit could be exhausted without gaining substantive information.

604, Lawrence Marraffino: "Not relevant as written depositions are rarely used."

RULE 33: 15 INTERROGATORIES

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: The present limit "isn't broken." Interrogatories help identify potential witnesses, theories, documents, and even additional defendants.

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Reducing the number of interrogatories will be wasteful because lawyers, now careful to frame narrow interrogatories, will be forced to write their questions more broadly, leading to more objections.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of interrogatories.

274, James Jordan: "# of rogs — again, in a simple case maybe that would work. Not in a complex commercial case"

276, John D. Cooney: Reducing the number "will lead to overly broad and compound questions." They are needed to discover additional defendants and, as an example, additional asbestos-containing products that plaintiffs do not recall forty years later.

278, Perry Weitz: All but the final sentence is, with one word change, verbatim the same as 276, noted above. The final sentence predicts that the effect "will be to cause extraordinary and systemic delays and motion practice."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The reduction is unnecessary and counterproductive, as with reducing the number of depositions.

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

296, William B. Curtis, for Reglan Litigation Group, AAJ: Typical pharmaceutical cases are complex. "If only 15 interrogatories were allowed, there would be no practical way to discover the basic information needed to intelligently learn how the company makes and sells its drugs." An illustrative first set of interrogatories for Reglan litigation is attached, showing that a reasonable set of questions would exceed the limit.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Echoes 264, the AAJ Transvaginal Mesh Litigation Group, adding that Darvocet litigation involves a product "marketed for decades by numerous pharmaceutical companies." The universe of discoverable information is massive.

299, Aaron Broussard: This is a Catch-22. "If you make your request too detailed, you can use up half of your interrogatories in one request. If you make your request too wide-open, so that it encompasses everything with fewer words, the opposing party will object to it as vague and you will never know whether you have all of the requested information." It would be more effective to provide that a party answering an interrogatory "shall include all information, including documents, that the language of the request encompasses under all reasonable interpretations." And a party who objects must explain what tasks are not being performed because they are too burdensome, or what terms require further explanation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No data are offered to show the need to reduce the number of interrogatories. No attempt is made to address disputes about whether subparts are discrete or logically related. Reducing the number will encourage more broadly worded and burdensome interrogatories. And the problem will be aggravated by the parallel reductions in other discovery devices.

307, Hon. A. Leon Holmes: Opposes the reduction. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

311, James Coogan: "This rule change is particularly disturbing." Issues often appear that can be resolved only by written answers to written questions. Twenty-five, the present limit, at least has a rational relation to these needs.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases many areas of discovery are inexpensively accomplished by interrogatories. Reducing the number will increase motions for leave to ask more. (Also opposes the new proposed rules' limits on the number of requests for production.)

317, Steven Banks for the Legal Aid Society in New York City: "Interrogatories, used properly, are an efficient means of eliciting factual information (such as the identity of witnesses and involved persons * * *) which would be considerably more burdensome to elicit through depositions." Improper use, as to seek extensive narrative answers that can be got more efficiently through depositions, can be controlled directly.

321, Timothy M. Whiting: Reducing the number "will lead to overly broad and compound questions." In mesothelioma cases interrogatories have led to discovering additional defendants and additional asbestos-containing products.

324, Jonathan J. Margolis: "In employment cases * * * it is far more efficient for a plaintiff to ask the defendant to identify those who made the decision to fire or demote the plaintiff in an interrogatory than to parse out perhaps thousands of documents or to ask multiple deposition witnesses." And interrogatories can be useful to determine whether affirmative defenses are real or mere boiler-plate. Interrogatories also can be an efficient way to identify witnesses. There is no empirical evidence of a need to reduce the number.

325, Joseph M. Sellers: Presumptive limits that are too high for some cases may encourage over-discovery. When too low, they encourage broader requests in lieu of a higher number of more tailored requests, and engender collateral disputes. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: "Well-crafted written discovery has always been the cheapest, most reliable and efficient means to obtain information." The severely limited numbers for Rules 33 and 36 will force litigants to ask broader questions, further limiting the usefulness of written discovery.

350, Pennsylvania Bar Association: The default number of interrogatories should be left at 25.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Fifteen is more than sufficient for employment and labor cases (from a defending perspective).

357, Joanne S. Faulkner: "For low income consumers, often written discovery is all they can afford." Interrogatories and requests to admit are often the only way to get beyond evasive answers to the complaint. The number should not be reduced.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing home litigation often covers a number of different events and circumstances. That requires many interrogatories. And interrogatories often help shape other discovery, including depositions. The reduced limits are a mistake.

359, Andrew B. Downs: "As a general proposition, interrogatories are useless." The questions are cumbersome. The answers are evasive, opaque, "jello-like." They should be abolished. Reducing the number is but a step in the right direction.

360, Robert Peltz: The impracticality of the proposed reduction is illustrated by attaching standard interrogatories approved by the Supreme Court of Florida for general negligence, automobile, and medical malpractice actions. For plaintiffs they run in the 20s, up to 29 in medical malpractice cases.

361, Caryn Groedel: Reducing interrogatories will require plaintiffs to spend more money on depositions.

362, Edward Hawkins: The 15 interrogatory limit "is simply unrealistic."

363, Dean Fuchs, at request of NELA-Georgia Board: Written discovery through Rule 33 and 36 "can be an extremely effective tool to not only discover information * * * about [] claims and defenses, but also * * * to frame cases for a ruling on summary judgment and to narrow issues for trial." The misuse of marginally relevant boilerplate interrogatories should not distract from the importance of carefully drafted interrogatories and requests to admit. Limiting the number will increase satellite litigation in counting disputes and in requests to exceed the limit.

365, Edward P. Rowan: "Interrogatories cut down the complexity of depositions, and even eliminate the need for some depositions." The restriction is unwise.

368, William G. Jungbauer: "Interrogatories allow a party to identify witnesses, additional and relevant facts, and documents." Reducing the limit will lead to overly broad and compound questions.

369, Michael E. Larkin: Interrogatories are efficient. They reduce the likelihood of unnecessary depositions and other discovery. The proposal is unnecessary, and will lead to more work for the court.

370, Thomas D'Amore: "Interrogatories are an unobtrusive way to identify witnesses, additional and relevant facts and documents." Defendants often do not agree to discovery beyond the presumptive limit, and judges may grant fewer if the presumptive limit is lowered.

372, J. Burton LeBlanc, for American Association for Justice: "Interrogatories are a useful,

inexpensive and unobtrusive way to obtain basic background information." They are a critical information-gathering tool. Many comments made in March 2013, several of them by government agencies, protested. There is no evidence supporting a presumptive limit at 15.

373, Michael L. Murphy for AAJ Business Torts Section: Do not lower the limit. Interrogatories are used "for many purposes, including identifying witnesses, gaining an understanding of the organizational structure and lines of responsibility, narrowing or ruling out potential claims and theories, and identifying potentially relevant evidence." A reduction is likely to lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: Interrogatories and requests to admit are a simple and inexpensive means of acquiring information. Responses often focus and drive oral discovery. Limiting them will force attorneys to cast a wider net. Consider a product liability case. More than 25 interrogatories may be needed on each of five different topics -- the identity of the employees responsible for design, assembly, or manufacture; the design history, including component part suppliers or manufacturers and other models using the same component or system; computer modeling and physical testing methods used to judge safety of the product before its sale; field performance of the product and claims and lawsuits similar to the instant litigation; alternative designs studied before the product was released for sale.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Interrogatories are used "to inexpensively identify witnesses, obtain information relating to damages, and even identify the size of the class for numerosity purposes." They should not be further limited.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): For both Rules 33 and 36, the Committee should "put more teeth into enforcement, as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

379, John M. Gallagher: There is no good reason to reduce the number of interrogatories, nor to limit requests to admit.

383, Alan B. Morrison: Opposes the reduction. Answering interrogatories is rarely burdensome in the way that responding to Rule 34 requests can be. They are an inexpensive way of obtaining information, "and often reveal something about the requester's thinking about the case, from both a legal and factual perspective." There are few cases where requests for interrogatories are the culprit in claims of discovery abuse. And this reduction seems incongruous with the proposed limit to 25 requests to admit — "the burdens of investigating and properly answering these Requests seem very similar to the burdens under Rule 33."

386, Arthur R. Miller: The reduction to 15 "is particularly questionable." Interrogatories are not burdensome and are inexpensive. "There are very few cases, if any, in which interrogatories are the source of discovery abuse." If a question seems onerous, a party can respond as best seem reasonable, and allow the judge to decide whether anything else should be required.

394, Thomas Crane: In employment discrimination cases, 15 interrogatories are not enough. Interrogatories are an efficient way to obtain critical information. Depositions by written questions tend to be costly.

398, Shira A. Scheindlin: "There is no empirical evidence that 25 interrogatories has caused any

problems * * * It is a change only for the purpose of signaling a narrowing of the scope of discovery." It will increase cost and delay in resolving disputes.

400, Gregory P. Stone: Interrogatories are important and cost effective. The information exchanged is important in determining whether to go to trial, and — if trial is had — in avoiding the need to approach a trial "blind."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Limiting the parties to fewer interrogatories will force them to write their questions broadly, leading to litigation over the propriety of the questions.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The present limit of 25 is severe and unwarranted. The model interrogatories for personal injury actions in Florida list 23 questions. Nor is there any clear problem that warrants a reduction. Interrogatories establish simple facts and stances of the parties, and obtain basic information such as the identity of witnesses, ownership of vehicles, and other important matters. Further limits will require extremely broad interrogatories, eliciting objections and motions. 448, Robert D. Curran, tracks 410 without the Florida interrogatories.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. They seek very basic information at the beginning of a case, and help prepare the case in later discovery for summary judgment and trial. Often in securities fraud cases the defendant will request that the plaintiff use interrogatories instead of a Rule 30(b)(6) deposition; limiting the number will impede this efficiency. Interrogatories, including contention interrogatories, may lead to elimination of claims and defenses.

420, Daniel A. Edelman: Combines Rules 33 and 36. Do not reduce the numbers. Instead, find ways to put teeth into enforcement, "as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

421, Louis A. Jacobs: "As for whether Judges should 'manage up' discovery by starting with limits, rather than 'manage down' discovery by starting with liberal discovery, the Committee should not drink this law-and-economics flavor of Kook-Aid." Limiting the number of interrogatories is "yet another recipe for more judicial involvement * * *. From my perspective, counting as a discrete interrogatory the subparts of a single interrogatory dooms discovery in employment litigation." "For example, we always ask in a single interrogatory for the identity of the decisionmaker, as well as each individual who provided input on which any decisionmaker relied, for specific employment decisions, ranging from termination and discipline, through evaluating performance or investigating misconduct, to assignments and opportunities." "If each employment decision is deemed a discrete interrogatory, the ceiling is in many cases bumped on the first one."

445, Gerald Acker, for Michigan Assn. for Justice: "[P]arties simply do not produce relevant documents during initial disclosures, as a matter of course." Interrogatories are needed to flesh out the case. And they are efficient.

457, Carl A. Piccarreta: There is no need to reduce the limit. The system is not broken.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Interrogatories are useful to

narrow the range of disputed issues and as an efficient, low-cost form of discovery. Government cases regularly see the full use of the 25 limit.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "In all but the most straightforward cases, 15 interrogatories may not suffice." Either the rule text or the Committee Note should emphasize the need for flexible application.

464, Douglas A. Spencer: Limiting the number of interrogatories would make prosecuting or defending cases next to impossible.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "This proposal will only encourage more aggressive law and motion practice."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference agreed that interrogatories are useful, and that there is no general problem with the limits set at 25.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Offering a not complex disability discrimination example: "15 questions, even if consisting solely of contention interrogatories, would be insufficient."

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Reducing it to 15 interrogatories "will lead to overly broad and compound questions."

614, Lars A. Lundeen: "I have honed my initial set of interrogatories in the typical auto collision court case, filed in State court, to 33." Setting a limit of 15 for more complex cases is unworkable.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes the proposal, which "will produce more motion practice without meaningful benefit."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes.

1054, Assn. of Bar of the City of New York: Supports, on condition the proposal is revised to direct that the court must increase the limit consistent with Rule 26(b)(1) and (2). But notes that "interrogatories can (and often do) impose great burdens on litigants, because they can require searching reviews of documents and factual investigation in order to respond, even though the same work could be done by the requesting party based on the documents produced in discovery."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Strongly opposes, advancing for defendants the arguments often advanced for plaintiffs.

1588, Leigh Ferrin for Public Law Center: More than one-third of civil actions in federal courts involve at least one pro-se litigant. They cannot afford depositions. They need interrogatories. In civil rights cases, for example, they often need 5 to 10 interrogatories just to figure out the identities of the individuals who allegedly violated the plaintiffs' constitutional rights.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Interrogatories have long been disfavored as ineffective, costly and often not justified. * * * An additional reduction in the number * * * would be beneficial in most cases."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 The proposed reduction to 15 interrogatories is problematic for the same reasons as the reduction in the number of depositions.

November Hearing, Andrea Vaughn: p 173: For the reasons that reducing the number of depositions will impede actions for unpaid wages, reducing the number of interrogatories will also be an impediment.

November Hearing, Barry H. Dyller: p 183 In litigating constitutional violations by government employees or actors "I rarely use interrogatories, so I don't care how many there are personally."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Increasing the number should be considered.

January Hearing, Elise R. Sanguinetti: p. 151 For contingent-fee plaintiffs in wrongful-death and catastrophic-injury cases, interrogatories are an inexpensive, "really critical" way to obtain necessary information while holding costs down.

February Hearing, J. Bernard Alexander, III: p 272 Although answers to interrogatories are filtered through counsel, they provide some information, narrow the scope, narrow the issues.

RULE 34(b)(2)(A): EARLY SERVED REQUESTS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes because it opposes the proposal to permit requests to produce before the Rule 26(f) conference.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 34: SPECIFIC OBJECTIONS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that by adding a "specificity" requirement "the Committee may finally eradicate" the practice of boilerplate objections.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The proposal "appear[s] reasonably calculated to address the goal of requiring greater specificity in parties' responses to document requests * * *."

372, J. Burton LeBlanc, for American Association for Justice: Requiring specific objections is a positive step toward preventing parties from evading discovery requests. November Hearing, Burton LeBlanc, President, American Association for Justice: p 139, 141: In general terms, "we support the [Rule 34] proposals as written."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: It is common for defendants to assert undue burden without articulating what that means, or to assert a general privilege objection. Information is withheld until the court, usually in response to a motion to compel, orders the defendant to provide evidence estimating the costs. "A responding party's inability to back up their vaguely stated objections has, in many cases, led to the production of highly relevant information." Requiring specific objections is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: "It should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart" when there is a general objection applicable to all of a counterparty's requests. The Committee Note should make this clear.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

407, David J. Kessler: (This comment makes many suggestions for the Rule 34 proposals that are difficult to compress into a summary. Detailed rereading is well worthwhile.) The proposed obligation to state objections with specificity should be linked to the particularity of the request. Rule 34 works well only when there is communication between the parties that crystallizes and clarifies the scope of the responding party's search and production. Problems become acute when the parties are not even aware that they disagree about the scope of the requests. The lack of consequences for overbroad requests creates an incentive to make overbroad requests. (1) Many courts have already instituted the specific-objection requirement. (2) The Committee Note might usefully say that when a request on its face violates Rule 26(g) it is enough to make that objection without making any other objections or any obligation to respond. (3) The obligation to object with reasonable particularity should be tied to the specificity of the request.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Requiring more specific objections is helpful.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 34(b) proposals.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: The Rule 34 proposals were generally supported by the conference participants.

499, Beth Thornburg: This extremely limited proposal will not prohibit laundry-list objections, nor deter or raise the cost of objecting, nor ease the burdens on the discovering party.

581, James Robson: Eliminating boilerplate objections and baseless assertions of privilege "is an excellent idea."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. It corrects a gap between Rule 33 and Rule 34.

635, Matthew D. Lango for NELA/Illinois: Supports "the proposal to bar generalized discovery objections."

1054, Assn. of Bar of the City of New York: Supports. Particularized objections support reasoned negotiations and the court's assessment of objections. The Committee Note should state that an objection is sufficiently specific if it states the limits that have controlled the search for responsive and relevant materials.

1413, Jocelyn D. Larkin for Impact Fund and several others: Endorses the amendments "regarding responses to document requests. Evasive responses, coupled with vague references to 'rolling' production at some unspecified future time, significantly contribute to delay and inefficiency in the discovery process."

1462, Margaret M. Murray: "Requiring the responding party to state objections with specificity is fundamental and long overdue." "Any process requiring * * * extensive meeting and conferral or judicial intervention to gather information merely to evaluate a responding party's stated objection is not effective."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: Massachusetts Superior courts require specific objections. It works. "Blanket objections are not tolerated."

2072, Federal Courts Committee, New York County Lawyers' Assn.: All the Rule 34 proposals "will clarify discovery obligations and expectations. * * * [T]he requesting party will know if it has reason to consider moving to compel. The procedures set forth are in line with existing law and good practice."

2110, Miriam Hallbauer & Richard Wheelock for LAF: This is "a sensible way to discourage litigants from attempting to evade discovery with rote, essentially meaningless objections."

January Hearing, P. David Lopez (EEOC): p 68 Agrees with the proposal.

January Hearing, Jennie Lee Anderson: p 271 Many inflated discovery costs are inflicted by defendants on themselves. Rule 34 requests to produce are often met with two or three pages of objections to each request, and no production at all. Extended negotiations follow. Defendants refuse to make specific objections, and give no real information on the cost of responding. Then defendants are unable to prove the claimed burden and production is ordered. Requiring specific objections will encourage more candid exchange of information, earlier.

February Hearing, William B. Curtis: p. 77 "[T]he proposals to Rule 34 are a very good start,

because what they do is they eliminate prophylactic objections."

February Hearing, Ariana Tadler: p 325 Supports the "(b)(2)(B)" proposals.

RULE 34: PRODUCTION — TIME FOR PRODUCING

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this provision "should ultimately provide greater clarity and increased understanding surrounding productions of ESI."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section supports, but believes the Committee Note language should be transferred to rule text stating that when production is made in stages, the response should specify the beginning and end dates of production.

372, J. Burton LeBlanc, for American Association for Justice: Codifying the general practice of producing, and requiring the producing party to disclose when production will occur, will streamline production of documents. And it will allow parties to anticipate when production will occur, particularly when production takes place in stages.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has become standard practice for responding parties to refuse to produce any documents until all discovery disputes have been resolved," and to start producing on a "rolling" basis without estimating a time to complete production "or, in some cases, even confirm when a production is complete." The proposal is desirable.

374, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).t

407, David J. Kessler: (This comment addresses the choice to produce, and timing, in great detail.) (1) Producing, rather than permitting inspection, is a well-established practice. But there is a growing tendency in courts to defeat a party's choice whether to produce or permit inspection by too readily providing direct access to documents or computers in an attempt to reduce the overall cost of discovery. "Even if no privileged documents are at stake, this solution is too great an intrusion into a responding party's private affairs." "[A] court should not compel inspection over a responding party's choice to produce except where production is technically impossible or there is evidence of discovery abuse that mandates inspection." The Committee Note should say that "absent abuse, it is the responding party's choice to either produce * * * or permit inspection."

(2) There is an "iron triangle" that joins cost, schedule, and scope. Reducing cost and accelerating the schedule reduces the quality of the production. A large discovery can be done quickly, but that will be expensive. It can be done quickly and inexpensively, but it will not be very good. "[W]hat can be reasonably accomplished in discovery is a question of both time and money." [A] There is little case law on what it means for a requesting party to specify a reasonable time for inspection or production. Nor is it clear how the requesting party's specification bears on a responding party's choice of a time to produce. Because a party does not review documents provided for inspection [?], production takes longer than inspection. [B] It is difficult to determine how long it will take to produce, and the time is controlled by factors that may not be known when the initial response is made. These factors include volume, format, location (both geographically and technically); various languages; the nature of the requests; requirements to issue code or compartmentalize electronic data; whether data is searchable; the amount of privileged information; the complexity of the litigation of review; the amount of redaction; and "etc." These factors may be understood only as discovery unfolds. [C] The time to produce will be affected by changes in the scope of the request in response to negotiations or motions to compel. The proposal may create an incentive for responding parties to make

aggressive objections, hoping to narrow the scope of discovery so they can state a shorter time for production. [D] It is not clear how stating a proposed time to produce "would interact with contingent productions like phased discovery or production from not reasonably accessible data sources under 26(b)(2)(B). Sources not reasonably accessible should be searched only after reasonably accessible sources have been searched and produced. [E] So it is not clear how the stated time to produce would be integrated with the Rule 26(e) duty to supplement — would a party be chastised for supplementing after the stated time to produce?

"Given these concerns, it does not seem practical to include this proposed amendment in the Rules." But if it is, "I would make it clear in the Notes that it is reasonable and expected that responding parties may need to update or supplement the date by which their production will be completed.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Often it will not be feasible to produce at the time for inspection stated in the request. But referring to a later "reasonable" time "will engender disputes about whether a production has been unreasonably delayed." "Reasonable" should be deleted. "[T]he parties frequently negotiate that productions will be made on a rolling basis." Difficulties arise where there is little or no negotiation, "not because of the terms of the current Rule."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. A response may state that documents will be produced, without specifying a time for production. "That practice is a frequent source of frustration, disputes and motions."

1054, Assn. of Bar of the City of New York: Supports. But the Note should observe that it suffices to state a time when it is anticipated that production will be complete. Precise predictions may be difficult in undertaking large-scale productions.

1462, Margaret M. Murray: "[I]n most of our firm's class action cases, we receive responses to discovery requests without a single responsive document provided." Defendants refuse production of documents until all discovery disputes are resolved. When production begins they say only that it is "rolling," and refuse to identify an estimated date for completion. In some cases, they will not even confirm whether production is complete.

1463, N. Denise Taylor for Association of Southern California Defense Counsel: The amendment reflects common practice, and eliminates discovery battles over access to original files.

1552, Esther L. Klisura for State Bar of California Committee on Federal Courts: As proposed, there is a risk that the rule will be read to give the responding party unilateral control in determining what is a reasonable time. "reasonable" should be deleted, and this sentence added: "*If the later time stated in the response has not been stipulated to or previously ordered by the court, the requesting party may move to compel an earlier production.*"

1608, Jonathan M. Redgrave: Amend the rule to read: "or by a later reasonable time specifically identified in the response taking into account factors such as the volume and complexity of the production. When it is necessary to make the production in stages the response should specify the beginning date of the production and anticipated end dates of the production."

1878, Roger L. Mandel: "The use of boilerplate objections combined with the refusal to state when documents are actually being withheld based on the objections and to commit to document production within reasonable certain periods of times are the single biggest problems with

discovery today and greatly increase the time, expense and difficulty of discovery. I strongly favor the proposals to deal with these issues."

RULE 34: STATEMENT OF WITHHELD ITEMS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this requirement "could make Rule 34 responses more straightforward and less evasive."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The goal is desirable, but there may be unintended consequences. The proposal "would seemingly require a responding party to obtain extensions of time to respond until it knows whether documents [responsive] to a particular request are being withheld. Such a response can only be accurately made after there has been a sufficient document review to enable an accurate response. Yet, it does not appear to be desirable written response for that reason. This problem could be cured by making it clear in the proposed rules that a party can respond by saying in effect, that it has not yet determined whether responsive documents are being withheld to the request, but it will supplement its response to provide that information within a reasonable time."

357, Joanne S. Faulkner: This "is salutary, and a similar provision should be added to Rule 33." Indeed, written discovery should be governed by the same principle as Rule 30(c)(2) applies at depositions — the requested information should be provided along with the objection. Nervous lawyers could be reassured by adding a provision that production does not waive objections to admissibility and relevance.

372, J. Burton LeBlanc, for American Association for Justice: The practice of stating objections and then producing subject to the objections makes it difficult to assess what has not been produced and which objections go to whatever has not been produced. The proposed change will discourage parties from evading discovery on procedural grounds and enable the requesting party to assess whether further discovery will produce evidence to support its claims.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has * * * become commonplace for parties to respond to discovery with a litany of boilerplate objections without revealing whether they are actually being relied upon to withhold information." It is impossible to determine whether anything has been withheld, and if so on what grounds. Countless hours of meeting and conferring are required. This proposal is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: Refers to 26(b)(2)(C), but means 34. The idea is good. But if a party objects to making a search at all, either because unduly burdensome or vague, it cannot know whether it is withholding responsive documents. The statement in the Committee Note that a party can state the limits that have controlled the search is adequate to the task, but should be moved into rule text.

381, John Stark: The proposals place greater emphasis on document requests, restricting other modes of discovery. This is mistaken, for the reasons described with the suggestion that numerical limits and many other limits should be placed on Rule 34. So requiring a statement whether responsive materials are withheld goes in the opposite direction.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: This proposal is undesirable. A producing party does not "withhold" a document it believes is not discoverable. The result will approach a need to produce a "log" of "withheld" material. A typical Rule 34 request is broad —

"every document that mentions widget X." The responding party may believe that is too broad, and produce a set of documents it has identified. It should not be required to search for every document mentioning X so as to be able to describe those it is not producing. Such a duty would only encourage broad requests.

407, David J. Kessler: (This the third part of this detailed comment on the Rule 34 proposals).

(1) "Withhold" is not an appropriate term. "As a general matter, we have not historically required parties to identify the documents they are not producing or that did not fall within the document request, properly construed." "Requiring responding parties to establish why they did not search in a specific location or produce a specific document turns discovery on its head"; all they need do is object. For example, it is common to use search terms, "but a party is not withholding documents that are not identified by its search terms." Nor should it be required to disclose the search terms, which by all the better authority are protected as work product.

(2) As a practical matter, even responding parties who take their Rule 26(g) responsibilities seriously "may not know exactly how they will search for the documents they agree to produce. Nor may they be aware if any documents are going to be excluded from the production that would otherwise be responsive but for the objections."

(3) The rule should instead focus "on what [the] responding party is agreeing to search for and produce. * * * [T]he court should ask whether the scope of what the responding party has agreed to search for and produce is reasonable and whether the requesting party and the court can clearly understand what the responding party is agreeing to produce. Too often responding parties provide a series of objections and responses, but never describe what they actually agree to search for and produce."

(4) Rule 34(b)(2)(C) should instead be amended:

(C) Objections. An objection to part of a request must specify the part and ~~permit inspection of the rest.~~ state with reasonable clarity what information the party will either produce or for which it will allow inspection. Where a party objects to a request in its entirety and does not plan to produce any documents in response to the request, the party should so state.

The Committee Note would be revised in parallel, see p. 11 of the comment. February Hearing, David Kessler: p 342 "Many objections to discovery requests do not withhold any documents whatsoever, but rather limit those stems [sic] of proper scope of discovery under the rules." A party is not withholding anything when it states the limit of the inquiry. It would be better to direct that the responding party state what it is looking for.

421, Louis A. Jacobs: "[E]mployers regularly * * * raise boilerplate general and 'to the extent' objections, and the Committee's effort to eradicate this abuse is wonderful. Conditionally couched discovery responses leave us wondering what information or documents have been withheld, and requiring an indication of that shortfall facilitates resolution of disputes."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department agrees that some litigants do not disclose whether anything has been withheld. It "supports the proposed amendment insofar as it does not create a detailed disclosure requirement, which would be unworkable." Responses often are due while still gathering information about the categories of documents that will or will not be provided by the agency. The Department supports the proviso in the Committee Note that a statement of the limits that have controlled the search qualifies as a statement that the materials have been withheld.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: This "will increase transparency, requiring parties to communicate whether otherwise discoverable information is being withheld."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: This proposal is long overdue. Often the first question at the meet-and-confer after a Rule 34 response asks whether anything has been withheld under the objections. "Usually the response is that nothing has been withheld. Now that information will be in the response." But in cases where production occurs over time, counsel may not yet know whether anything will be withheld. The producing party ought to be able to make the objection, and be required to amend the response to state whether documents have been withheld.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

540, Alex Dahl for Lawyers for Civil Justice: This proposal imposes an added and unnecessary burden. Any confusion typically is resolved at a meet-and-confer. "The root cause is often a failure to object with specificity." "The requesting party also has a duty to propound specific demands."

558, Richard Alembik: Proposed 34(b)(2)(B) and (C), to eliminate boilerplate discovery objections and baseless privilege assertions, is a very good idea.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. "The magistrate judges have seen many motions addressed to the ambiguity" of responses that state objections, and then state that without waiving the objections, certain documents will be produced, but do not state whether other responsive documents will be produced.

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": (Probably fits here:) "We strongly support the amendments of Rule 34 to prevent evasive answers to document requests."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, along with the specific objections proposal. This is workable because the Note recognizes that a statement on the scope of the search functions as a statement that anything outside the scope is "withheld."

1054, Assn. of Bar of the City of New York: Sort of supports the proposal. A better method for curbing evasive responses would be to prohibit conditional responses — "subject to, and without waiving" objections. Coupled with the requirement that objections be specific, this could go a long way. The practical difficulty is that objections typically are prepared early on, in the early stages of searching for responsive documents or even before the search has begun. You cannot know then whether anything will be withheld. If the proposal goes forward, it should be modified to require notification of withholding only at the conclusion of the document production.

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports this and the specific objections proposal.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Approves both the specific objections proposal and the requirement to "delineate which, if any, responsive documents are being withheld based on any objections."

1393, Camille Godwin: While opposing the other proposals, endorses the Rule 34 changes. They

will reduce "time needlessly spent by courts and litigants ferreting out the basis of routinely overbroad objections which often serve only to mask the existence of materials known to be responsive and which defendants hope will remain uncovered."

1462, Margaret M. Murray: A laundry list of objections "necessitate[s] countless hours of meeting and conferral, simply to determine whether documents were withheld and, if so, why. * * * The change will substantially lower the extent to which court intervention is required."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This amendment is extremely helpful."

1476, Zenola Harper for Horizon Blue Cross Blue Shield: "This amendment is problematic because it would likely spawn a new genre of discovery disputes through which the requesting party attacks the log of documents identified as withheld * * *."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: "The Massachusetts Superior Courts adopted this rule and it works. * * * Requiring an objecting party to disclose if it is actually withholding documents saves everyone time."

1521, R. Stanton Dodge for DISH Network: "[I]t is rare that a party knows, at the time it serves its responses, exactly what it has and what it will or will not be producing."

1536, Lisa Tate for American Council of Life Insurers: Overbroad and ambiguous requests to produce make it difficult to know what has been "withheld." The proposal should be withdrawn.

1732, J. Burton LeBlanc for American Assn. for Justice: Supports all the Rule 34 proposals.

1883, Norman E. Siegel: Eliminating "the unfortunately popular tactic of not disclosing whether documents are being withheld based on a particular objection" will eliminate unnecessary discovery disputes.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This will aid litigants who are at a disadvantage relative to their opponents because they lack sufficient access to know what discoverable information even exists."

2141, Kevin N. Ainsworth: The objection also should state "whether and to what extent the objecting party limited its search for responsive materials."

2264, Scott A. Kane: Common requests ask for all documents relating to any allegation in the complaint. It is difficult to state what is withheld when faced with an overbroad request. The Committee Note should state: "The sufficiency of the identification of materials withheld on the basis of objection should be measured by, among other things, the degree of specificity of the description of materials sought in the request."

November Hearing, Jeana M. Littrell: p. 17-18, 20-22: Opposes this proposal. An affirmative statement that documents are being withheld will undoubtedly lead to follow-on discovery asking what has been withheld, and why. We do not now get such follow-on discovery, even though we do make the common boilerplate objections that a request is overbroad, unduly burdensome, and that subject to these objections we are producing. We should not do that, but we do. What happens next is that the requesting party calls, and we work it out.

January Hearing, Janell M. Adams: "Withheld" creates difficulties when TAR is used — you do not know what documents you have not produced when you have not identified them. We use TAR now only on agreement with the other parties. So they know we may not have identified every relevant document. But we use other methods to sort out responsive documents from the set of relevant documents, and we do not tell other parties "which word searches, which particular methodologies, analytics, whatever" guided the choice of responsive documents. We should not have to provide that information to identify what has been "withheld."

February Hearing, John H. Martin: p 172 Texas requires a statement of withheld items only for privileged items. That has worked well, and should be considered with this proposal.

February Hearing, Stuart A. Ollanik: p 266 Supports the proposal.

RULE 34: NUMERICAL LIMIT

After prolonged discussion, the Advisory Committee decided to abandon drafts that would have amended Rule 34 by imposing a presumptive numerical limit on the number of requests to produce. Many of the prepublication comments addressed this proposal. It is addressed in some post-publication comments as well.

257, Todd Croftchik: "Even a reasonable limit of 50 requests would significantly reduce the attorneys' fees and costs expended in responding to hundreds of requests for production in a single product liability case."

258, Peter Sturmfels: Verbatim the same as 257 above.

260, William LeMire: Verbatim the same as 257 above.

269, Mary Novacheck: Verbatim the same as 257 above.

307, Hon. A. Leon Holmes: the limitations presently in place on requests for production are sufficiently generous that there are few disputes. (This is combined with Rules 30, 31, 33, and 36; it may reflect a local rule.)

318, Brian Sanford: "Rule 34 should not contain a limit on requests."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Carries forward a pre-publication comment protesting the adoption of a limit on the number of Rule 34 requests.

372, J. Burton LeBlanc, for American Association for Justice: Calls to reinstate the abandoned proposal to impose a numerical limit on Rule 34 requests "are ill-advised."

381, John Stark: Makes a number of suggestions for Rule 34, collected here. Both the number and scope of requests should be limited at the outset of litigation. Indeed, the rules should identify categories of cases — for examples, administrative record cases, absolute or qualified immunity cases, time-barred cases — where discovery planning and discovery requests are presumptively prohibited. It is a mistake to limit the numbers of depositions, interrogatories, and requests to admit; the result will be to force ever more discovery into the costlier Rule 34 requests. Amendments should require "more focused and limited questioning," and allow more than 30 days to respond. Rather than allowing requests for any relevant information, the focus should be on "getting 'just enough' to understand the case." And the requesting party should be made to bear some of the burden of production if there is to be true proportionality.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: "[P]resumptive limits on document discovery should be considered." "Susman's Checklist," for example is an agreement among the parties that discovery be limited to five custodians in the first instance, to be followed by five more custodians in a second round. The requesting party identifies the custodians. After the second round, further custodians can be discovered only on showing good cause.

465, Neil T. O'Donnell: Opposes the abandoned proposal to add a presumptive limit of 25 requests to Rule 34.

635, Matthew D. Lango for NELA/Illinois: Any presumptive limits would lead to broader requests and more discovery disputes.

637, Louis Lehr for Trial Attorneys of America: Recommends a limit setting a presumptive number of Rule 34 requests.

RULE 36: NUMERICAL LIMITS ON REQUESTS TO ADMIT

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of requests.

274, James Jordan: "If you limit everything else and then limit RFAs???"

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The limit is shortsighted. In railroad litigation, requests to admit are frequently used to eliminate the need for fact witnesses and additional expert witnesses. They eliminate the need to prove facts that are truly not in controversy.

289, Craig B. Shaffer & Ryan T. Shaffer: Rule 36 requests are not "discovery" tools. As a practical matter, a motion for summary judgment provides an alternative means to obtain admissions when the nonmovant fails to identify evidence creating a genuine dispute. And if a lawyer raises issues of authentication — most logically at a Rule 26(f) conference — and is rebuffed, that should be a basis for exceeding the limit. [It is not clear whether "authentication" is used in a sense that expands beyond documents, which are not included in the presumptive limit.]

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

299, Aaron Broussard: Combines Rule 36 limits with Rule 33 limits: the problem is that a smaller number of broad requests will support disingenuous responses.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No empirical data are cited to support the proposal. The presumptive limit to 25 requests "will create more issues than any it purports to solve." As with Rule 33, parties will dispute what are discrete subparts. There will be disputes whether a request is truly directed at admitting the genuineness of a document as opposed to some other purpose. Consider, for example, a forgery case: will a request to admit genuineness count against the limit? There is no demonstrated need. Do not make the change.

307, Hon. Leon Holmes: Opposes. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

317, Steven Banks for the Legal Aid Society in New York City: "Admissions are particularly useful for establishing uncontested background facts such as the staffing of a government agency and the allocation of staff to different locations and functions." In employment cases, requests can be critical where the employer's records show violations on their face. More than 25 requests have proved useful in streamlining important evidentiary disputes. And courts can readily evaluate requests against arguments of burden or other impropriety.

322, Michelle D. Schwartz, for Alliance for Justice: The limits pose a threat to plaintiffs with

limited resources. "High-quality requests for admission serve to reduce the number of issues that must be decided at trial." Limiting the number will force plaintiffs to devote more resources to trial proofs that could have been avoided.

324, Jonathan J. Margolis: Failures to admit can be followed up by interrogatories seeking the supporting facts; that may make lawyers less likely to deny anything they think the other side cannot prove. There is no empirical evidence that abusive numbers of requests are made so often as to warrant a new restriction.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Written discovery requests are more efficient. Reducing the number will diminish the utility, and force broader requests. And this will increase the need for deposition discovery.

349, Valerie Shands: "Why on Earth would one want to *reduce* the number of things the parties can agree upon before trial?" And if a judge unjustifiably denies an increase, there will be further cost and delay "while one is forced to appeal an issue * * *."

350, Pennsylvania Bar Association: Supports the 25-request limit.

357, Joanne S. Faulkner: Interrogatories and requests to admit are often all that a consumer can afford. A request for admissions can be a poor person's deposition. Do not impose numerical limits.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Requests to admit are seldom used in nursing home litigation. But they are used to request an admission that documents are admissible. This use should be protected by amending Rule 36(a)(1)(B) to provide for requests to admit the genuineness and admissibility of any described document. (The proposed numerical limit does not apply to requests under 36(a)(1)(B).)

361, Caryn Groedel: Limiting the number of requests will result in plaintiffs having to spend more on depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: Imposing limits on Rule 36 is even worse than reducing the number of interrogatories, "given their great effectiveness in narrowing issues for trial, framing summary judgment motions, and the relative ease to which Requests for Admissions are responded." This should be a non-issue; "I have never heard or experienced any complaint about the abuse of Rule 36."

365, Edward P. Rowan: Limiting requests to admit will increase time and cost, because they are efficient and inexpensive.

369, Michael E. Larkin: Requests to admit are valuable, allowing the parties to resolve issues in an efficient manner and to determine the issues the opposition asserts.

370, Thomas D'Amore: "I often use requests for admission to limit the number of issues in the case so that I don't have to do discovery on issues." Why impose a limit "[i]f efficiency and cost savings is the goal"? "I would question the motives of the proponents."

372, J. Burton LeBlanc, for American Association for Justice: Requests to admit "are cheap but essential discovery tools" that enable smaller plaintiffs to establish critical information and are almost cost-free. Imposing a numerical limit will encourage broader requests, making it even

easier than it is now for defendants to deny. There is no evidence to support the limit. And the exemption of requests to admit the genuineness of documents favors defendants and large corporate interests — most document-heavy cases involve large corporations on both sides, so they do not face the same limits on requests to admit as plaintiffs with smaller cases.

373, Michael L. Murphy for AAJ Business Torts Section: Do not impose a limit. Requests to admit "are used for a host of reasons, including authenticating evidence, establishing the basis for stipulation, and narrowing the fact issues for trial." A limit will lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: The reasons to abandon the proposed limit are advanced in opposing the reduction to 15 interrogatories under Rule 33.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Requests to admit generally are used sparingly to achieve efficiencies by streamlining issues and focusing discovery, and by establishing undisputed facts related to liability. Limits need not be imposed.

394, Thomas Crane: Requests to admit "are a fairly efficient way to obtain pointed information efficiently." There is no need to create a limit — "I have personally never seen more than perhaps 35."

400, Gregory P. Stone: "I've been able to use fifty to sixty requests to admit to save days of trial testimony in vehicle defect cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) "Plaintiffs rely on requests for admission to eliminate the need to produce at trial proof of facts that are not in controversy." If plaintiffs are forced by numerical limits to frame broad requests, it will be easier for defendants to deny, increasing litigation costs.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: The limit to 25 requests, excluding requests regarding the authenticity of documents, is reasonable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: "In a standard personal injury action against a cruise line on behalf of a passenger, we propound a set of approximately 25 requests for admissions." The proposal is a solution in search of a problem. 448, Robert D. Curran, tracks 410 without the cruise line example.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. (See Rule 33 summary.) Requests to admit may obviate the need for motions in limine with respect to certain exhibits or testimony.

445, Gerald Acker, for Michigan Assn. for Justice: Requests to admit "are cheap and effective tools for discovery." They should not be limited.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Requests to admit are a useful tool for narrowing the issues for trial. They do not impose the same burdens as requests for documents or testimony. Limitations will gain little in efficiency, and that will be at the risk of increased trial time. "The Department has handled many cases, affirmative and defensive, in which responses to more than 25 requests have been useful to narrow the claims or defenses * *

*."

460, Jo Anne Deaton: The presumptive limit "is long overdue." Plaintiffs' counsel have served large numbers of requests to admit "for no apparent reason other than to 'churn' discovery and increase fees."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "This change will require parties to be more selective in their use of requests of admission and to focus on the material issues in dispute * * *."

464, Douglas A. Spencer: Limiting the number of requests to admit is inappropriate. They are an invaluable tool to limit the issues presented at trial.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "Reasonable requests for admission * * * are perhaps the most simple and direct discovery tool allowing the parties to narrow the issues to be tried." No empirical data support imposing a limit.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was more discussion of this proposal than the other proposed numerical limits. Some defense attorneys argued that requests to admit are abused, and that 25 is a reasonable presumptive limit. But "multiple plaintiffs attorneys noted that requests for admission are very effective discovery tools, sometimes in larger numbers than 25."

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Requests to admit result in fewer objections than other types of discovery. But defendants tend to deny most requests, and plaintiffs cannot know which they will admit. Adopting a presumptive numerical limit is unwise.

524, Joel S. Neckers: "I have handled several cases in the recent past where opposing counsel filed literally thousands of request for admission," imposing thousands of hours of time to litigate and respond to the requests.

589, Kathleen M. Neary for Employment Rights Section, AAJ: "Requests for admissions are often times utilized to establish that medical or counseling bills that were incurred as a result of the unlawful employment practices are fair, reasonable and were necessitated by the employment practice."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses. "The magistrate judges have seen instances in which the requests for admissions have been excessive and burdensome." The number can be addressed in a scheduling order. If the question arises later, the parties can work it out or make a motion.

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. (Also opposes the other proposed numerical limits.)

1054, Assn. of Bar of the City of New York: Supports. "[E]xcessive or irrelevant requests for admission can be overly burdensome or harassing." A number of courts have adopted local rules setting a presumptive limit of 25 requests.

1560, Arthur N. Read for Friends of Farmworkers: Rule 36 requests can be linked to requests to produce documents by seeking an admission that requested documents not produced do not exist

— this is particularly valuable as to documents a defendant is required by law to make and keep. Requests to admit are particularly important with respect to defendants who simply ignore discovery requests because failure to timely respond effects an admission. And they can summarize in an undisputable manner the results of document discovery, including the accuracy of summaries of voluminous records.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Substantive requests for admission have also become disfavored and are largely viewed as unproductive, leading to objections and/or vague or incomplete responses and, sometimes, needless motion practice for additional responses." But it is good to exempt requests concerning the authenticity of potential trial exhibits.

November Hearing, Darpana M. Sheth, for the Institute for Justice: There is no empirical evidence of problems with burdensome or excessive requests to admit. If there is a problem, it is that litigants do not use Rule 36 enough. Admissions serve vital purposes beyond laying the foundation to admit documents into evidence. They narrow the issues, and facilitate proof with respect to the issues that remain. Admissions that the casket monopoly in Louisiana did not serve any health or safety purposes shortened the trial to 3 hours from an expected 3 days.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Their use should be encouraged, not limited.

November Hearing, Patrick M. Regan: p 278 "The limit on requests for admissions * * * is a solution in search of a problem." The purpose is to narrow the issues. Why should we want to limit that worthy goal? In litigating between 300 and 400 cases in federal courts, and many in state courts, I've never, "ever, ever had a problem with the excessive number of requests for admissions."

January Hearing, P. David Lopez (EEOC): p 68 Requests to admit "can be a very, very effective tool." It is really important to draft them right. And if one formulation triggers an objection, it is often important to craft an alternative.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. "[O]ften requests for admissions in particular play a significant role in streamlining the pursuit of these cases."

January Hearing, Elise R. Sanguinetti: p. 151 In single-plaintiff wrongful-death and catastrophic-injury cases, requests to admit are often used. It is rare to ask more than 25, but "I want to be able to do that" when necessary to save the client money.

February Hearing, Donald H. Slavik: p. 14 At 22-23: "[O]ur complaint is a set of requests for admissions." The proposed limit may not cause problems for plaintiffs. "The defense may be more harmed. I get requests * * * 40, 50, 60, but if it helps narrow the scope of the issues going to trial, I think they're important."

February Hearing, J. Michael Weston: p 87 In a recent case the plaintiffs served a little under 1,000 requests to admit, asking for authentication of documents that had been produced in other cases around the country, but that were offered here in different forms that made it difficult to figure out which was what.

February Hearing, Leigh Ann Schell: 86 requests to admit have been served in a recent case. Many of them involve matters that must be resolved by expert testimony. Negotiations have failed to win any relief. The present rules allow us to seek relief, and we will. Adopting a presumptive limit will at least encourage the parties to take a more surgical, narrow approach.

February Hearing, J. Bernard Alexander, III: p 272 Requests to admit are a way to whittle down a case. I have never had an issue where an adversary has asked a judge to cut the number of requests.

RULE 37(a)(2): COMPEL PRODUCTION

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves the corresponding Rule 34 proposal, and so endorses this conforming proposal.

OTHER

256, Hon. Scott Crampton: This comment makes suggestions for AO Form 88, a subpoena form being revised to reflect the 2013 amendments of Rule 45.

263, The Cady Law Firm, by Christopher D. Aulepp: After criticizing parts of Rule 26(b)(1): "We are also opposed to the other proposed changes." The effect will be opposite to promoting justice, efficiency, and economy of resources.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Overall, the limits on discovery "will * * * make it much more difficult for individuals to find evidence when suing a massive — and sometimes multinational — company."

268, Craig Smith: Do not adopt the changes. Many "would negatively impact almost all plaintiffs, but would particularly harm plaintiffs in cases involving multiple defendants, complex litigation, and cases where the defendant holds a disproportionate amount of information compared to the plaintiff."

271, J.C. Metcalf: Prior rules changes, including disclosure, have been a farce. Corporate defendants produce little or nothing. A successful assertion there is nothing to produce in one case may be followed in another case by producing numerous documents claimed not to exist in the first case. "The proposed rule changes will exacerbate this dynamic." They "are a nightmare for the fair and orderly administration of justice."

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Rule 8 should be amended to reflect the plausibility standard adopted in the Twombly and Iqbal decisions. At the very least, a new Committee Note should be added to acknowledge those decisions and to explain their relationship to Rule 8.

295, Andrew Horowitz: The Western District of Pennsylvania has an innovative and resoundingly successful early ADR program that has been copied by other districts. And it has "recently launched a voluntary expedited litigation program where the parties consent to mutual limits in discovery and motions practice to reduce costs and bring about faster resolution." Such experiments should be continued.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The Sedona proposals include several recommendations to address preservation in Rule 16 and at various points in the discovery rules. These proposals overlap the comments on Rule 37(e). But several may be described here because they address topics that go beyond preservation.

Rule 16(a) The purposes for a pretrial conference would be expanded:

(3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C);

(3) (4) managing discovery and discouraging wasteful pretrial activities * * *.

Rule 26(c) The protective order provisions would expressly address preservation:

(1) In General. A party or any person from whom discovery is sought or who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things [may move for a protective order] * * *. The court cannot consider the motion ~~must include~~ unless it receives a certification [of meet and confer], and [the motion] is accompanied by a report that conforms to the requirements of Rule 26(f)(5). [Rule 26(f)(5) may be the 26(f)(3)(F) set out below.]

A protective order could specify the terms of preservation; limit the scope of preservation; or "reliev[e] a party from preserving certain documents, electronically stored information, or tangible things."

Rule 26(f) The discovery plan provisions of Rule 26(f) would be expanded to include this as a new (3)(F):

(F) If the parties are unable to resolve issues discussed during a Conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:

- (i) A section stating the issues during the conference and summarizing areas where agreement was reached on each issue;
- (ii) A section, containing no argument, providing a brief statement identifying each issue for which agreement was not reached, including:

- a short and plain statement of the position of each person or party on each issue in contention and;
 - the proposal of each party for reaching a resolution of the issue.

494, Charles R. Ragan: endorses these Sedona proposals.

636, Jonathan Harris: Supports the proposed change to the rule for expert witness disclosures...

1031, Steven Thompson: "[T]he rules should require a more thorough 'initial disclosure' by the defense. The defense should be forced to disclose all documents and information that support or relate to the claim against them, not solely the defense to the claim. In many cases, the defense has all of the documents, drawings, data and other material necessary to get to the truth about the plaintiffs' case * * *."

1197, Auden Grumet: We should expand the scope of information and evidence produced by mandatory disclosures.

1209, Christopher Heffelfinger: Rule 34(b)(2)(D) should be amended to direct that a privilege log must be served no later than 90 days following service of the request to produce.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that there is a need to recognize in the rules the problems of discovering information housed in foreign jurisdictions that have privacy laws restricting the transfer of personal information to other countries. The Sedona Conference International Principles on Discovery is a good guide. Rule 26(b) should provide that the court give due consideration and regard to a party's compliance obligations with any conflicting non-U.S. data protection law. "The burden of establishing that a conflict exists would rest with the producing party." Factors to consider would include availability of the information from another source — as in the United States — not subject to the privacy constraints; whether compliance with both laws is possible, for example by anonymizing the data or producing in redacted form; and phasing discovery to allow additional time to comply with the foreign law. If the producing party proves it impossible to comply with both laws, the burden would shift to the requesting party to show that the information is crucial to the litigation. If discovery is allowed, it should be narrowly targeted to reduce the risk of noncompliance.

1919, Fenn Little: This is one of a few suggesting that Rule 68 should be amended to allow a plaintiff to make an offer of judgment.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 107
Proposes that "contention interrogatories * * * not be required to be answered until the close of discovery."

COLLECTIVE SUMMARIES

Many comments make virtually identical arguments to make the same points, whether to support, criticize, or oppose a proposal. The following pages summarize comments from 487 to 600 in a form that illustrates what a "vote-" counting tally would look like. The count was abandoned at that point on the view that it has no substantial value.

General: Pro

Many brief comments can be summarized as generally supporting or opposing the proposals with little elaboration.

Others decry the costs of discovery. Assertions that the cost of discovery forces defendants to settle meritless claims are common. And there are some comments that the costs of discovery deter plaintiffs from ever filing, or lead to abandoning an action after filing, or force settlement on unfair terms.

490, Wes Blumenshine

510, John Olinde

514, Andy Osterbrock: General support. Deleting "reasonably calculated" is particularly important because it has been misused to stretch discovery beyond any reasonable intention.

517 Jeffrey D. Smith

580, Norman Jetmundsen for Vulcan Materials Company

General: Con

Many opposing comments emphasize the sharp divide between plaintiffs and defendants, and urge that rules amendments should be adopted only with substantial support from both plaintiffs and defendants. In related vein, many comments urge that the proposals will further tilt the balance of federal courts toward favoring defendants and disfavoring plaintiffs. This concern is often tied to laments about recent developments in pleading standards, class actions, and expert witnesses, along with the uses made of summary judgment.

An occasional comment underscores the divide between plaintiffs and defendants by "question[ing] the motivation behind those proposing the" amendments.

Some argue the restrictions will be unconstitutional. The more specific focus is on the right to jury trial, and depriving plaintiffs of the information needed to escape summary judgment or judgment as a matter of law.

It also is common to observe that discovery now works well in most cases. And the present rules give all the power judges need to make discovery work well in all cases.

512, Joseph R. Neal, Jr.

513, Laura Zubulake: As plaintiff in the eponymous series of cases, suggests that limiting oral depositions, requester-pays, and proportionality (depending on how it is handled) "have the potential to make it more difficult for individuals."

516, Dale Irwin

522, Kenneth Allen: The proposals will endanger public safety by hampering product-liability litigation.

523, Craig Davis

527, Samuel Bearman

533, Joanne Doroshov: Much of the discovery costs defendants complain of arise from their efforts to hide information or prevent disclosure of documents.

534, Jeff Schulkin

536, Steve Saks

544, Scott Hunter

546, Tye Smith

547, Chris Nidel (One of those that questions the motivations)

550, Jacob Lebowitz

558, Richard Alembik: Most of the changes are unnecessary.

561, Margaret Simonian

565, Robert Hill: "[T]he corporate defendants control Congress and the Courts, including the rule making process. Sad day. Justice for sale in America."

566, David Addleton: The proposals "violate fundamental fairness, equal protection, and due process principles."

567, Michael Ford

573, Bryden Dow

594, Sidney Cominsky

Rule 1: Pro

The arguments supporting the Rule 1 proposal emphasize the need for cooperation, at times pointing to local rules or standards requiring cooperation. Some urge that "cooperation" should be written into Rule 1 text.

497, Kenneth A. Lazarus for American Medical Assn.

Rule 1: Con

Two basic points are made in opposing the Rule 1 proposal. One is that rules of professional responsibility bear heavily on cooperation; the civil rules should not confuse the subject. Cooperation is a matter of professional aspiration in a system that remains fundamentally adversary. The other is a fear that the proposal is a lure for sanctions, with accompanying motion practice. Experience under the 1983-1993 version of Rule 11 is invoked.

524, Joel S. Neckers

Rule 4: Pro

(None of the comments from 487 to 600 require a note.)

Rule 4: Con

Opposition to shortening the time to serve reflects concerns that some defendants evade service; some are hard to find; some may be buried in layers of interlocking ownership that makes it difficult even to identify the defendant; serving multiple defendants may complicate matters; service by the Marshal's Service often is delayed. Plaintiffs have no incentive to delay service. Unless they want to delay to settle before service, or to perform the Rule 11 inquiry that tardy clients push beyond the limitations period. Requests to waive service will be discouraged because there will be only a brief period to accomplish service after the plaintiff learns that the defendant will not waive. The defendant is not prejudiced if service takes 120 days. Several comments point to the time required to effect service in another country; the most that can be said for this argument is that it implicitly relies on an ambiguity in the provision in Rule 4(m) that excepts service under Rule 4(f) or 4(j)(1) — service on a foreign corporation outside any judicial district of the United States is made under Rule 4(h)(2), which calls for service "in any manner prescribed by Rule 4(f)," not "under" Rule 4(f).

503, Patrick Malone 590, E. Craig Daue, agrees

504, Kenneth Behrman

521, Lincoln Combs

528, James Ragan

537, Victor Bergman

538, A. Laurie Koller: "I have had several cases settle after filing and before service."

541, Jessica Sura

542, Justin Kahn

545, David Rash

548, Kevin Hannon

549, George Wise: "Busy doctors are frequently hard to catch and serve in person."

551, Gregory Smith

552, Daniel Ryan (Draws from 553)

553, William Smith

554, Hubert Hamilton

557, John Lowe

558, Richard Alembik Perhaps 90 days would suffice.

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

564, Joel DuBoff

570, Nicole Kruegel

577, Clark Newhall

578, Christian Bataille

581, James Robson

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

Rule 16(b) Case Management Pro

The comments favoring the Rule 16(b) proposals tend to be general — enhancing early and active case management is desirable.

497, Kenneth A. Lazarus for American Medical Assn.: Supports.

583, James Howard: Agrees "with the provisions which reduce delays and create earlier deadlines."

Rule 16(b) Case Management Con

Most of the opposition to the Rule 16(b) proposals focuses on the acceleration of the time for the first scheduling conference. 60 days often is not enough, particularly for defendants whose lawyers need to find out what the case is about well enough to participate effectively in the conference. The problem is aggravated when a defendant takes some time interviewing firms before choosing counsel. And with large organizations time may be needed to sort through the layers of bureaucracy. The Department of Justice expresses particular concerns that arise not only from the complexities of the Department's own organization but also from the complexities of the agencies it often represents.

Rule 26(b)(1): Pro

The comments supporting Rule 26(b)(1) generally pick up the themes advanced by the Advisory Committee. Proportionality has been in the rules since 1983, both in what has become Rule 26(b)(2)(C)(iii) and Rule 26(g). The factors are familiar and well understood when someone thinks to invoke them. But proportionality is too often overlooked, or overcome by mistaken expansion of the "reasonably calculated" provision. Making proportionality an express part of the scope of discovery, measured by the factors that have been in force for thirty years, will make good on the promise made in 1983 but not yet fulfilled. Some urge that the proposal should go further, limiting the scope of discovery to matter that is both relevant and "material" to the parties' claims or defenses. Many comments also give specific examples of producing huge volumes of information, as compared to relatively minuscule fractions used as exhibits at trial. The high costs of responding to discovery requests also are detailed, particularly by corporate counsel.

The argument of opponents that bringing proportionality into the scope of discovery will impose a new burden of justification on the party requesting discovery is mistaken. (1) Just as now, argument to the court will not be a question of burdens. Each party will be called on to advance the information best available to it — the requesting party to explain relevance and importance, the responding party to explain costs and burdens. (2) Present Rule 26(g) requires the requesting party to consider all of these matters and to certify to them in making the request.

It is, moreover, important to do something to rein in the costs of discovery. Cost can thwart access to justice by dissuading plaintiffs from filing actions, or from persisting when the cost of discovery becomes apparent. Cost also can force compromise and settlement. The costs of litigation in the United States, moreover, are far higher than in other countries, placing United States firms at an increasing disadvantage in global competition.

487, Peter J. Mancuso for Nassau County Bar Assn.

488, Robert Buchbinder

496, James Edwards: (Ambiguous, but seems pro.)

497, Kenneth A. Lazarus for American Medical Assn.

498, Jose I. Rojas

576, Glenn Hamer for Arizona Chamber of Commerce and Industry

January Hearing, Robert Hunter: p. 200 Over the last five years, the amount Altec has paid for settlements is 61% of what it has spent on discovery. In part that is due to succeeding at trial.

January Hearing, Steven J. Twist: p. 243 "The triumph of cost over merit is a direct result of the current rules." Eliminating subject-matter discovery, discarding "reasonably calculated," and moving proportionality up to (b)(1) will cause parties and judges to pay much needed attention to the standard. There will be no change in "burdens" when a dispute is taken to the court.

January Hearing, L. Jill McIntyre: p 259 Proportionality goes hand-in-hand with the Rule 37(e) proposal, to guide preservation by what is proportional.

January Hearing, Patrick J. Paul: p. 265.

January Hearing, John J. Rosenthal: p 305 The package is modest. It will reduce costs, and will not inhibit anyone's ability to put on claim or defense.

January Hearing, Andrew B. Cooke: p 323 "Too often discovery is used * * * to gain tactical or settlement leverage for discovery on discovery or for setting up requests for sanctions."

Rule 26(b)(1): Con

The arguments in opposition focus most intensely on "proportionality." (1) The multiple factors are subjective. (2) Parties asked to make discovery (commonly identified as defendants) will seize the subjective character of the factors to refuse discovery of anything. (3) It is impossible to administer the factors because the importance of discovery, and the benefits to compare to the burdens, cannot be known until the discovery has shown what there is to discover. (4) Emphasis on the amount in controversy invites responding parties and courts to throttle discovery in cases that involve small dollar amounts but matters of great public interest. Individual employee claims are a common example. (5) Moving the factors up from (b)(2)(C)(iii), where they function as a limit, to the scope of discovery in (b)(1), will change the burdens on discovery motions. Now the party resisting discovery has to show the request is outside the limits. Under the proposal, the requesting party will have to show that the request is within the scope of discovery as defined by proportionality factors. Many comments are framed in terms that ignore the obligations imposed by present Rule 26(g).

It also is said that courts accurately understand and enforce proportionality under the present rules.

Omitting the examples of discoverable material — documents, witnesses, and the like — raises concerns that courts will conclude that such things are not relevant to the claims or defenses in the action, and are even more likely to deny discovery needed to understand an adversary's electronic information systems and to identify the custodians whose electronically stored information should be preserved and produced.

Opposition to deleting the phrase that allows discovery of inadmissible matter "reasonably calculated" to lead to the discovery of admissible evidence tends to assert that this sentence has become the operating definition of the scope of discovery.

Opposition to deleting the provision that extends discovery beyond the parties' claims or defenses to include the subject matter of the action on showing good cause urges that this discovery may be necessary to uncover new claims or defenses, or to reach information that is relevant to the original claims or defenses.

As with the proposed numerical limits on depositions, interrogatories, and requests to admit, a great many comments predict that the proposed rules will add to cost and delay by generating many more discovery disputes, disputes that often will be taken to the court.

All of the proposals that seem to curtail present discovery practices also are met with the observation that courts have ample power under the current rules to ensure that discovery is confined to limits appropriate to the needs of the case. The problems with discovery are generated by defendants who obstruct and delay by motions, provide requested information only late in the game, or simply fail to provide relevant and responsive information.

On a broader level, the discovery package as a whole is challenged as a distortion of the transsubstantive structure of the Civil Rules. All of the empirical evidence shows that discovery works well in a high proportion of all cases. Serious problems arise only in a small fraction, cases that typically are complex and involve both high stakes and contentious adversary behavior. Attempting to address these cases in rule provisions that apply to all cases will degrade access through discovery to information necessary to prove the claims of many plaintiffs, particularly in such areas as employment claims, civil rights, and consumer protection.

487, Peter J. Mancuso for Nassau County Bar Assn.

495, Jillian Estes

502, Peter Everett

503, Patrick Malone 539, Craig Currie: "Echo[es]" Malone

506, Richard Davis

505, Jason Itkin

509, Allegra C. Carpenter

511, Les Alderman

515, Steve Conley

518, Robert Stoney

521, Lincoln Combs

526, Jonas Jacobson

529, Robert Palmer

530, Travis Larsen

532, Ann Pinheiro

537, Victor Bergman

538, A. Laurie Koller

541, Jessica Sura

542, Justin Kahn

545, David Rash

547, Chris Nidel

548, Kevin Hannon

549, George Wise

551, Gregory Smith

552, Daniel Ryan (draws from 553)

553, William Smith

554, Hubert Hamilton

555, Patrick Mahoney: Including a lament about removing "reasonably calculated"

556, Jerry Spitz

557, John Lowe

559, Patrick Cruise

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

570, Nicole Kruegel

571, Fletcher Handley

574, Barry Julian

575, Eugene Brooks

577, Clark Newhall

578, Christian Bataille

581, James Robson

582, John M. Feder for Consumer Attorneys of California

583, James Howard

584, Christopher Bouslog

585, Dan Mordarski

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

600, Corrina Hunt

January Hearing, Janell M. Adams: p. 187.

January Hearing, Paul V. Avelar: p 250 The proposals will shift the burden of justification to the party requesting discovery.

January Hearing, Jennie Lee Anderson: p 271.

January Hearing, Jonathan Scruggs: p 328 Worries about "the amount in controversy" from the perspective of litigating First Amendment religion cases that involve nominal damages.

Rule 30 (and 31): Numerical and Duration Limits: Con

The most common theme in opposing all of the numerical limits proposals is that the result will be increased disagreement, more motions, and more cost and delay.

A second common theme is that the rules are functioning well as they are. There is no evidence to support the belief that a presumptive limit to 10 depositions per side is too high, that 25 interrogatories are too many, that there is a need to limit requests to admit. This position is supported by pointing to many different types of litigation that commonly require more than 5 depositions or 15 interrogatories. Requests to admit simply have not generated problems that require a numerical limit. The need for depositions ranges from individual employment cases to complex and multiparty litigation. Interrogatories are described as inexpensive and efficient means of shaping other discovery, particularly document requests and depositions. Requests to admit are described in similar terms — they may help shape other discovery (most likely requests made early in the process?), and to eliminate issues for summary judgment or trial.

A third theme is commonly put in rather guarded terms. The belief that lawyers will cooperate to expand presumptive limits when appropriate is addressed by recognizing that this cooperation happens frequently now. But in a worrisome number of cases it does not. Lowering the limits will encourage obstruction, often lawyer-driven but at times client-driven. (Cases involving government parties are singled out as leading politically motivated clients to insist on obstructionist tactics.) Bargaining will start at a lower floor. And when the outcome of bargaining is an appropriate level of discovery, the cost often is paid by trading away something else. Trust in the courts to get it right when bargaining among the lawyers fails also is doubted, albeit in respectful tones. The theme is that some judges do not want to be bothered with the burdens of effective discovery management. These judges will present a particular problem with reduced limits because they will take a presumptive limit as a judgment that ordinarily discovery beyond the limit is unwarranted.

487, Peter J. Mancuso for Nassau County Bar Assn.: 10 is appropriate.

492, David Wiley: Plaintiff employment claims.

494, Charles R. Ragan

497, Kenneth A. Lazarus for American Medical Assn.: (All proposed numerical limits.)

500, Arnold White: Employers fight unceasingly to withhold information needed by employees. The proposed numerical limits will destroy "the very concepts upon which the rules were founded."

502, Peter Everett

503, Patrick Malone 590, E. Craig Daue, agrees

505, Jason Itkin (All numerical limits)

506, Richard Davis (All numerical limits)

507, George Garrow (All numerical limits)

508, Sanjay S. Schmidt (All numerical limits)

509, Allegra C. Carpenter (All numerical limits)

511, Les Alderman

512, Joseph R. Neal, Jr.: Explicit focus on numerical limits, but may be more general: the proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.

518, Robert Stoney (All numerical limits)

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund

524, Joel S. Neckers (All numerical limits)

528, James Ragan (All numerical limits)

529, Robert Palmer (All numerical limits)

533, Joanne Doroshow (All numerical limits)

537, Victor Bergman (All numerical limits)

538, A. Laurie Koller: (All numerical limits) "I feel the same way about the proposed rule changes to 33 and 36 that medieval criminals felt about thumbscrews."

541, Jessica Sura (All numerical limits)

542, Justin Kahn (All numerical limits)

543, Robert Hall (All numerical limits, "adding a layer of 'proportionality' on top.")

545, David Rash (All numerical limits)

547, Chris Nidel (All numerical limits)

548, Kevin Hannon (All numerical limits)

549, George Wise (All numerical limits)

551, Gregory Smith (Depositions and interrogatories)

552, Daniel Ryan (All numerical limits; draws from 553)

553, William Smith

554, Hubert Hamilton (All numerical limits)

557, John Lowe (All numerical limits)

559, Patrick Cruise: Focus on depositions, but has no objection to shortening the length.

560, Jason Monteleone (All numerical limits)

562, Teresa McClain (All numerical limits)

563, James E. Girards (All numerical limits) 591, David Rudwall, agrees

568, Brent Hankins

569, Karen Allen (Depositions; interrogatories reduce the need for depositions — 15 is too few)

570, Nicole Kruegel (All numerical limits)

574, Barry Julian (All numerical limits)

577, Clark Newhall (All numerical limits)

578, Christian Bataille (Depositions and interrogatories)

582, John M. Feder for Consumer Attorneys of California (All numerical limits)

583, James Howard (All numerical limits)

584, Christopher Bouslog (All numerical limits)

585, Dan Mordarski (Depositions and interrogatories; 6-hour depositions OK, although the reduction is not necessary)

586, Tom Carse (All numerical limits)

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ (All numerical limits)

592, Geoffrey Waggoner (All numerical limits)

595, John McGraw (All numerical limits)

596 Kenneth Miller (All numerical limits)

597, Michael Blanchard

598, Mark A. Gould (All numerical limits)

January Hearing, Paul V. Avelar: p 250

January Hearing, James C. Sturdevant: p 296 Many years of experience with individual and class actions protecting plaintiffs' consumer, employment, civil, and other rights. Examples of cases that legitimately required discovery well beyond the proposed limits. Lower limits will send a message to judges to deny needed discovery, and will increase costs and delay in litigating

discovery disputes.

Rule 33 Numerical Limits: Pro

(None of the comments from 487 to 600 require a note.)

Rule 33 Numerical Limits: Con

One common theme is that the present presumptive limit of 25 interrogatories is working well. There is no evidence of any need to reduce it.

A second theme is that interrogatories are an efficient and inexpensive means to get discovery of some facts and to help frame the use of other, more expensive discovery devices. Identification of documents and witnesses are common examples. Multiple claims require multiple interrogatories.

Reducing the number will mean that interrogatories are drafted in broader terms — 25 better-focused interrogatories will be more productive and less burdensome than 15 broadly focused interrogatories.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. mancuso for Nassau County Bar Assn.

504, Kenneth Behrman

515, Steve Conley

556, Jerry Spitz

564, Joel DuBoff

600, Corrina Hunt (Also against Rule 36 limits)

Rule 36: Pro

(None of the comments from 487 to 600 require a note.)

Rule 36: Con

The arguments against imposing a presumptive numerical limit of 25 requests to admit parallel the arguments against reducing the presumptive limit in Rule 33.

Requests to admit are said to be useful in narrowing the scope of discovery by showing that some potential issues framed by the pleadings are not in fact disputed. Later in the progress of discovery they help to narrow the issues further. Many comments say that Rule 36 is an inexpensive and useful tool that has not been used to impose undue burdens. And some cases genuinely deserve more than 25.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. Mancuso for Nassau County Bar Assn.

494, Charles R. Ragan: Rule 36 can be very valuable. If any presumptive limit is imposed, it should be 50, not including requests addressed to the genuineness of documents.

2013 CIVIL RULES PROPOSALS: PREPUBLICATION COMMENTS

Many comments on what became the proposals published for comment in August 2013 were submitted before the Advisory Committee met in April. The comments were based on the Committee's report to the Standing Committee for its January meeting. They were assigned civil comment numbers 3 through 255, although at least a couple of them were assigned two numbers.

Substantial portions of many of these prepublication comments addressed two tentative amendments that were withdrawn before publication. The early sketches included a presumptive limit of 25 requests to produce under Rule 34 and reset the presumptive length of a deposition to 4 hours.

Comments addressed to the proposals that survived to publication focused primarily on the discovery proposals. Proportionality received a fair amount of attention, but the most common focus was the reduction in the presumptive number of Rule 30 and Rule 31 depositions, the reduction in the presumptive number of interrogatories under Rule 33, and the adoption of a presumptive limit on requests to admit under Rule 36 (not counting requests to admit the authenticity of documents).

The comments overwhelmingly, although not universally, opposed the proposed limits on discovery. Most of them reflect the difficulty plaintiffs encounter in discovering information they need to avoid summary judgment and prove their claims. Lawyers representing plaintiffs in employment actions provided a great many of these comments. Some of the comments, particularly from employment lawyers in California, track other comments quite closely, often verbatim in many parts. One of these, number 91, adds this refreshing observation: "Although the rest of this letter may not be my original words, I agree 100% with everything that follows, as it states my position on these matters perfectly."

The concerns expressed by the employment lawyers are faithfully reflected in many post-publication comments. Virtually all of them address the reduced or new presumptive limits on the number of discovery requests. Many address the reduced scope of discovery. Employee plaintiffs typically have little information, while employers command the other employees and files that have what may be much information. Discovery by the employer is likely to be complete on one deposition of the plaintiff employee. The employee, on the other hand, may need several depositions simply to identify the people, or group of people, who made the challenged decision. Plaintiff's counsel typically takes the case for a contingent fee, advancing the costs of discovery, and has strong incentives to take only the most promising steps for discovery. Both interrogatories and requests to admit are efficient, less expensive means of shaping the action and identifying the persons who need be deposed; even 25 interrogatories may be too few, as illustrated by the form interrogatories approved for use in employment actions brought under California state law. The belief that the limits will be expanded when appropriate by agreement among the adversaries or, when needed, by the court, is unrealistic. Some judges now limit depositions to fewer than the presumptive ten. A worrisome number of judges treat the presumptive numbers as limits that should seldom be exceeded. And as to scope, there is a risk that arguments will be made, and perhaps accepted, that information as to treatment of comparably situated employees will be found not relevant to the discrimination claim. The emphasis on the amount in controversy will encourage defendants to protest that the cost of discovery should not exceed what may be a relatively low level of damages, with the confounding complication that a plaintiff who was very well paid may have much greater access to discovery than a low-paid employee who needs the small recovery more desperately than the well-paid employee needs a large recovery. And it is continually emphasized that employment actions (as well as several other categories of litigation) advance important public policies, yet courts may be insensitive to the "importance of the issues at stake." Finally, it is often noted that as discriminatory practices have come to be increasingly shamed, most employers leave no open traces of discrimination. Only discovery that sorts through many circumstances can generate the information needed to prove discrimination.

Many of these prepublication comments provide cogent explanations of the positions they advance. But almost all of the positions and explanations are stated with equal clarity and force in the comments and testimony submitted during the official comment period. Some of those who provided these prepublication comments also provided comments or testimony after publication. Summarizing all the comments now would add needless repetition to the already lengthy summaries of the post-publication comments and testimony. Only a few novel points need be noted here.

118, Robert H. Wilde: Utah state courts adopted rules amendments in 2011 that "are similar in many ways to the proposals now before the Committee. My experience leads me to the conclusion that the proposed amendments are a solution in search of a problem." The present limits on discovery are reasonable for almost all of my cases representing employees or employers. The proposed limits will seriously disadvantage employee plaintiffs. The restrictions on discovery in Utah "were offset to some degree by broader initial disclosure requirements." Implementing the discovery protocols proposed for employment cases would alleviate some of these concerns. If the federal proposals are adopted, broader disclosure requirements should be adopted, at least in employment actions.

119, Michael S. Wilde: (In the same firm as Robert H. Wilde, no. 118 above:) "Utah has recently experimented with cutting back on the amount of discovery that may be performed in cases and created a tiered system whereby cases with more at stake receive more discovery. In my opinion the implementation of these rules, which are similar to ones being considered in the federal system, has been nothing short of a train wreck * * *." The limitations often impose inadequate discovery, forcing motions, dragging the judges into micromanagement they do not want.

127, Scot G. Dollinger: "In Texas, we can serve discovery with our petitions and I do so in every case. As a result, * * * defendants have answered discovery and made disclosures within 60 to 90 days of filing suit. * * * I almost never have a discovery dispute." 188, Laurie Higginbotham, also suggests adopting the Texas practice.

148, Mark Ledbetter: "[I]t is not only wrong but galling that these back channel corporate believers are making their way again into the procedural rules. Efforts to tilt the table of justice for the tortfeasor abound in the state houses all over America. It is sadder still when the Federal Judiciary begins its own assault on the Plaintiff." "I realize that I cannot remove corporate counsel from this Committee, as Plaintiff's attorneys practice in small firms like mine and do not have the time to serve on these Committees * * *. As if it were not enough to be a member of large firm, representing large corporations, it is unfair and unfaithful to the ideals of the American legal system to shrink and shrivel the rights of the Plaintiff in such a bald effrontery."

158, Richard J. Vaznaugh: Attaches form interrogatories approved for use in employment cases in California Superior Court. After instructions and definitions there are many pages of interrogatories, most with several subparts. 201, Wendy Mussell for California Employment Lawyers Assn.: Also attaches and commends California form interrogatories, both for employment cases and for general cases.

163, Richard R. Renner: Suggests "that the rules require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms." Parties still print out emails and produce the hard copy, or convert documents to PDF forms by scanning hard copy or otherwise making the PDF file non-searchable.

173, Salvatore Graziano v. National Assn. of Shareholder & Consumer Attorneys: (It is not clear whether this suggestion is made only if the presumptive limits on discovery requests are adopted as proposed, or is made for the present rules as well:) Rule 26(b)(2)(A) should encourage expanding

the limits: "By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30, and leave to alter such limits shall be freely granted in complex litigation, consistent with the principles set forth in Rule 26(b)(2)(C)."

189, Mark P. Herron: Suggests discovery could be improved by expanding initial disclosures to require disclosure of witnesses who have discoverable knowledge and documents relevant to all claims and defenses, without regard to whether the disclosing party plans to use them. And initial disclosure should be further expanded to require the exchange of basic information regarding how ESI is maintained; N.D. Ohio has a local rule, Appendix K, requiring this.

[No number -- between 194 and 195], 252 Robert B. Fitzpatrick: Contrasts experience litigating in the 1960s, 70s, and 80s, when lawyers cooperated, with the "warrior mentality" too often encountered today. The fault is not in our rules, but in the warrior approach and the ways it encourages lawyers to use the rules. The focus of reform should be on providing the structure and incentives to ensure the tools are used responsibly. "[T]he judiciary needs to actively and forcefully involve itself at an early stage in requiring counsel to cooperate on a reasonable, enforceable, discovery plan." The Initial Discovery Protocols for Employment Cases are attached; their wider use should be encouraged.

199, John Vail, Center for Constitutional Litigation: (1) Colorado Pilot Project Rule 1.3 requires that all process and costs be proportionate to the needs of the case. AAJ members practicing under the program report that the result is boilerplate objections with the burden on the party requesting discovery to demonstrate proportionality and admissibility. At an initial conference, moreover, the judge may be asked to assess proportionality "based simply on the unsubstantiated assertions of each party about the value of the case." One example: plaintiff asserted a \$5,000,000 value in a matter of public importance; the defendant asserted it was a purely private dispute with a maximum value of \$300,000.

(2) Relying on rules framed to encourage judges to manage up, rather than manage down, relies too heavily on flexibility informed by judicial discretion. The First Amendment right to petition the government protects the right to bring a lawsuit. See *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2494 (2011). "In a contest between managerial flexibility and constitutional values, managerial flexibility should lose."

207, Alireza Alivandivafa: In cases not covered by approved form interrogatories, California limits "specially prepared interrogatories" to 35. It also limits requests for admissions to 35 (not counting genuineness of documents). This is noted, not to argue that the limits are set at the right number, but to observe that both for interrogatories and requests to admit the procedure for increasing the number is simply to serve them with a "Declaration of Necessity." The simple procedure works.

221, Richard T. Seymour: The experiment with presumptive limits has failed. Managing up is a myth. "The false assumption of attorney incompetence and the existing restrictions on discovery * * * divert the time and attention of judges into process, and away from the merits." Thus Rule 36 requests to admit used to be useful because each request was accompanied by an interrogatory that asked the reasons for any failure to admit and by a request to produce any documents identified as a reason. The limit to 25 interrogatories ended that practice. It would make more sense to start high, perhaps with 250 interrogatories and 50 depositions per case, and ask the parties to justify managing down.

225, L. Steven Platt: (1) "[T]he agencies charged with the responsibility for investigating charges of discrimination, the local branches of the EEOC, do a dreadful job. They find that there is probable cause to believe that discrimination has occurred in 2.5% of the cases they see." (2) For the length of depositions, "[w]e have lived with a two-hour rule in Illinois and it has worked, much to

everyone's surprise." Limiting depositions to three hours is no problem, so long as more time is allowed on demonstrating need to a judge.

226, Peter J. Neufeld, Barry C. Scheck, Nick Brustin, David Rudovsky, John L. Stainthorp, Jan Susler, Russell Ainsworth: In representing plaintiffs whose convictions have been vacated on proving innocence by DNA evidence, we find civil defendants frequently balk at admitting the DNA proof. "We typically serve similar requests [to admit] on the same issues, breaking down the DNA testing step by step, and often receive admissions to some, but not all, of these requests." Limiting the number will make it less likely that undisputed matters are admitted.

228, Tami Smith for National Court Reporters Assn.: Opposes reductions in the numbers and length of depositions.

I.B. RULE 37(e): FAILURE TO PRESERVE ESI

Introduction

During its meeting in April, 2014, the Civil Rules Advisory Committee voted unanimously to recommend adoption of a new Rule 37(e) to replace current Rule 37(e). The new rule differs from the proposed amendment published for public comment in August, 2013, but the Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the Advisory Committee on this subject.

The public comments on the package of Civil Rules amendments were strikingly, perhaps uniquely, comprehensive and vigorous. A total of 2,345 written comments were received and posted on Regulations.gov. Many of the comments submitted later in the process referred to or built upon comments submitted earlier. Three public hearings were held, with a total of more than 120 witnesses speaking. The rule revisions made after publication respond to the public comments.

At the end of this Report is the proposed new Rule 37(e) and the recommended Committee Note. The amendment proposal is presented as an amendment to the current rule, which seemed simpler than presenting it as a revision of the published proposal. For purposes of background, an Appendix to this memorandum presents the published amendment proposal. Also included in the agenda materials should be a summary of written comments and of the testimony on Rule 37(e) at the public hearings.

This Report introduces the issues the Advisory Committee (and its Discovery Subcommittee) have addressed during this redrafting effort, and which inform the rule proposal below.

Background

Present Rule 37(e) was adopted in 2006. The Advisory Committee recognized then that the continual expansion of electronically stored information (“ESI”) might provide reasons to consider a more detailed response to problems arising from the loss of ESI. A panel at the Duke Conference in 2010 presented a unanimous recommendation that the time had come for a more detailed rule.

Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. The courts agree unanimously that a duty to preserve ESI arises when a party reasonably anticipates litigation. But they differ significantly in the approaches taken after finding a loss of ESI that should have been preserved. A new rule that illuminates the purposes and methods of responding to the loss can do much to promote uniformity and to encourage desirable judicial responses.

The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation. An accumulation of

information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.

During the two years following the Duke Conference, the Subcommittee considered several basic approaches, including successive drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by a Duke Conference panel, which called for specific rule provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. In the end, however, it became apparent that the range of cases in federal court is too broad and too diverse to permit such specific guidelines. The Subcommittee chose instead to pursue a different approach that addresses court actions in response to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

Under this approach, as with present Rule 37(e), the proposed Rule 37(e) does not itself create a duty to preserve. The new rule takes the duty as it is established by case law. Cases uniformly hold that a duty to preserve information arises when litigation is reasonably anticipated. Although some comments urged that the rule should eliminate any duty to preserve before an action is actually filed, the Advisory Committee continues to believe that a rule so limited would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in the comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

The Published Rule 37(e) Proposal

The published rule proposal is in the Appendix. It included a number of features that were modified after the public comment period. It relied on a distinction between curative measures and sanctions, invoking Rule 37(b)(2)(A) as a source for the latter. The published proposal provided that a court could take steps to cure the loss of information such as permitting additional discovery, ordering curative measures, or ordering the party that lost the information to pay the reasonable expenses, including attorney's fees, caused by the loss. It provided that a court generally could not impose sanctions unless it found that the loss of information caused substantial prejudice and was willful or in bad faith. But it also provided that sanctions would be permissible without that finding of culpability in the rare case in which the loss "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed rule also included a list of factors to be applied in determining whether a party failed to retain information it should have retained in anticipation of litigation, and whether its failure was willful or in bad faith.

The invitation for comment included five questions: (1) whether the rule should be limited to ESI; (2) whether the rule should allow sanctions when the loss "irreparably deprived a party of

any meaningful opportunity to present or defend against the claims in the litigation”; (3) whether present Rule 37(e) should be retained; (4) whether the phrase “substantial prejudice” as used in the rule proposal should be defined; and (5) whether the term “willful” should be defined.

As a review of the summary of comments shows, there was a great deal of comment about the language in the published proposal and these five questions. In particular, both the “willful” and “bad faith” standards for sanctions were questioned by many who commented. Many also argued that the “irreparably deprived” provision might “swallow the rule” by permitting judges to circumvent the culpability requirements for sanctions. Other comments stressed that the “substantial prejudice” standard for cases in which actions were proven to be “willful or in bad faith” was too demanding, and that those culpability requirements would be too difficult to satisfy in many cases.

Modifications Based on Public Comments

The Advisory Committee’s Discovery Subcommittee began deliberating on appropriate reactions to the public comments with a half day meeting in Dallas immediately after the third public hearing. The Subcommittee held six conference calls after that meeting, carefully examining the issues raised by the public comments. Many of the public comments reinforced conclusions previously reached by the Subcommittee, while others provided valuable new insights. Some of the general conclusions will be addressed here, with more specific explanations provided in the discussion of specific rule recommendations.

The Advisory Committee remains firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed. The explosion of ESI in recent years has affected all aspects of civil litigation; the preservation of ESI is a major issue confronting parties and courts; and the loss of ESI has produced a bewildering array of court cases.

Loss of electronically stored information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.

At the same time, the public comments made the Advisory Committee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI. Among other steps after its Dallas meeting, the Discovery Subcommittee took an intensive look at cases addressing the loss of information relevant to litigation. The public comments and this analysis highlighted the

wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.

The public comments also made clear that the explosion of ESI will continue and even accelerate. One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years — more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere in the “cloud,” complicating the preservation task. In other words, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants. The need for broad trial court discretion in dealing with these challenges will likewise increase. The Advisory Committee accordingly concluded that the published proposal’s approach of limiting virtually all forms of “sanctions” to a showing of both substantial prejudice and willfulness or bad faith was too restrictive.

The value of preserving judicial flexibility was reinforced by a related conclusion. One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized by many; the hope was that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Advisory Committee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain — the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations rather than the prospect of litigation, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.

The Advisory Committee also concluded that any reference in the new rule to “sanctions,” or to Rule 37(b)(2)(A) as a source of sanctions, should be deleted. The Advisory Committee concluded that allowing curative measures was clearly appropriate for the loss of ESI, and found that drafting a rule became quite complicated if it sought to distinguish between curative measures and sanctions. Another concern was that the sanctions listed in Rule 37(b)(2)(A) are justifiably called sanctions because they result from disobeying a court order, whereas the same measures in other settings might rightly be viewed as curative. Some of the (b)(2)(A) sanctions, further, seem inapposite to failure to preserve information in the absence of a court order — for example, (iv) “staying further proceedings until the order is obeyed” and (vii) contempt.

Further questions were raised during the public comment period about the references in the published draft to “substantial prejudice” and “willful or in bad faith.” Many comments urged that

further definitions should be adopted. Particularly forceful concerns were raised about the use of the word “willful.” Depending on the context, “willful” has been defined by courts in many different ways. Under some definitions, willfulness could be found from an act intentionally done even though there was no thought about the effect on information that should be preserved for anticipated or pending litigation. A party, for example, might “willfully” trade in a smart phone without any thought about preserving the information stored in it. Nor did “bad faith” entirely escape criticism.

The published provision that allowed sanctions when the loss of information “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation” drew particular criticism. Many expressed concern that it risked undoing the attempt to limit “sanctions” to circumstances of substantial prejudice and either willfulness or bad faith. “[I]rreparably deprived” and “any meaningful opportunity to present or defend against the claims in the litigation” were said to lie in the eye of the beholder. A judge who is not prepared to find willfulness or bad faith might seize on these phrases to justify sanctions in circumstances not covered by what was intended to be a very narrow exception to the requirements of substantial prejudice and willfulness or bad faith.

Although the Rule 37(e) proposal authorizes a wider range of measures to cure demonstrated prejudice, it carefully cabins use of several very severe measures — presuming that the lost information was unfavorable to the party that lost it, giving the jury an instruction that it may or must presume that the information was unfavorable, dismissing the action, or entering a default judgment. These measures may be used only on a finding that the party lost the information with the intent to deprive another party of its use in the litigation. As specified in the revised Committee Note, the rule rejects the view of such cases as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that would permit adverse-inference instructions on the basis of negligence or gross negligence.

Finally, after much discussion, the Advisory Committee concluded that the list of “factors” specified in Rule 37(b)(2) of the published proposal was unnecessary and might cause confusion. Accordingly those rule provisions were removed, but Committee Note language retains a discussion of how several of those considerations might affect the application of the revised rule.

The Rule in Detail

Limiting the Rule to ESI

The Advisory Committee recommends that the rule be limited to ESI. That is the subject that launched this venture in the first place, and it clearly is the subject which most requires uniform guidance. Review of numerous cases led to the conclusion that the law of spoliation for non-ESI is well developed and long-standing, and should not be supplanted without good reason. There was little complaint about this body of law as applied to information other than ESI, and the Advisory

Committee concluded that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, such as hard-copy documents, at least in terms of the approaches set out in Rule 37(e). But repeated efforts have shown that it is very difficult to craft a rule that deals with failure to preserve tangible things. The classic case is *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), which upheld dismissal of the action after the plaintiff failed to preserve the allegedly defective airbag. The published proposal — which was not limited to ESI — sought to accommodate such cases by allowing “sanctions” if a party’s actions in failing to preserve information “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” As already noted, this provision drew many comments suggesting that it opened the door to avoiding the limits otherwise imposed on “sanctions.” Limiting the new rule to ESI avoids this complication.

In addition, there are some pertinent practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e), like the present Rule 37(e), should be limited to ESI.

The Advisory Committee recognizes that the dividing line between ESI and other evidence may in some instances be unclear. But it concludes that courts are well equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by this issue.

Reasonable steps to preserve

The revised rule applies if ESI “that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it.” The rule calls for reasonable steps, not perfection, in preserving ESI, and is thus consistent with other rules on related subjects. For example, Fed. R. Evid. 502(b)(2), dealing with inadvertent disclosure of material that is privileged or work-product material, focuses on whether “the holder of the privilege or protection took reasonable steps to prevent disclosure,” and Rule 502(b)(3) asks whether the privilege holder “promptly took reasonable steps to rectify the error.”

Revised Rule 37(e) adopts the same approach to preservation for use in litigation. As

explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that the party's sophistication with regard to litigation may bear on whether it should have realized what should be preserved.

Restoration or replacement of Lost ESI

If reasonable steps were not taken, and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits the court's powers under Rules 16 and 26 to order discovery to achieve this purpose. In particular, discovery regarding sources of ESI that might otherwise be regarded as inaccessible or allocation of expenses might be important. At the same time, however, the quest for lost information should take account of whether the lost information likely is only marginally relevant or duplicative of other information that remains available.

(e)(1)

Proposed Rule 37(e)(1) provides that the court may:

upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. Unlike the published preliminary draft, it adds a limit urged by many of the comments – that the measures be no greater than necessary to cure the prejudice. As the Note also makes clear, a court is not required to exhaust all possibilities of curing prejudice.

Proposed (e)(1) says that the court must find prejudice to order corrective measures, but it does not say which party bears the burden of proving prejudice. Many comments raised concerns about assigning such burdens, noting that it is often difficult for a party to prove it was prejudiced by the loss of information it has never seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

This proposed rule departs from the published proposal's approach of limiting all "sanctions" under Rule 37(b)(2)(A) to a showing of substantial prejudice and bad faith. It preserves the trial court's ability to use some measures included in Rule 37(b)(2)(A) to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established. *See* Rule 37(b)(2)(A)(i); (ii). The proposed rule does not attempt

to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three more general ways — measures under (e)(1) require a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures limited by (e)(2) unless it makes a finding that the party acted with the intent to deprive another party of the information's use in the litigation. Finally, because (e)(1) measures are not "sanctions," there should be no concerns about whether they raise professional responsibility issues.

(e)(2)

Proposed (e)(2) provides that the court may:

- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As noted above, some circuits permit such instructions upon a showing of negligence or gross negligence, while others require a showing of bad faith. Subdivision (e)(2) resolves the circuit split by permitting adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Advisory Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Advisory Committee's Discovery Subcommittee carefully analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion — when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Why else would the party have destroyed it? Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")(citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence or gross negligence adopt a different rationale — that the adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. *See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some logical appeal, the Advisory Committee has several concerns with this approach when applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the “cloud.” Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Advisory Committee to conclude that the circuit split, at least with respect to ESI, should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends the logic of the mandatory adverse-inference instruction to the even more severe measures of dismissal or default. The Advisory Committee thought it anomalous to allow dismissal or default in circumstances that do not justify the instruction.

A difficult drafting issue presented by (e)(2) arises from the multiplicity of instructions that may be available to guide a jury’s consideration of a failure to preserve ESI. Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at the time of trial. These issues are examined in the Committee Note.

Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. This is because the adverse inference permitted under this section can itself satisfy the prejudice requirement: if a court or jury infers the lost information was

unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss. An express prejudice requirement is also omitted because there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).

Factors in published Rule 37(e)(2)

The published proposal included a list of factors that it said the court should employ in determining whether a party should have retained information and whether it lost the information willfully or in bad faith. Proposed Rule 37(e)(2) was as follows:

- (2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:
- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
 - (B) the reasonableness of the party's efforts to preserve the information;
 - (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
 - (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
 - (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

This list of factors received much attention during the public comment period. Some saw the factors as providing useful guidance to parties trying to determine what to preserve, and to courts presented with motions under the rule. But many others raised substantial concerns about whether the list was incomplete and possibly misleading. Some factors received particular criticism. Factor (C), for example, raised concerns about whether some courts might read it as requiring compliance with even extremely unreasonable demands to preserve. Factor (E) was criticized on the ground that it offered no help to a party faced with a preservation decision before suit was filed, and also on the ground that it might promote motion practice once a case has commenced.

The arguments against lists of factors are familiar. The list may be mistaken as exclusive,

or the list may become a routine set of items to be checked off, approached without sufficient care. Or the enumerated factors themselves may be less important than other factors omitted from the examples, either when the rule is adopted or as the world changes — and changes in the world of ESI are notoriously rapid. Or a wisely chosen list of factors may be expressed poorly. Or confusion may arise from the proper use of factors that bear differently on different determinations. The reasonableness of efforts to preserve information, for example, may have scant bearing in determining whether the loss caused prejudice — at most, there is a common element in the apparent importance of the information. For reasons like these it is common experience to begin with rule drafts that list factors, then to demote the factors to discussion in a Committee Note, and perhaps to take the final step of expunging all references to suggested factors for decision.

The eventual decision of the Advisory Committee was to remove the factors from the rule. Substantial portions of the Committee Note discussion of the factors have been retained, particularly as they bear on the question whether information should have been retained, and whether reasonable steps to preserve were taken.

Acts of God

The published version attempted to address a concern raised by the Standing Committee — whether the rule would permit sanctions to be imposed for events outside the party's control. The example given was the destruction of a hospital's computer records by flooding from SuperStorm Sandy. The published draft met this problem by providing for “sanctions” only if “the party's actions” caused the loss.

The same protection exists in the current recommendation. The revised rule authorizes the specified measures only when a party fails to “take reasonable steps to preserve” information that should be preserved in anticipation of litigation. As the Committee Note observes generally, such reasonable steps need not lead to perfect preservation. More specifically, the Note also acknowledges that a party cannot be held responsible for loss of information that occurs despite such steps. If the information is not in the party's control, or other events beyond its control — such as a flood, failure of a “cloud” service, or a malign software attack — cause the loss of information, the rule does not authorize measures under either Rule 37(e)(1) or (e)(2).

Replacing Present Rule 37(e)

The published preliminary draft called for replacing present Rule 37(e) with the new rule. The invitation for public comment included the question whether the present rule should be preserved. There were some comments that favored retaining some of the present rule, but the great majority saw no need for retaining the current rule once the new rule is adopted. The Advisory Committee recommends replacing the current rule with the new rule.

The Advisory Committee concluded that retaining the present rule would cause confusion

in light of the new rule's text. For example, the present rule refers to "sanctions," while the new rule does not. The present rule talks in terms of "good faith," while the existing rule focuses on reasonable steps, prejudice, and the specific intent required in (e)(2). The present rule was designed to leave inherent power available for the loss of ESI, while the new rule displaces inherent power. The present rule includes a potentially open-ended exclusion of cases involving "exceptional circumstances," while the new rule does not. In light of these potential sources of confusion, and because the Advisory Committee believes that the proposed rule provides even more protection for parties who act reasonably than does the present rule, the Advisory Committee concluded that present Rule 37(e) should be replaced. Borrowing the language of the present rule, the Committee Note does state that the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information.

Conclusion and Gap Report

The public comment period was very helpful in presenting issues regarding Rule 37(e). The Discovery Subcommittee carefully considered the public comments during a series of meetings and conference calls that produced the proposed rule. The Advisory Committee is confident that the proposed rule strikes the right balance on this important subject. Public comments also confirmed that rulemaking in this area is genuinely needed. For the guidance of the Standing Committee, the Gap Report regarding changes since publication is presented below.

Gap Report

The revised rule is a modification of the published draft in several ways: (1) It applies only to electronically stored information; (2) It removes the provision in the published draft that authorized "sanctions" against a party that lacked the culpable state of mind called for in the rule if the loss of information caused "irreparable prejudice" to another party's ability to litigate; (3) It does not speak in terms of "sanctions" and no longer invokes the list of sanctions contained in Rule 37(b)(2)(A); (4) It places primary emphasis on measures to restore or replace lost electronically stored information; (5) On finding prejudice to a party due to loss of the information, it authorizes the court to order measures "no greater than necessary" to cure the prejudice; (6) It does not use the culpability standard "willful or bad faith", substituting the standard that the party "acted with the intent to deprive another party of the information's use in the litigation"; (7) Only when that culpability standard is met, it authorizes the court to presume that the lost information was unfavorable to the party that lost it, to instruct the jury it may so infer from the loss of the information, or to dismiss the action or enter a default judgment; (8) It no longer includes in the rule a list of factors for the court's consideration in applying the rule. Recognizing that these changes are substantial, the Civil Rules Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

PROPOSED RULE 37(e)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

(e) **Failure to Preserve Provide Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Committee Note

Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to

31 determine when certain measures should be used. The rule does not affect the validity of an
32 independent tort claim for spoliation if state law applies in a case and authorizes the claim.

33 The new rule applies only to electronically stored information, also the focus of the 2006
34 rule. It applies only when such information is lost. Because electronically stored information often
35 exists in multiple locations, loss from one source may often be harmless when substitute information
36 can be found elsewhere.

37 The new rule applies only if the lost information should have been preserved in the
38 anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many
39 court decisions hold that potential litigants have a duty to preserve relevant information when
40 litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not
41 attempt to create a new duty to preserve. The rule does not apply when information is lost before
42 a duty to preserve arises.

43 In applying the rule, a court may need to decide whether and when a duty to preserve arose.
44 Courts should consider the extent to which a party was on notice that litigation was likely and that
45 the information would be relevant. A variety of events may alert a party to the prospect of litigation.
46 Often these events provide only limited information about that prospective litigation, however, so
47 that the scope of information that should be preserved may remain uncertain. It is important not to
48 be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

49 Although the rule focuses on the common-law obligation to preserve in the anticipation or
50 conduct of litigation, courts may sometimes consider whether there was an independent requirement
51 that the lost information be preserved. Such requirements arise from many sources — statutes,
52 administrative regulations, an order in another case, or a party's own information-retention
53 protocols. The court should be sensitive, however, to the fact that such independent preservation
54 requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The
55 fact that a party had an independent obligation to preserve information does not necessarily mean
56 that it had such a duty with respect to the litigation, and the fact that the party failed to observe some
57 other preservation obligation does not itself prove that its efforts to preserve were not reasonable
58 with respect to a particular case.

59 The duty to preserve may in some instances be triggered or clarified by a court order in the
60 case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and
61 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once
62 litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly
63 seeking judicial guidance about the extent of reasonable preservation may be important.

64 The rule applies only if the information was lost because the party failed to take reasonable
65 steps to preserve the information. Due to the ever-increasing volume of electronically stored
66 information and the multitude of devices that generate such information, perfection in preserving

67 all relevant electronically stored information is often impossible. As under the current rule, the
68 routine, good-faith operation of an electronic information system would be a relevant factor for the
69 court to consider in evaluating whether a party failed to take reasonable steps to preserve lost
70 information, although the prospect of litigation may call for reasonable steps to preserve information
71 by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve
72 suffice; it does not call for perfection. The court should be sensitive to the party's sophistication
73 with regard to litigation in evaluating preservation efforts; some litigants, particularly individual
74 litigants, may be less familiar with preservation obligations than others who have considerable
75 experience in litigation.

76 Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss
77 of information occurs despite the party's reasonable steps to preserve. For example, the information
78 may not be in the party's control. Or information the party has preserved may be destroyed by
79 events outside the party's control — the computer room may be flooded, a “cloud” service may fail,
80 a malign software attack may disrupt a storage system, and so on. Courts may, however, need to
81 assess the extent to which a party knew of and protected against such risks.

82 Another factor in evaluating the reasonableness of preservation efforts is proportionality.
83 The court should be sensitive to party resources; aggressive preservation efforts can be extremely
84 costly, and parties (including governmental parties) may have limited staff and resources to devote
85 to those efforts. A party may act reasonably by choosing a less costly form of information
86 preservation, if it is substantially as effective as more costly forms. It is important that counsel
87 become familiar with their clients' information systems and digital data — including social media
88 — to address these issues. A party urging that preservation requests are disproportionate may need
89 to provide specifics about these matters in order to enable meaningful discussion of the appropriate
90 preservation regime.

91 When a party fails to take reasonable steps to preserve electronically stored information that
92 should have been preserved in the anticipation or conduct of litigation, and the information is lost
93 as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be
94 restored or replaced through additional discovery. Nothing in the rule limits the court's powers
95 under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding
96 discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B)
97 on allocation of expenses may be pertinent to solving such problems. If the information is restored
98 or replaced, no further measures should be taken. At the same time, it is important to emphasize that
99 efforts to restore or replace lost information through discovery should be proportional to the
100 apparent importance of the lost information to claims or defenses in the litigation. For example,
101 substantial measures should not be employed to restore or replace information that is marginally
102 relevant or duplicative.

103 **Subdivision (e)(1).** This subdivision applies only if information should have been preserved
104 in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the

105 information, information was lost as a result, and the information could not be restored or replaced
106 by additional discovery. In addition, a court may resort to (e)(1) measures only “upon finding
107 prejudice to another party from loss of the information.” An evaluation of prejudice from the loss
108 of information necessarily includes an evaluation of the information’s importance in the litigation.

109 The rule does not place a burden of proving or disproving prejudice on one party or the other.
110 Determining the content of lost information may be a difficult task in some cases, and placing the
111 burden of proving prejudice on the party that did not lose the information may be unfair. In other
112 situations, however, the content of the lost information may be fairly evident, the information may
113 appear to be unimportant, or the abundance of preserved information may appear sufficient to meet
114 the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be
115 reasonable in such situations. The rule leaves judges with discretion to determine how best to assess
116 prejudice in particular cases.

117 Once a finding of prejudice is made, the court is authorized to employ measures “no greater
118 than necessary to cure the prejudice.” The range of such measures is quite broad if they are
119 necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;
120 the severity of given measures must be calibrated in terms of their effect on the particular case. But
121 authority to order measures no greater than necessary to cure prejudice does not require the court
122 to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court’s
123 discretion.

124 In an appropriate case, it may be that serious measures are necessary to cure prejudice found
125 by the court, such as forbidding the party that failed to preserve information from putting on certain
126 evidence, permitting the parties to present evidence and argument to the jury regarding the loss of
127 information, or giving the jury instructions to assist in its evaluation of such evidence or argument,
128 other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure
129 that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted
130 under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s
131 use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking
132 pleadings related to, or precluding a party from offering any evidence in support of, the central or
133 only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific
134 item of evidence to offset prejudice caused by failure to preserve other evidence that might
135 contradict the excluded item of evidence.

136 **Subdivision (e)(2).** This subdivision authorizes courts to use specified and very severe
137 measures to address or deter failures to preserve electronically stored information, but only on
138 finding that the party that lost the information acted with the intent to deprive another party of the
139 information’s use in the litigation. It is designed to provide a uniform standard in federal court for
140 use of these serious measures when addressing failure to preserve electronically stored information.
141 It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d
142 Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or

143 gross negligence.

144 Adverse-inference instructions were developed on the premise that a party's intentional loss
145 or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the
146 evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent
147 or even grossly negligent behavior does not logically support that inference. Information lost
148 through negligence may have been favorable to either party, including the party that lost it, and
149 inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information
150 never would have. The better rule for the negligent or grossly negligent loss of electronically stored
151 information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit
152 the most severe measures to instances of intentional loss or destruction.

153 Similar reasons apply to limiting the court's authority to presume or infer that the lost
154 information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding
155 at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on
156 the loss of information in these circumstances, permitting them only when a court finds that the
157 information was lost with the intent to prevent its use in litigation.

158 Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or
159 infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction
160 that directs or permits the jury to infer from the loss of information that it was in fact unfavorable
161 to the party that lost it. The subdivision does not apply to jury instructions that do not involve such
162 an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties
163 to present evidence to the jury concerning the loss and likely relevance of information and
164 instructing the jury that it may consider that evidence, along with all the other evidence in the case,
165 in making its decision. These measures, which would not involve instructing a jury it may draw an
166 adverse inference from loss of information, would be available under subdivision (e)(1) if no greater
167 than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of
168 courts to give traditional missing evidence instructions based on a party's failure to present evidence
169 it has in its possession at the time of trial.

170 Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another
171 party of the information's use in the litigation. This finding may be made by the court when ruling
172 on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse
173 inference instruction at trial. If a court were to conclude that the intent finding should be made by
174 a jury, the court's instruction should make clear that the jury may infer from the loss of the
175 information that it was unfavorable to the party that lost it only if the jury first finds that the party
176 acted with the intent to deprive another party of the information's use in the litigation. If the jury
177 does not make this finding, it may not infer from the loss that the information was unfavorable to
178 the party that lost it.

179 Courts should exercise caution in using the measures specified in (e)(2). Finding an intent

180 to deprive another party of the lost information's use in the litigation does not require a court to
181 adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the
182 severe measures authorized by this subdivision should not be used when the information lost was
183 relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be
184 sufficient to redress the loss.

185 Subdivision (e)(2) does not include an express requirement that the court find prejudice to
186 the party deprived of the information. The adverse inference permitted under this subdivision can
187 itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable
188 to the party that lost it, the same inference suggests that the opposing party was prejudiced by the
189 loss. In addition, there may be rare cases where a court concludes that a party's conduct is so
190 reprehensible that serious measures should be imposed even in the absence of prejudice. In such
191 rare cases, however, the court must still find the intent specified in subdivision (e)(2).

APPENDIX
Published Rule 37(e) Amendment Proposal

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~(e) — **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) Failure to Preserve Discoverable Information.

(1) Curative measures; sanctions. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the

28 request was clear and reasonable, and whether the person who made it and
29 the party consulted in good faith about the scope of preservation;

30 (D) the proportionality of the preservation efforts to any anticipated or ongoing
31 litigation; and

32 (E) whether the party timely sought the court's guidance on any unresolved
33 disputes about preserving discoverable information.

1 Committee Note

2 In 2006, Rule 37(e) was added to provide protection against sanctions for loss of
3 electronically stored information under certain limited circumstances, but preservation problems
4 have nonetheless increased. The Committee has been repeatedly informed of growing concern about
5 the increasing burden of preserving information for litigation, particularly with regard to
6 electronically stored information. Many litigants and prospective litigants have emphasized their
7 uncertainty about the obligation to preserve information, particularly before litigation has actually
8 begun. The remarkable growth in the amount of information that might be preserved has heightened
9 these concerns. Significant divergences among federal courts across the country have meant that
10 potential parties cannot determine what preservation standards they will have to satisfy to avoid
11 sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very
12 serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some
13 information later sought in discovery.

14 This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of
15 guidelines for federal courts, and applying them to all discoverable information, not just
16 electronically stored information. The amended rule is not limited, as is the current rule, to
17 information lost due to “the routine, good-faith operation of an electronic information system.” The
18 amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy
19 their preservation responsibilities may do so with confidence that they will not be subjected to
20 serious sanctions should information be lost despite those efforts. It does not provide “bright line”
21 preservation directives because bright lines seem unsuited to a set of problems that is intensely
22 context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh
23 in calibrating its response to the loss of information.

24 Amended Rule 37(e) supersedes the current rule because it provides protection for any
25 conduct that would be protected under the current rule. The current rule provides: “Absent
26 exceptional circumstances, a court may not impose sanctions under these rules on a party for failing
27 to provide electronically stored information lost as a result of the routine, good-faith operation of
28 an electronic information system.” The routine good faith operation of an electronic information
29 system should be respected under the amended rule. As under the current rule, the prospect of
30 litigation may call for altering that routine operation. And the prohibition of sanctions in the

31 amended rule means that any loss of data that would be insulated against sanctions under the current
32 rule would also be protected under the amended rule.

33 Amended Rule 37(e) applies to loss of discoverable information “that should have been
34 preserved in the anticipation or conduct of litigation.” This preservation obligation was not created
35 by Rule 37(e), but has been recognized by many court decisions. It may in some instances be
36 triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that
37 should be considered in determining, in the circumstances of a particular case, when a duty to
38 preserve arose and what information should have been preserved.

39 Except in very rare cases in which a party’s actions cause the loss of information that
40 irreparably deprives another party of any meaningful opportunity to present or defend against the
41 claims in the litigation, sanctions for loss of discoverable information may only be imposed on a
42 finding of willfulness or bad faith, combined with substantial prejudice.

43 The amended rule therefore forecloses reliance on inherent authority or state law to impose
44 litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does
45 not affect the validity of an independent tort claim for relief for spoliation if created by the
46 applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of
47 such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

48 An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their
49 discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court’s scheduling order may
50 address preservation. These amendments may prompt early attention to matters also addressed by
51 Rule 37(e).

52 **Subdivision (e)(1)(A).** When the court concludes that a party failed to preserve information
53 that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety
54 of measures that are not sanctions. One is to permit additional discovery that would not have been
55 allowed had the party preserved information as it should have. For example, discovery might be
56 ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not
57 reasonably accessible. More generally, the fact that a party has failed to preserve information may
58 justify discovery that otherwise would be precluded under the proportionality analysis of
59 Rule 26(b)(1) and (2)(C).

60 In addition to, or instead of, ordering further discovery, the court may order curative
61 measures, such as requiring the party that failed to preserve information to restore or obtain the lost
62 information, or to develop substitute information that the court would not have ordered the party to
63 create but for the failure to preserve. The court may also require the party that failed to preserve
64 information to pay another party’s reasonable expenses, including attorney fees, caused by the
65 failure to preserve. Such expenses might include, for example, discovery efforts caused by the
66 failure to preserve information. Additional curative measures might include permitting introduction

67 at trial of evidence about the loss of information or allowing argument to the jury about the possible
68 significance of lost information.

69 **Subdivision (e)(1)(B)(i).** This subdivision authorizes imposition of the sanctions listed in
70 Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was
71 a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform
72 standard in federal court for sanctions for failure to preserve. It rejects decisions that have
73 authorized the imposition of sanctions — as opposed to measures authorized by Rule 37(e)(1)(A)
74 — for negligence or gross negligence. It borrows the term “sanctions” from Rule 37(b)(2), and
75 does not attempt to prescribe whether such measures would be so regarded for other purposes, such
76 as an attorney's professional responsibility.

77 This subdivision protects a party that has made reasonable preservation decisions in light of
78 the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality.
79 Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss
80 of information may affect other decisions about discovery, such as those under Rule 26(b)(1),
81 (b)(2)(B), and (b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the
82 exceptional circumstances described in Rule 37(e)(2)(B)(ii) are shown.

83 The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should
84 have been preserved; if so, the court may impose sanctions only if it can make two further findings.
85 First, the court must find that the loss of information caused substantial prejudice in the litigation.
86 Because digital data often duplicate other data, substitute evidence is often available. Although it
87 is impossible to demonstrate with certainty what lost information would prove, the party seeking
88 sanctions must show that it has been substantially prejudiced by the loss. Among other things, the
89 court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if
90 these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when
91 the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)
92 sanctions in the expectation that the court will employ the least severe sanction needed to repair the
93 prejudice resulting from loss of the information.

94 Second, it must be established that the party that failed to preserve did so willfully or in bad
95 faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

96 **Subdivision (e)(1)(B)(ii).** This subdivision permits the court to impose sanctions in
97 narrowly limited circumstances without making a finding of either bad faith or willfulness. The
98 need to show bad faith or willfulness is excused only by finding an impact more severe than the
99 substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown
100 that a party failed to preserve discoverable information that should have been preserved. In addition,
101 it must be shown that the party's actions irreparably deprived a party of any meaningful opportunity
102 to present or defend against the claims in the litigation.

103 The first step under this subdivision is to examine carefully the apparent importance of the
104 lost information. Particularly with electronically stored information, alternative sources may often
105 exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A)
106 can reduce the adverse impact. If a party loses readily accessible electronically stored information,
107 for example, the court may direct the party to attempt to retrieve the information by alternative
108 means. If such measures are not possible or fail to restore important information, the court must
109 determine whether the loss has irreparably deprived a party of any meaningful opportunity to present
110 or defend against the claims in the litigation.

111 The “irreparably deprived” test is more demanding than the “substantial prejudice” that
112 permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
113 might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff’s
114 failure to preserve an automobile claimed to have defects that caused injury without affording the
115 defendant manufacturer an opportunity to inspect the damaged vehicle may be an example. Such
116 a situation led to affirmance of dismissal, as not an abuse of discretion, in *Silvestri v. General*
117 *Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically
118 important event. But even such losses may not irreparably deprive another party of any meaningful
119 opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the
120 evidence presented by the party who lost discoverable information that should have been preserved,
121 along with possible presentation of evidence and argument about the significance of the lost
122 information, should often afford a meaningful opportunity to litigate.

123 The requirement that a party be irreparably deprived of any meaningful opportunity to
124 present or defend against the claims in the litigation is further narrowed by looking to all the claims
125 in the litigation. Lost information may appear critical to litigating a particular claim or defense, but
126 sanctions should not be imposed — or should be limited to the affected claims or defenses — if
127 those claims or defenses are not central to the litigation.

128 A special situation arises when discoverable information is lost because of events outside
129 a party’s control. A party may take the steps that should have been taken to preserve the
130 information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious
131 computer attacks. Curative measures may be appropriate in such circumstances — this is
132 information that should have been preserved — but sanctions are not. The loss is not caused by “the
133 party’s actions” as required by (e)(1)(B).

134 **Subdivision (e)(2).** These factors guide the court when asked to adopt measures under
135 Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37(e)(1)(B). The
136 listing of factors is not exclusive; other considerations may bear on these decisions, such as whether
137 the information not retained reasonably appeared to be cumulative with materials that were retained.
138 With regard to all these matters, the court’s focus should be on the reasonableness of the parties’
139 conduct.

140 The first factor is the extent to which the party was on notice that litigation was likely and
141 that the information lost would be discoverable in that litigation. A variety of events may alert a
142 party to the prospect of litigation. But often these events provide only limited information about that
143 prospective litigation, so that the scope of discoverable information may remain uncertain.

144 The second factor focuses on what the party did to preserve information after the prospect
145 of litigation arose. The party's issuance of a litigation hold is often important on this point. But it
146 is only one consideration, and no specific feature of the litigation hold — for example, a written
147 rather than an oral hold notice — is dispositive. Instead, the scope and content of the party's overall
148 preservation efforts should be scrutinized. One focus would be on the extent to which a party should
149 appreciate that certain types of information might be discoverable in the litigation, and also what it
150 knew, or should have known, about the likelihood of losing information if it did not take steps to
151 preserve. The court should be sensitive to the party's sophistication with regard to litigation in
152 evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar
153 with preservation obligations than other litigants who have considerable experience in litigation.
154 Although the rule focuses on the common law obligation to preserve in the anticipation or conduct
155 of litigation, courts may sometimes consider whether there was an independent requirement that the
156 lost information be preserved. The court should be sensitive, however, to the fact that such
157 independent preservation requirements may be addressed to a wide variety of concerns unrelated
158 to the current litigation. The fact that some information was lost does not itself prove that the efforts
159 to preserve were not reasonable.

160 The third factor looks to whether the party received a request to preserve information.
161 Although such a request may bring home the need to preserve information, this factor is not meant
162 to compel compliance with all such demands. To the contrary, reasonableness and good faith may
163 not require any special preservation efforts despite the request. In addition, the proportionality
164 concern means that a party need not honor an unreasonably broad preservation demand, but instead
165 should make its own determination about what is appropriate preservation in light of what it knows
166 about the litigation. The request itself, or communication with the person who made the request,
167 may provide insights about what information should be preserved. One important matter may be
168 whether the person making the preservation request is willing to engage in good faith consultation
169 about the scope of the desired preservation.

170 The fourth factor emphasizes a central concern — proportionality. The focus should be on
171 the information needs of the litigation at hand. That may be only a single case, or multiple cases.
172 Rule 26(b)(1) is amended to make proportionality a central factor in determining the scope of
173 discovery. Rule 37(e)(2)(D) explains that this calculation should be made with regard to “any
174 anticipated or ongoing litigation.” Prospective litigants who call for preservation efforts by others
175 (the third factor) should keep those proportionality principles in mind.

176 Making a proportionality determination often depends in part on specifics about various
177 types of information involved, and the costs of various forms of preservation. The court should be

178 sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties
179 (including governmental parties) may have limited resources to devote to those efforts. A party may
180 act reasonably by choosing the least costly form of information preservation, if it is substantially as
181 effective as more costly forms. It is important that counsel become familiar with their clients'
182 information systems and digital data — including social media — to address these issues. A party
183 urging that preservation requests are disproportionate may need to provide specifics about these
184 matters in order to enable meaningful discussion of the appropriate preservation regime.

185 Finally, the fifth factor looks to whether the party alleged to have failed to preserve as
186 required sought guidance from the court if agreement could not be reached with the other parties.
187 Until litigation commences, reference to the court may not be possible. In any event, this is not
188 meant to encourage premature resort to the court; amendments to Rule 26(f)(3) direct the parties to
189 address preservation in their discovery plan, and amendments to Rule 16(b)(3) invite provisions on
190 this subject in the scheduling order. Ordinarily the parties' arrangements are to be preferred to those
191 imposed by the court. But if the parties cannot reach agreement, they should not forgo available
192 opportunities to obtain prompt resolution of the differences from the court.

SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION

The following summaries refer to the comments by the numbers assigned to them by the Administrative Office. The full comments should be available through Regulations.gov. The numbers there begin with USC-RULES-CV-2013-0002-, followed by the numbers that appear in these summaries. Since the final number, included below, is the only thing that's different, there seemed no reason to include the rest.

Note also that some commenters appear more than once. Some who submitted written comments also appeared at a hearing, and some submitted more than one written comment.

The review of comments after no. 804 did not attempt to include all those who commented, although every one of the 2345 comments received was reviewed. There were many comments that were very similar in both the pro-amendment and anti-amendment camp. Regarding comments after no. 804, this summary is limited to what seemed to be comments that differed from what's been heard before, and it does not list those who made those same points. It is easy to report that very many additional comments echoed both sets of comments already summarized repeatedly. (For example, it appears that two law firms submitted essentially identical letters from 15 to 20 lawyers each on the last day.) Perhaps, then, it is appropriate to begin with something mentioned in comment 1540, which quoted Rep. Morris Udall, who was a former boss of the submitting lawyer, and who tried to cut long-running hearings by saying "Everything has been said; just not everyone has said it."

The comments are arranged topically as follows

1. Overall
2. Rule 37(e)(1) -- Failure to preserve
3. Rule 37(e)(1) -- Curative measures
4. Rule 37(e)(1)(B)(i)
5. Rule 37(e)(1)(B)(ii)
6. Rule 37(e)(2)
7. Need to retain provisions of current Rule 37(e)
8. Limiting the rule to electronically stored information
9. Additional definition of "substantial prejudice"
10. Additional definition of "willfulness or bad faith"

Summary of Rule 37(e) Comments

1. Overall

Ronald J. Hedges (262): Does the proposed rule violate the Rules Enabling Act? In *Interfaith Comm. Org. v. Honeywell Int'l, Inc.*, No. 11-3813 (3d Cir. June 4, 2013), the Third Circuit considered whether Rule 68 might infringe on substantive rights provided by the fee-shifting provisions of the Resource Conservation and Recovery Act, but rejected that argument. The district court, however, had held that Rule 68 was incompatible with Congress' purpose in enacting RCRA that applying the rule to cases brought under the act would violate the Rules Enabling Act. "Does proposed Rule 37(e) violate the Rules Enabling Act? Would it simply govern the 'manner and means' by which a party's substantive right to a sanctions award is governed? Or would the rule alter the 'rules of decision' by which a court would adjudicate that right?" Would the requirement that courts find willfulness or bad faith vary a substantive right? Or would negligence still be sufficient for the imposition of serious sanctions? Does not the proposed rule set forth substantive standards for a court to apply -- at least some of which do not now exist?"

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The proposal has little or no deterrent value, which should be the purpose of a rule purporting to sanction unacceptable conduct by a party. The rule change would make it more difficult to obtain sanctions. This is moving in the wrong direction. "At a time when the plaintiffs' aviation bar needs liberalization of the discovery rules to deter and cure the problems being encountered in their technically complex cases, the Committee advances proposals which will make discovery of sophisticated corporate defendants more difficult and spawn new discovery avoidance tactics among defendants and their lawyers."

Lawyers for Civil Justice (267): A new preservation rule is urgently needed. Under current law, courts have created ad hoc litigation hold procedures, and parties struggle to define the line that should apply to the scope of preservation. As a result, they are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. This fear has fueled an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information. But the proposal lacks sufficiently clear preservation directives, and also includes sanctions standards that permit sanctions to be imposed based on an insufficient showing of culpability. Beyond that, we need a bright-line rule on the preservation trigger. The rule instead enshrines the vague "foreseeability" standard in the opening sentence. In its place, the Committee should adopt a bold, clear and reasonably balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps. Judicial decisions have transformed the traditional spoliation rule that was a brake on plaintiffs' conduct prior to suit into a new rule that places great affirmative burdens on defendants to preserve all potentially relevant material. Under the "reasonable anticipation" trigger standard, decisions must be made before receipt of a scope-defining complaint. Critics of this rule that use hypotheticals involving auto-delete do not make justifiable objections for a variety of reasons.

Washington Legal Foundation (285): WLF fully embraces the overarching objective of proposed 37(e), which is to replace the disparate treatment of preservation and sanctions with a single uniform standard. In particular, the rejection of the Second Circuit's ruling that mere negligence is sufficient to support sanctions (in *Residential Funding, Inc. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002)) is welcome. WLF believes these changes have the potential

Summary of Rule 37(e) Comments

to significantly curtail the amount of satellite litigation about spoliation allegations and also reduce the high costs of over-preservation.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts, but is concerned that the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." The absence of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of these terms by the courts. AHIMA suggests that Committee may wish to consider further clarification and definition of those terms.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. It stresses that preservation and spoliation issues are not only concerns for institutional defendants. "In the past, particularly in an asymmetrical case (such as a single employee discrimination action brought under Title VII), plaintiff's counsel might have paid only fleeting attention to his or her client's preservation obligation since it was presumed that the defendant employer had possession, custody or control of all the relevant ESI. That confidence may be misplaced, however, with the advent of social media. * * * Since the plaintiff controls when litigation commences, as well as the nature and scope of any claims asserted, a plaintiff's attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions." "[S]ome version of proposed Rule 37(e) may provide relief from the balkanized approach to the spoliation issue that now characterizes the litigation landscape, thereby bringing some predictability to this area of law."

Fred Slough (291): The proposed rule "provides an incentive to destroy records. The opposing party has too high a burden to be able to hold those who destroy evidence responsible. A jury should know that the violator has hidden potentially damaging evidence and the new rules make it more difficult for a Judge to impose such a sanction."

Philip Favro (298): (Includes two articles about the package of proposed changes) By ensuring that the sanctions analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach that may benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The proposed rule also addresses some of the lingering concerns of the plaintiffs' bar. For example, it specifically empowers the court to order additional discovery or other curative measures when a litigant has destroyed information it should have retained.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section wholeheartedly supports codifying the obligation to preserve information in anticipation of and during litigation. This measure should promote more consistent application of the standards for triggering and defining the scope of the duty to preserve. The Section also agrees that the appropriate scope of the information to be preserved is "discoverable information" as defined in proposed Rule 26(b)(1), or current Rule 26(b)(1) if that is retained without change.

Thomas Y. Allman (308): Generally speaking, the proposed rule should help to promote a uniform approach and foreclose the current practice of using inherent sanctioning power as an end run around existing Rule 37(e). But a number of aspects of the proposed rule raise concerns that need to be addressed.

Summary of Rule 37(e) Comments

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer has experience in mass tort cases involving federal MDL proceedings, and endorses all the comments submitted by LCJ, of which it is a member. It notes that the current system virtually guarantees costly overpreservation of evidence because no clear standards are given about when a party should "reasonably anticipate litigation." For example, in a group of class actions that were recently concluded Bayer preserved an estimated 17,388 GB of information over a period of four years. In response to plaintiffs' discovery requests, we produced 31.1 GB of that information (1.3 million pages). The ratio of information preserved to information produced was 559:1. We believe that the proposed 37(e) amendments would be an improvement, but that they do not go far enough.

Jonathan Smith (NAACP Legal Defense Fund) (310): The proposed changes would permit parties who have failed to preserve discoverable information to suffer minimal consequence, and could have a detrimental effect on civil rights litigation. They place an extremely heavy burden on parties seeking sanctions or adverse-inference instructions as a result of an opposing party's conduct during the discovery process.

Steven Banks (Legal Aid Society - New York City) (317): Instead of simply revising the current rule governing preservation of electronic discovery, the amendment creates a broadly applicable new rule that significantly curtails the trial court's discretion to sanction spoliation of any evidence, electronic or otherwise. This is a significant change in the federal rules, creating a standard for sanctions that would be very difficult for any party affected by the destruction of evidence to meet. Legal Aid opposes the proposed rule. In the Second Circuit, where we typically litigate, sanctions are more broadly available than would be true under the proposed rule. We agree with Judge Scheindlin's comments in Sekisui American Corp. v. Hart, 2013 WL 41163122 (S.D.N.Y., Aug. 15, 2013), that imposing sanctions only where evidence is destroyed willfully creates perverse incentives. In one recent case involving a prisoner who was beaten by another prisoner, employees of the City Department of Correction watched videos of the area where the assaults occurred but then deleted them. In another similar case, the City preserved only fragments of the video of the event. It turned out that the Department had essentially no video preservation policies, despite the obviously critical nature of surveillance videotape to the litigation. It is patently unfair for our clients to have to meet the very stringent threshold proposed by this new rule in order to permit the trial court to impose sanctions.

U.S. Chamber Institute for Legal Reform (328): The rewriting of Rule 37(e) is needed because the current rule's effectiveness has been called into question. Because companies fear that they will be sanctioned for loss of information, preservation costs have continued to mount under the current rule. Fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information, even though only an infinitesimal fraction ends up being used by the parties in litigation. The proposed new rule is an improvement over the current rule. A rule that gives the court the option of using curative measures is sensible. But the ILR believes that the rule should be improved by strengthening its protections against sanctions.

Bryan Spoon (329): The proposed changes benefit large corporations and add another barrier between a plaintiff and the materials that could prove or disprove the case. Spoliation is already a major issue, and these changes make it easier for corporations to destroy relevant document without appropriate sanctions.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): Preservation issues have taken

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on a life of their own. Corporations worry about preserving terabytes of e-discovery that may never be relevant to any of the claims or defenses at issue in any litigation. Many of the preserved documents serve no business purpose and are preserved solely due to fear of sanctions in light of the unsettled legal standard. Before the proliferation of e-discovery, practitioners were faced with the simpler question of what paper documents needed to be maintained. E-discovery creates a completely different dynamic. The volume is exponentially greater. There is a greater risk of inadvertent destruction. The FDCC therefore urges the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information.

Doug Lampe (343) (Ford Motor Co.): Ford supports revising Rule 37 to establish uniform preservation and sanctions guidelines across courts, and agrees that the revisions would at least somewhat reduce the burden of over-preservation.

Kim Stone (345) (Civil Justice Assoc. of Calif.): We support the proposed changes to Rule 37(e), which should help reduce unnecessary and expensive preservation of information. We agree with the comments of the Lawyers for Civil Justice and the Institute for Legal Reform.

Shanin Specter (344) (Kline & Specter): Our firm represents plaintiffs in catastrophic injury cases, particularly medical malpractice. We believe the proposed rule alters substantive law, and goes beyond practice. The adoption of this rule would preempt the application of the substantive law regulating spoliation of evidence of those states which have addressed the topic.

The Sedona Conference Working Group 1 (346): It is unclear whether the Committee's proposed changes to Rule 37(e) as currently drafted will have a substantial impact on the goal of reducing the burden and costs associated with overbroad preservation or setting forth a uniform national spoliation standard. We ask that the Committee carefully consider our alternative proposals, which we submitted to the Committee in October and December of 2012. We approve of the goal of replacing current Rule 37(e) with a rule that would establish a uniform national culpability and prejudice standard. But we have a number of concerns about the manner in which the current proposal is drafted.

Pennsylvania Bar Assoc. Fed. Practice Comm. (350): The Committee endorses the concept of a uniform approach to spoliation sanctions in federal courts. The proposal has a careful balance with respect to the imposition of an adverse inference. It lowers the degree of malfeasance required by the spoliating party as the prejudice to the opposing party increases, such that only ordinary negligence is required if the prejudice is extreme, bad faith or willful conduct is required for lesser prejudice, and no adverse inference sanctions is available without at least substantial prejudice to the opposing party.

Eric Hemmendinger (Shawe Rosenthal) (351): We support changing Rule 37 to limit motions for sanctions for failure to preserve. The current rule has given rise to discovery which is aimed not at obtaining evidence, but at identifying something arguably relevant which the employer failed to preserve, which then becomes the centerpiece of a spoliation claim. We support limiting such claims to situations in which the failure caused substantial prejudice and was willful. But we fear that the list of factors in the rule may cause trouble, and could encourage parties to seek discovery about those matters. We think that a party seeking such discovery should have to demonstrate substantial prejudice at the outset, before getting any discovery on this ground.

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Kenneth D. Peters & John T. Wagener (353): The proposed rule is comprehensive and demonstrates an intent to tie sanctions for failure to preserve discoverable evidence to conduct that is "willful" or "in bad faith" and causes "substantial prejudice." These changes may help to mitigate a litigant's ESI burden, which often results in over preservation. But proposed (B)(ii) is likely to generate substantial motion practice as the courts struggle to define exactly what it means. It should be deleted.

Advisory Comm. on Civil Litigation, E.D.N.Y. (355): We do not support this amendment at this time. We agree that, ideally, there should be a uniform national rule governing the consequences of failure to preserve information. But in view of the rapid and continuing evolution of electronic discovery, we do not believe the time is ripe to promulgate such a rule. The different federal courts diverge about the proper standards for determining the consequences of failure to preserve discoverable information, and the Supreme Court has not yet spoken on the issue. Promulgation of a uniform rule should await further experience and further development of the law in this area.

Richard McCormack (356): It is extremely important that these changes be made in order to ensure fairness to all sides in the litigation. The change should establish a much-needed uniform national standard that would lessen the cost of over-preservation and additional litigation over allegations of spoliation. But I think that (B)(ii) should be removed as the courts are likely to use it to avoid the primary rule. In addition, the Committee should make it clear that sanctions are available only when the party has acted willfully and in bad faith. The list of factors in proposed 37(e)(2) should be removed. Finally, the rule should prescribe a clear, bright-line standard on when the affirmative duty to preserve information is triggered. The best one would be commencement of litigation.

Dusti Harvey (358) (AAJ Nursing Home Litigation Group): The wholesale revamping of Rule 37(e) represents both a broad shifting of the burden in determining whether a discovery violation is subject to court sanction as well as a narrowing of a court's ability to impose sanctions in the first place. The current rule requires the party failing to provide electronic discovery to demonstrate that its conduct was in good faith. The proposed changes appear to limit a court's ability to sanction a party for failing to produce discoverable material generally (not merely electronic discovery). The changes would require the aggrieved party to convince the court of numerous factors, some quite intangible, before sanctions could be imposed. Discovery violations by corporate defendants have become commonplace in all types of litigation. But most acts or omissions giving rise to the destruction, loss, or withholding of discovery would likely not be sanctionable under the proposed rule.

Edward Hawkins (362): Eliminating the adverse inference instruction by changing Rule 37(e) will serve only to encourage rule-breaking plaintiffs and defendants to withhold evidence. The sting of the adverse inference instruction helps to keep both the plaintiff and the defendant forthcoming with discovery.

John M. Gallagher (379): The proposed change to Rule 37(e) purports to insulate a party from sanctions for failure to provide ESI if it has been lost as a result of routine, good faith operation of an electronic storage system. But once one party sends to the other party a "litigation hold" letter, the world of "routine" has been lost in the rearview mirror.

Richard Malad (376): I strongly oppose this rule change. We represent plaintiffs who

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confront defendants with a substantial advantage at the outset. The various rule changes will only serve to limit discovery these plaintiffs need. The Rule 37(e) change will place limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous states specifically permit it. The rule change also allows the court to consider "proportionality" of the preservation efforts, likely as an appeal to defendants who do not want to preserve large amounts of information.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We applaud the effort to develop a national standard for spoliation sanctions and confine the most serious sanctions to a narrower set of situations. But we think that "willful" is the wrong term to use in (B)(i) and that (B)(ii) should be removed entirely from the amended rule.

Alan Morrison (383): I support the back-end approach of focusing on the consequences of failing to preserve, rather than attempting to establish front-end preservation requirements (assuming that would be permissible in a rule). I also agree that curative measures, as opposed to sanctions, are a better option.

Glen Pilie (Adams & Reese) (385): We support the adoption of amended Rule 37(e) and agree with the LCJ comments regarding the need for a clear rule regarding the scope of ESI preservation. We offer an example of a recent case in which our client was the defendant and suffered sanctions due to its failure to preserve temporary internet files that might have shown that its employees accessed the plaintiff's secure website to order forklift parts. The case is *NACCO Materials Handling Group v. The Lilly Company*, 278 F.R.D. 395 (W.D. Tenn. 2011). Plaintiff was a billion dollar global forklift manufacturer, and it claimed defendant, a small family-owned forklift dealership, had engaged in improper use of access to plaintiff's site. But it did not sue for four months after discovering the alleged access to its website. After suit was filed, defendant issued a litigation hold to key personnel in the parts department, which seemed to be involved. It did not instruct every employee in the company to preserve ESI and did not retain an ESI expert. Instead of an outside expert, it relied on its in-house IT director (who split his duties between that job and serving as a trainer for forklift repair). Defendant did not immediately cease its ordinary retention practices and establish protocols with regard to backup files, and employees were not instructed to disable "auto-delete" functions on web browsers or in temporary internet files. The magistrate judge imposed sanctions for failing to protect this information even though there was no evidence that any relevant information was lost. Moreover, defendant had a pending 12(b)(6) motion at the time. Defendant decided, however, to settle while an appeal of the magistrate judge's ruling was pending before the district judge, largely due to the harshness of the looming sanctions and the potential disruption they could cause to this small business if not reversed.

International Assoc. of Defense Counsel White Paper (390): The proposed rule holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation about allegations of spoliation. It establishes a national standard that would eliminate the court's ability to impose sanctions under "inherent authority" or state law. The amendment should provide practitioners with added security when advising clients on discovery issues.

Hon. James C. Francis IV (395): The proposed rule would radically alter the standards for remedying spoliation. In the process, it would curtail the ability of innocent parties to obtain relief when they are prejudiced by the destruction of information potentially relevant to

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litigation. But the rule does not solve the problems it purports to address. Instead, by focusing on the state of mind of the spoliator it introduces additional uncertainty and arbitrariness. Most importantly, it would undermine public perception of the fairness of our justice system. I urge the committee to withdraw the proposed rule or modify it substantially. There is no evidence that courts have imposed disproportionately serious sanctions. To the contrary, default, dismissal, and the imposition of an adverse inference instruction have generally been ordered only in response to the most egregious conduct by a party. Even if the rule were to produce uniformity in federal court, any entity that operates nationally would confront the risk of the most rigorous state court sanctions rules (citing cases from state courts). Moreover, the concept of willfulness varies depending on the context in which it appears (citing cases). A rule that provided more precision and certainty about the preservation obligation itself might hold promise, but this rule does not try to do that. Moreover, overpreservation is not caused solely by the prospect or actuality of litigation; regulatory and other preservation obligations exist. And lawyers do not think like criminals, adjusting their behavior based on the penalty for violating an obligation rather than the obligation itself. Yet the rule leaves that obligation unchanged. The rule might also prevent courts from using narrowly tailored preclusion orders to address the loss of specific information. Focusing on intent invites arbitrariness, because it is one of the most difficult things one can ask a court to resolve, and it would also tend to favor unsophisticated plaintiffs as compared with savvy business defendants. The Advisory Committee has not addressed, much less rebutted, the principle underlying Residential Funding -- that the party responsible for the loss of evidence, not the innocent party, should be responsible for the consequences that result from loss of information. Making sanctions unavailable unless the party deprived of the evidence can demonstrate bad intent of the spoliator would make the judicial system look unjust. A better proposal might look like the following:

(e) Failure to Preserve Discoverable Information

(1) Curative measures. If a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation, the court may impose a remedy no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith.

(2) Factors to be considered in fashioning a remedy. The court should consider all relevant factors in determining the appropriate remedy where a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it an the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservations to any anticipated or ongoing litigation; and

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(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Steven J. Twist (396): This rule is a much-needed reform. The fear of spoliation sanctions is a major driver of litigation cost. The fear is created by the lack of a nationwide standard that prohibits sanctions for loss of information unless it was in bad faith.

Hon. Shira Scheindlin (398): This rule does not provide a clear standard for preservation, as many urged the Committee to do. It does propose a national standard for imposing sanctions. At the moment, the circuits are in disarray, and I agree that a single national standard for the federal courts would be desirable although such a standard will not bring true national uniformity as the fifty state courts may adopt different standards. The idea of curative measures is good, but the rule is unclear and seems to be too restrictive. In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court addressed an instruction to the jury that it had the power to find that if a party had control over information but failed to preserve it the jury could infer that the lost information was unfavorable to that party. The court said this was not a sanction and that neither the court nor the jury was required to make such a finding. So it sounds like a "curative measure" under the proposed rule, but how many judges would think of a jury instruction as a curative measure? In sum, this proposal will create new problems without solving old ones. Magistrate Judge Francis has proposed a different rule. I agree with his proposal and all of his comments.

Eduarde Miller (Boehringer Ingelheim, USA, Inc.) (399): The proposed rule would appropriately prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." Such a standard is necessary and long overdue. There is no doubt about the need to create a uniform national standard aimed at avoiding costly over-preservation and ancillary litigation over allegations of spoliation. But proposed (B)(ii) is unnecessary and could eviscerate the entire rule by allowing courts to impose sanctions without finding willfulness or bad faith. And the conjunctive should be "and" in (B)(i). Also, the factors in (e)(2) should be removed because they are not relevant to the principal point in the proposed rule and there is a risk that they could be converted into mandates for certain conduct. Finally, it would be better to add a clear, bright-line standard for preservation to the rule.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): The proposed changes only encourage stonewalling and hiding the ball, both of which regularly occur already in product liability litigation. We already know that the failure to produce information by defendants often causes substantial prejudice. But making plaintiffs prove that imposes an unfair burden on them.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The proposed amendment is a step in the wrong direction. Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. But the changes will set the bar for obtaining sanctions so high that they will never be met.

Mark S. Stewart (Ballard Spahr) (412): Currently there is a diversity of judicial views on preservation and sanctions across the country. This diversity means that companies that operate in multiple jurisdictions have to err on the side of over-preservation, which drives up discovery costs. The uniform standard contemplated by the proposed amendment will allow companies to formulate a single strategy geared toward complying with that national standard. A uniform

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federal standard will probably also impact state practice. These developments would benefit plaintiffs as well. Before the use of social media was widespread, plaintiffs' counsel generally did not have much reason to pay attention to the possibility of being sanctioned. Today, the increasing importance of social media in cases brought by individuals changes that calculus. The cost of preservation sanctions motions may soon be visited more evenly on plaintiffs and defendants. The 2010 FJC study demonstrated that spoliation motions are infrequently granted, but that they generally double the time it takes to resolve a case, and that it is 27 times more likely that the case will proceed to trial. Limiting sanctions to intentional misconduct will reduce this expensive and time-consuming motion practice and facilitate efficient case disposition that will ultimately benefit all litigants.

Mark Kundla (416): The proposed rule appropriately limits sanctions to situations in which the party's conduct is "willful" or in "bad faith" and causes "substantial prejudice." These changes will help to mitigate a litigant's ESI burden, which often results in excessive costs of document retention.

Harlan Prater (418): The amended rule would establish a much-needed uniform national standard that would curtail costly over-preservation. But the use of the term "willful" as part of the standard is problematical because some courts define it in a way that would make sanctions too easy to obtain. I think that the standard should be "willful and bad faith."

William Adams (419): The proposed rule would alleviate the threat of sanctions for minor or unintentional failures to preserve every piece of potentially relevant evidence.

Daniel Edelman (420): This change, like all the proposed changes, would have a disproportionate impact on a plaintiff's already-limited ability to obtain relevant discovery from evasive corporate defendants. The cumulative effect of these changes would devastate our clients's ability to pursue their legal claims in what is already a David v. Goliath situation.

Dave Stevens (428): I'm not a lawyer, but I favor these changes. I own a small campground in Ohio, and find that I spend about as much time trying to minimize the threat of litigation as I do trying to win more customers. I favor the limit on penalizing businesses for discarding information to cases involving bad faith. The cost of litigation has caused us to eliminate diving boards and the rope swing, and I'm not going to install a zip line due to liability worries.

Ryan Furguson (433): The new sanctions provision is a positive step, which should prevent sanctions being imposed on a party without consideration of the impact of the loss of evidence on the case. The costs of storing and later reviewing this material put undue pressure on the parties to settle without regard to the merits.

Donald Bunnin (Allergan) (436): We favor the amendment because we believe it will clarify litigants' obligations and ease some of their burdens. In one product liability trial, we preserved and collected approximately 10 million documents. But only four thousand needed to be produced to plaintiff. Yet the costs of preserving the data exceeded \$275,000. We would support changing the rule to say willful "and" bad faith.

James Cocke (444): I support the amendments. We are a medium sized company that finds that current discovery avenues are so broad that if we were to truly attempt to comply with

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all of the discovery demanded of us we would have to shut down our operation and spend all of our time addressing ESI and the endless monster that modern computers and their progeny have created.

Stephen Aronson (446): I agree with Sen. Kyl that creating a national standard against discarding information that would hamper litigation is beneficial.

Robert D. Curran (448): Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. In any case involving a car crash that ends up in federal court, the parties anticipate litigation. Indeed, we frequently encounter work product objections to discovery that are premised on the anticipation of litigation. But critical evidence, such as security videos, black box data, automobiles themselves, devices involved in the accident, and the like are often destroyed or lost. The proposed change to Rule 37(e) is a step in the wrong direction because it sets the bar for sanctions so high that it will never be met.

Vickie Turner (450): We agree with LCJ and commend this proposal. We also agree that the standard should be "willfulness and bad faith" and that (B)(ii) should be removed. We also think that there should be a clear standard on when the duty to preserve arises.

David Hill (452): I agree with Sen. Kyl that there should be a clear national standard that says companies can be punished for discarding information only if done in bad faith.

John Brown (454): I support a clear national standard that would allow companies to be punished if they discard information in order to hide something or hamper litigation or if done in any other bad faith. But discarding as part of a records retention system it should not be punished.

Michael Scott (455): E-Discovery has posed new and difficult problems regarding evidence retention. I urge the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. I think that commencement of litigation should be the standard. I think that (B)(ii) should be removed because it would "swallow the rule." I also think that in (B)(i) the standard should be "willful and bad faith." I urge the deletion of the factors in 37(e)(2). If they are not deleted, they should be put into the Note.

Niels Murphy (456): The proposal to adopt a rule establishing a national standard holds great promise to curtail costly ancillary litigation about allegations of spoliation. But (B)(ii) could "swallow the rule" and should be removed. There also should be a clear, bright-line standard for the trigger. The "anticipation of litigation" standard in the proposed rule is not sufficient, and a "commencement of litigation standard" would be better.

Andrew Knight (458): I generally support new 37(e). Presently spoliation becomes the focus of the litigation in many cases rather than the merits of the case. I think the "willful or bad faith" standard is troubling because many courts consider a company's establishment of routing auto-delete mechanisms to be "willful." I think that the standard should be "willful and bad faith." I also believe that (B)(ii) should be removed from the rule so as to avoid confusion.

Stuart Delery (U.S. Dep't of Justice) (459): It is important that the Committee keep in mind that this rule will govern not only complex commercial litigation but also all other types of cases. Litigants with less sophistication, such as pro se litigants, do not have access to technical

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personnel to advise them on computer-based concerns.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

George Schulman (L.A. Country Bar Assoc. Antitrust & Unfair Bus. Prac. Section) (462): Our experience in modern litigation is that the amount of electronic information is exploding exponentially. A case involving a singular event, such as a filed contract, can generate thousands of emails among the parties. Matching up electronic production for all of the parties almost always reveals missing emails, whether they are missing because of lack of preservation or just a bad search for evidence requires additional rounds of discovery and often leads nowhere. Thus, while we appreciate the Committee's work in establishing a national standard and exempting mere negligence from severe sanctions, we note that efforts to uncover what is missing and why will surely run into the timing and discovery limits proposed elsewhere in the report.

Janet Poletto (463): We view the proposed amendment as an improvement over the existing situation. It appropriately limits sanctions to situations where a party's conduct is "willful" or "in bad faith" and causes "substantial prejudice." These changes will help mitigate a litigant's ESI burden, which often results in excessive costs of document retention and management for fear of sanctions.

Lisa Kaufman (Texas Civil Justice League) (466): TCJL strongly supports the proposed language for 37(e) requiring a showing of willful or bad faith conduct causing substantial prejudice before sanctions may be imposed. This change will reduce the risk that routine data maintenance will expose a litigant to sanctions simply for performing its day-to-day business operations in a cost-effective and reasonable manner.

Michael Freeman (Director, Tort Litigation, Walgreen Co.) (467): I favor the changes, but think 37(e) should go further. The word "and" should be substituted for the word "or" in (B)(i) on the culpability standard, and (B)(ii) should be deleted.

Kenneth Wittnauer (VP & Gen. Counsel, Britax Child Safety, Inc.) (483): These changes are helpful in providing certainty regarding preservation obligations. But I join others in saying they do not go far enough and urge that the word "and" be used instead of "or" in (B)(i) and that (B)(ii) be removed from the rule.

Peter Mancuso (Nassau County Bar Ass'n) (487): We support the proposed amendments to 37(e) and welcome the general approach of dealing with the failure to preserve ESI in a less onerous and fairer manner. In particular, we support the effort to incorporate directly into the rules an obligation to preserve information in anticipation of litigation. Rather than relying on inherent power, codifying the principle makes sense. We also agree that the correct focus should be on "discoverable information." We agree that sanctions (rather than curative measures) should be imposed only upon a showing of substantial prejudice and willfulness or bad faith.

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We disagree with those who have argued that this change will encourage careless or sloppy preservation efforts. We do not believe counsel or their clients will act in such a manner simply because a finding that (B)(i) is not satisfied might enable them to avoid sanctions.

Robert Buchbinder (488): The obligation to preserve evidence and the consequences of noncompliance have, under the current rules, resulted in meritless spoliation arguments that often derail litigation. The proposed changes to 37(e) are most helpful in providing certainty to my clients regarding their preservation obligations.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. Regarding (B)(ii), there was concern that the language used is vague and risks swallowing the rule. Because the sanctions turn on the importance of the information rather than culpability, very severe sanctions could result from essentially innocent conduct. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

James Edwards (496): Litigation today is inefficient, costly, and uncertain. One reason for these problems is uncertainty about preservation. We lack clear and consistent guidelines for preservation of information, and in many cases parties must settle claims due to the high costs rather than on the merits. Proposed Rule 37(e), along with amended Rule 26(b), should address the burdens of both over-preservation and overbroad discovery.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations) (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Martin Stern (501): I support the proposed amendment to Rule 37(e). But I think that it should be changed in two ways. First, "or" in (B)(i) should be changed to "and," and second, (B)(ii) should be eliminated altogether. Several also urge adoption of clear, bright-line standards

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for preservation decisions. Many other comments repeated this support and voiced these two recommendations for change, including those from Andy Osterbrock (Dow Corning Corp.) (514); Joel Neckers (524); Christian Bataille (578); Chet Roberts (579); Jamie Bryan (621); Vincent LaMonaca (on behalf of SVC, Inc) (640); Kenneth Waterway & Kelsey Black (652); L. Neal Ellis, Jr. (665); Tony Hullender (BlueCross BlueShield of Tennessee) (667); Lawrence D. Wade (668); Rex Darrell Berry (669); Scott Barbour (672); Lawrence L. Connelli (675); Lindy H. Scoffield (678), James T. Anwyl (679) and Leigh A. Stepp (680) (the last three letters are identical and come from the partners in Anwyl, Scoffield & Stepp, LLP); Debra L. Stegall (686); Richard Chesney (687), Gregory Bwower (690), Henry D. Nelkin (691), Michael Jenks (692), Lynn H. DeLisa (697), Rudolph Petruzzi (764) (the previous six comments are all from lawyers in the same law firm and endorse the amendments in general and 37(e) in particular); Cheryll L. Corigliano (694); Joyce G. Bigelow (696); Jeffrey Rubin (703); Mark Lavery (726); William Pokorny (731); Lee Mickus (Colorado Civil Justice League (755); Daniel Kuntz (MCU Resources Group, Inc.) (761); Michael I. Thompson (792); Michael Murphy (797); Jennifer B. Johnson (802).

Patrick Malone (503): This amendment is unnecessary. Moreover, the opportunity to obtain an adverse inference jury charge is an important incentive to keep parties honest in their discovery obligations. This rule change would reward wrongdoing. This comment resembles many other comments, both in its objections to the 37(e) proposals, but also in enumerating objections to the proposed changes to Rule 4, Rule 26, Rule 30, Rule 31, Rule 33, and Rule 36. Similar comments were received from many others, including: James Ragan (528); Victor Bergman (537); A. Laurie Koller (538); Justin Kahn (542); David Rash (545); Chris Nidel (547); Kevin Hannon (548); George Wise (549); Gregory Smith (551); Daniel Ryan (552); William Smith (553); John Lowe (557); Margaret Simonian (561); Teresa McClain (562); James E. Girards (563); Nicole Kruegel (570); Clark Newhall (577); James Howard (583); Christopher Bouslog (584); Tom Carse (586); E. Craig Daue (590); David Rudwall (591); Geoffrey Waggoner (592); John McCraw (595); Kenneth Miller (596); Michael Blanchard (597); Mark Gould (598); Herbert Ogden (608); Scott Loarned (611); Lars Lundeen (614); Marcia Murdoch (616); Shane Hudson (620); Thomas Bixby (627); Ian Crawford (628); James Swift (633); Todd Schlossberg (644); Craig Miller (650); John Baryllick (651); Thomas Yost (653); Brad Prochaska (658); Peter Ehrhardt (661); Alexander Blewett (685); Benjamin Graybill (704); Craig Wilkerson (718); Emily Joselson (on behalf of Langrock Sperry Woll) (730); Scott Smith (732); Karen Roby (734); Anonymous Anonymous (745); Sam U (746); Lisa Riggs (752); Mark Mandell (799).

Lawyers for Civil Justice (540) (supplementary comment): We strongly support the effort in Rule 37(e) to provide a uniform and predictable national standard that allows parties with potentially discoverable information to use their best judgment to manage their preservation efforts. And we still think that "willful" should be eliminated in (B)(i), and that the (B)(ii) exception should be eliminated. We also favor adding relevance and prejudice to the list of factors in 37(e)(2).

Glenn Hamer (Arizona Chamber of Commerce) (576): "By permitting [sanctions] only where willful conduct was carried out, the Committee's recommended changes to Rule 37(e) allow companies some certainty as they balance protecting themselves from litigation with addressing the needs of the market they serve. We urge the committee to further strengthen this protection by limiting spoliation sanctions only where conduct was committed in 'bad faith.'"

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Bradford A. Berenson (General Electric Co.) (599): GE's preservation challenges are enormous. It has over 300,000 employees world-wide, plus another 100,000 contractors who work closely with its employees. Approximately 35,000 employees leave the company or transfer jobs each year. GE operates in over 3,400 locations in 160 countries. In confronting preservation challenges, GE is faced with approximately 4,770 terabytes of email alone. Each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, and then ensure that the hold is honored. Enterprise-wide, this is a herculean task. The present "gotcha" game some plaintiffs adopt forces GE to engage in tremendous over-preservation. But those costs are overshadowed by the greater costs that arise when discovery actually occurs in litigation. "As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review, a task that typically requires a trained professional to examine each document that might be producible." (The comment offers three examples of situations in which GE incurred huge costs that bore no reasonable relation to the litigation stakes.) GE is particularly struck that the quality of justice in other countries seems relatively comparable with that in the U.S., while the cost of litigation in those countries is much, much lower. "[T]he disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that were participants in the global litigation market have a chance to opt out of the U.S. system, they often do."

Federal Magistrate Judges' Ass'n (615): The FMJA endorses the revision of Rule 37(e). "We believe the drafters have struck a balanced approach by requiring courts initially to look to possible remedies and weighing culpability in imposing sanctions."

Florida Justice Reform Institute (634): We strongly support the basic concept behind the proposed changes to Rule 37(e). A national standard is beneficial to promote the rapid development of a robust body of case law and to promote certainty and efficiency. But we think that (B)(i) should be limited to bad faith and the (B)(ii) should be removed from the rule. In addition, we favor adding a materiality factor to proposed 37(e)(2).

Cal Burnton (642): I favor the change to bring back a sense of professionalism and search for justice, which has been disappearing for our profession. With all the documents and electronic data existing wherever paper and data reside, one can never say that "all documents" have been produced. Yet the "sanctions" game will be played for no reason other than to put pressure on the other side, on the misguided view that if you hurt the other guy, you must be helping your own clients. But the rule should be changed in (B)(i) to require both bad faith and willfulness.

Hon. Lois Bloom (E.D.N.Y.): Along with the proposed changes to Rule 26, 30, and 33, the change to Rule 37(e) will cause more disputes and increase cost and delay. These amendments will only create new problems instead of curing existing ones.

Dana Bieber (Liability Reform Coalition of Washington): We support proposed 37(e), which we believe holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation.

Richard Valle (656): I am against the proposed changes. "As for the proposed revisions concerning Rule 37(e), I have a current case where it has taken almost a year to obtain all of the different versions of my client's medical records and bills. The court just ordered a forensic

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examination of Defendant's computer system. I don't believe we would be learning these things under the proposed revisions to the rules."

Noah Purcell (Solicitor Gen. State of Washington, on behalf of Washington State Attorney General's Office) (677): We enthusiastically agree with the proposed amendment to Rule 37(e). The absence of express proportionality limits in the current rules has the effect of significantly inflating the costs, complexities, and burdens of litigation by incentivizing over-preservation and over-broad discovery. We also favor the idea courts should prefer using curative measures to imposing sanctions.

Michael E. Klein (Altria Client Services) (684): I am manager of discovery support for all Altria and Philip Morris USA litigation. We have repeated experience producing huge amounts of information and finding that virtually none of it actually surfaces in the litigation. In answer to the Committee questions during hearings about whether the Rule 37(e) amendments would really result in measurable relief for businesses, we can report that the answer for us is "yes." The immediate benefit would be a significant reduction in the amount of information subject to preservation in our product liability litigation. So "the proposed Rule 37(e) amendments will provide millions of dollars of relief annually." We think that the rule should not be limited to ESI, that (B)(ii) should be eliminated, that 37(e) should not be retained, that the rule should define "substantial prejudice", and that (B)(i) should not authorize serious sanctions based on an unmoored concept of "willfulness."

Kenneth Suria (689): This is a welcome change because it offers protection for inadvertent and unintentional misplacing of discoverable material.

James Heavner (The Hartford Financial Serv. Group) (748): The Hartford spends millions of dollars every year preserving and producing documents, and supports this effort to provide a clearer and more reasonable standard for assessing this effort. But we think that looking to the Sedona Conference's emphasis on whether efforts to preserve were made in good faith is more promising. We also think that the rule should be emphasize whether alternative sources exist for the information.

Paul D. Weiner (704): My firm is the largest management-side law firm in the world. I spend full time on E-Discovery and have a team working for me. I want to "underscore the crushing eDiscovery burdens facing employers in today's digital world." Consistency across circuits is critical and is missing. One thing that is a bane is the frequency of overly broad cut-and-paste preservation demands, which are served in a knee-jerk fashion. I think that the mandates of Rule 26(g) should apply to such demands, and that lawyers be directed to make sure they are proportional. There is a dire need for rule amendments.

Wendy Butler Curtis (Orrick) (864): We favor requiring a finding of bad faith before sanctions may be imposed, partly on the theory that this standard will reduce gamesmanship and unjustified sanctions motions. To validate this assertion, we examined sanctions rulings from four circuits -- the 2d, the 8th, the 10th, and the 11th Circuits. Collecting all sanctions orders and opinions from those circuits gave us a pool of 119 cases. We then grouped cases into two categories, those where a finding of bad faith was required and those in which it was not. We hypothesized that a higher proportion of motions would be granted where the more demanding standard applied because the higher standard would deter groundless motions. Of the 119 cases involved, 32 used the bad faith standard and the other 87 used a lesser standard. Under the bad

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faith standard, 62% of the cases resulted in sanctions, while under the lesser standard the success rate was 45%. We believe these data show that the higher standard reduces the likelihood of groundless motions.

Philadelphia Bar Ass'n (995): The association endorses proposed 37(e).

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We agree that there is a need to revise Rule 37(e) to address issues of data preservation, spoliation and the availability and generally support the approach adopted in the proposed rule. We also believe that the factors identified in 37(e)(2) are relevant and appropriate in assessing the reasonableness of a party's efforts to preserve information for litigation. Nonetheless, we have reservations regarding some provisions and believe that further study and revised drafting is necessary before a final rule is promulgated. We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost.

Seth R. Lesser (1102): The proposed changes reflect changes that may be outdated in some areas of law. In our cases, so far as electronic discovery is concerned, the last few years have evidenced a sea change in the reduction of the expense and time spent on ESI discovery. The increased sophistication of both in-house and hired electronic discovery consultants is notable. At the same time, there are also far more efficient advanced search and review programs. As a result, we are rarely seeing companies having to spend substantial resources in our wage and hour cases to address legacy systems that are not compatible with more advanced programs. This has been a dramatic and marked change.

Robert Kohn (Federal Bar Ass'n) (1109): We support proposed 37(e). By making clear the relevant standards, the proposal simplifies the job of litigating and deciding a spoliation sanctions motion. This may also lead to more compromises to resolve spoliation issues by agreement rather than seeking court intervention.

John Vail (1118): The zeal of the Committee to address the concerns of outsized entities is well illustrated by proposed Rule 37(e), which has received insufficient comment. The goal of the Committee is to address preservation obligations that arise, as it acknowledges, primarily as a matter of substantive state common law. This federal procedural fix to a concern about state substantive law is beyond the ken of the Committee.

David Howard (Microsoft) (1222): The proposed amendment to 37(e) will help reduce the costs of over-preservation. Microsoft preserves data from every custodian at times, even though the lawyers working on the matter know there is a de minimis chance that the vast majority of the employees will ever be relevant to the litigation. If the rule is implemented, Microsoft will engage in this type of over-preservation much less often, because we will know that we can, in good faith, locate and instruct only those employees who are most likely to have relevant information without facing the tactical threat of a spoliation motion. At the same time, there is very little risk that the new rule will lead to insufficient preservation. It is in Microsoft's

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best interests to locate the key actors and place them under a litigation hold.

ARMA International (1263): ARMA is comprised of more than 27,000 professionals in the field of records and information management. It is the leading international organization dedicated to information governance. It maintains and designs information governance programs. Its governance programs are affected by judge-made preservation standards. The amendments to Rule 37(e) will therefore directly affect what ARMA does. It generally supports the proposed amendments insofar as they create a single, national standard for evaluating sanctions for spoliation. It does not profess expertise in managing discovery in litigation and does not express an opinion about the best way to prevent spoliation. But it can report that preservation or litigation holds are the largest exceptions to a records manager's maxim to retain document and information for only as long as it has business value or is statutorily required. Simplifying this standard should therefore produce information management benefits.

ARMA disagrees with those commenters who have argued that this standardization is illusory because the Federal Rules do not bind state courts. Not only do many state courts explicitly look to the Federal Rules, but the underlying premise is flawed; establishing a minimum federal standard will matter. It also agrees with the aim to raise the culpability standard above mere negligence. Because of the Second Circuit's Residential Funding decision many organizations have had to manage their preservation behavior according to this broad standard. This has been one of the causes of massive over-preservation. With the potentially devastating effect of spoliation sanctions hanging over their heads, organizations make preservation decisions out of fear as to how they will be second guessed after the fact. Magistrate Judge Francis pointed out that 9% of organizations surveyed by ARMA said that they did not have a records retention policy and 21% did not have policies that covered electronically stored information. But that disregards the fact that about 70% do have such policies, and these organizations are nevertheless over-preserving because they have reasonable policies but must deviate from them to avoid the risks of sanctions. So the reality is that the current low culpability standard does have a practical effect on how organizations manage their data. The specter of sanctions disrupts generally accepted data disposition principles because the cost to an organization of being accused of spoliation is vastly more significant than the large costs of over-preservation. From the perspective of the information governance professional, the uncertainty of the negligence standard drives an over-abundance of caution which not only makes the whole process more expensive, but prevents the deletion of irrelevant data.

George Wailes (1292): The proposed rule is unclear about what standard of conduct it is imposing when it refers to "willfulness." Does it intend to protect parties that ignore their obligations to preserve evidence? That seems to be true if it is rejecting the Residential Funding and Sekisui decisions, which say that intentional destruction does not require malice. Doing so will create pressure on law-abiding bodies to be less zealous in protecting the integrity of the fact-finding process, and would cut against the recently-amended ABA Model Rule 1.1, that says lawyers should keep abreast of technological developments. The rule also fails to say anything about the most important new development -- technology-assisted review of electronically stored information. This technology makes good on the hope of many that the daunting volumes of material can be tamed by technology, but it is not mentioned in connection with Rule 37(e).

P. David Lopez (EEOC) (1353): The EEOC has issued regulations requiring retention of various records. Compliance with these regulations is critical to EEOC's ability to investigate charges of discrimination. It agrees on the need for a preservation rule, and would favor a rule

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like the Category 2 rule presented at the Advisory Committee's April 2011 meeting. If a sanctions-only rule is not adopted, something like that should be reconsidered. It provides a useful standard regarding the scope of preservation but avoids the complications of the Category 1 rule. The rule actually proposed says in the Note that reasonable behavior should not be punished. But by definition negligent conduct is not reasonable. Therefore EEOC believes that the rule should permit remedial actions beyond the curative measures referred to in proposed 37(e)(1)(A) when relevant evidence is lost through negligence, and particularly if it is lost due to gross negligence.

Evan Stolove (Fannie Mae) (1360): The current version of Rule 37(e) has proven to be a confusing and difficult standard to apply, and has been rarely used. It also does not take into account the intent of the party that has lost ESI and whether there has been prejudice as a result even though those factors have often been important to judges making sanctions decisions. In that gap in the rules, there has been a proliferation of cases on spoliation that provide no uniform basis upon which to assess a party's preservation efforts. The proposed rule is intended to provide a uniform, national approach to spoliation sanctions. Fannie Mae supports the proposed changes. But it would favor changing proposed (e)(1)(B)(i) to say "willful and bad faith." It also thinks that proposed (e)(1)(B)(ii) should be removed from the rule. It has too many terms that are undefined, and the "irreparably deprived" criterion will probably be heavily litigated if adopted.

Jonathan Marcus (CFTC) (1366): Proposed 37(e) should provide much-needed national uniformity for the preservation of information, especially ESI. Courts across the country have reached different conclusions for many years on the subject of preservation, and that cacophony makes it difficult for an agency like CFTC because it litigates in all federal courts across the nation. The Second Circuit's negligence standard in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), is different from the Eighth Circuit standard in *Stevenson v. Union Pacific. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004), which requires intentional destruction to trigger sanctions. The Note to proposed 37(e)(1)(B)(i) rejects *Residential Funding* and the rule provides uniform guidance on this difficult issue which varies from circuit to circuit. It is crucial for a governmental agency to be able to make consistent agency-wide preservation decisions. We support the proposed rule because it makes this possible.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA is the largest membership association in the world that represents the accounting profession. It supports the recommendation of a national, rules-based federal standard for considering sanctions when parties fail to preserve discoverable information. Overhaul of Rule 37(e) is necessary to address the growing phenomenon of over-preservation. This practice is exacerbated by the different standards courts around the country have employed in imposing spoliation sanctions. Parties now use spoliation motions as a strategic tool to drive up the costs of litigation, and many entities have responded by developing preservation policies based on fear of outlier results. The AICPA strongly supports the Committee's efforts to combat these serious problems, and regards proposed 37(e) as a significant step toward reducing the costly practice of over-preservation. There is a pressing need for a uniform, national standard.

Peter Oesterling (Nationwide Mut. Ins. Co.) (1457): "Nationwide disagrees with the proposed changes to rule 37(e). These proposed changes not only do not advance the Committee's stated goal of establishing a uniform, national standard of preservation, these proposed changes would actually undermine that goal." The reliance on findings that a party's

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actions were "willful or in bad faith" and that they caused "substantial prejudice" in the litigation would not close the door to imposition of sanctions is a broad array of circumstances. In particular, the term "willful" is vague, ambiguous and susceptible to multiple interpretations. The factors in proposed 37(e)(2) do not provide guidance. "Given the uncertainty with all three of these terms, parties like Nationwide will likely preserve greater amounts of data and information in order to avoid potential sanctions." For similar reasons, Nationwide opposes deletion of the protections of current 37(e). Nationwide urges that the sanctions rule be confined to situations in which sanctions may be imposed only on proof a party acted with the specific intent to deprive its opponent of information relevant to a claim or defense. In addition, the "no culpability" provision in 37(e)(1)(B)(ii) should be withdrawn.

Julie Kane (Amer. Ass'n Justice) (1467): Proposed 37(e) would impose an extremely large burden on the party seeking sanctions. Substantial prejudice will be next to impossible to establish. The defense bar's proposal that the standard be "willful and bad faith" would make this worse. "It must be noted that the parties advocating for a narrow standard for sanctions are the same parties that usually possess the most relevant information in civil litigation." Moreover, the "national" standard won't really be national because every jurisdiction has its own set of laws and rules that require varying levels of preservation.

Thomas R. Kelly (Pfizer) (1491): "Pfizer does not expect the proposed amendments to have an immediate or dramatic effect on how and when the company preserves documents. But, under the proposed amendment, we believe Pfizer will gradually be able to lessen the burden with respect to its preservation efforts. Under the proposed rules, we believe Pfizer will be able to take a more practical and proportional approach to preservation, an approach which takes into account the facts and circumstances of each case. These may not be watershed changes, but they will be important and we hope will ultimately mean that company resources can go toward discovery of new medicines, rather than the cost of discovery for civil litigation."

Mark E. Harrington (Guidance Software) (1519): Guidance has deep concerns about this proposed rule. It proposes a radically altered framework regarding discovery sanctions that would severely constrain the ability of the trial judge to exercise sound discretion on a case-by-case basis. It places a burden on the innocent party to prove substantial prejudice and willful or bad faith conduct. Willfulness and bad faith are difficult to establish when the litigant does not have access to the lost evidence. In the Second Circuit, this showing would not be required under Residential Funding. Moreover, it would be extremely rare that the innocent party could show that the loss of information "irreparably deprived" it of any meaningful opportunity to prove its case.

Michael Lowry (1522): "In my Nevada practice, many of my cases now focus not upon the merits but instead litigate whether a spoliation instruction is warranted. 'Spoliation motions are now routinely filed. Trial courts are increasingly being asked to delineate the scope of a party's duty to preserve evidence.' *Glover v. Smith's Food & Drug Ctrs., Inc.* 2013 WL 5437096 (D. Nev. Sept. 26, 2013). Why? A spoliation instruction dramatically changes the case. I presented a webinar for USLAW in October, 2013, concerning spoliation. In preparing for the webinar I surveyed colleagues, and eventually the participants of the webinar, as to whether anyone had ever tried a case when a spoliation instruction would be issued. I could not find one. I instead received a history of cases that settled, rather than going to verdict, only because of a spoliation instruction. This anecdotal experience is why spoliation motions have become a predominant factor in my practice."

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Andre Mura (Center for Constitutional Litigation) (1535): The entities complaining about the burdens of production fail to distinguish between what they preserve solely for litigation purposes and preservation for other reasons. The fact that they preserve far more than they produce is not a problem that will be solved by proposed 37(e). The proposed rule and the problem of over-production are like two ships passing in the night. Parties with a lot of ESI preserve a lot of that information for a variety of purposes, including for litigation. But instead of giving rules of preservation that these parties requested, the Committee has proposed a rule that allows parties to evade sanctions for their behavior unless the innocent party can prove things that are hard to prove. At best, the proposed rule is an experiment. At least a rule limited to ESI will not overturn the rulings of federal courts across the country in cases involving spoliation of other types of evidence. Adopting a bad faith standard is too strict. It is akin to a mens rea requirement in criminal law, but would be more challenging with a corporate party. We think that the "curative measures" provision should be amended to allow a permissive jury instruction that allows the jury to determine whether evidence was lost, and whether that loss was willful or in bad faith.

John P. Relman (1547): By displacing inherent authority, the proposed rule intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to discipline misconduct by parties appearing before them. The rule may also undermine substantive federal regulations. For example, the EEOC has promulgated regulations requiring employers to preserve certain personnel documents, and various circuits recognize that violation of those regulations may give rise to an inference of spoliation and corresponding remedial measures.

Lawrence Kahn (City of New York Law Dep't, joined by cities of Chicago and Houston and International Municipal Lawyers Assoc.) (1554): The Note's description of the increasing burden of preserving information is absolutely the cities' experience. Harsh spoliation sanctions are incentives to "gotcha" satellite disputes which disproportionately distract from the merits of cases. These problems force cities to expend scarce resources solely to avoid these irresponsible side disputes. The problems encourage over-preservation and unnecessary litigation holds, often followed by over-collection, over-identification of potential custodians, and over-designations of the types of ESI to include even the most remotely relevant. To guard against this activity, the cities propose that bad faith be required to support sanctions. It is also critical to highlight the importance of proportionality to preservation decisions, including those made before litigation is filed.

Jonathan Redgrave (1608): I concur in the concern of the Federal Magistrate Judges' Association and think that the proposed rule should be revised to read: "If a party does not provide information requested in discovery because the party failed to preserve discoverable information that should have been preserved . . ." In addition, I think that proposed Rule 37(e)(1)(A) should require a predicate finding that there was a duty to preserve, and that there should be a finding of prejudice as well. I also agree that "willful" is problematical in (B)(i). Based on further reflection, he also thinks that the rule should be expanded to include a 37(e)(2), (3) and (4) to clarify the meaning of bad faith and substantial prejudice, and to preserve the provisions of current 37(e).

Patrick Oot (Electronic Discovery Institute) (1680): (He also serves as Senior Special Counsel to the Office of the General Counsel of the SEC.) The amendments provide litigants with much-needed tools to alleviate risk and mitigate significant cost. I predict that the growth

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in "junk data" will continue to burden producing parties as evidentiary scope creeps across emerging technology. Limitations on scope and emphasis on proportionality are therefore critical. Failure to implement such limitations will have broad cost consequences. Technology is not keeping pace with the growth in volume of data, so that the right place for emphasis among attorneys should be reasonableness of search and collection, not improved tools. Accordingly, the rules must protect reasonable decisions. The submission includes an adaptation from an October, 2013, presentation entitled "At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need a New Rule 37(e)."

J. Barton LeBlanc (AAJ) (1732): This proposed rule would disincentivize defendants from preserving critical evidence. Therefore, the rule should be limited to ESI if it is adopted. Better yet, the current rule should not be changed.

Robert Owen (1957): Since the adoption of the Federal Rules in 1938, the biggest changes in American civil litigation have flowed from the digital revolution. The explosion of digital information in the last 20 years means that there is an urgent need for rule reform now. Building on the ancient duty not to destroy known evidence, courts have recently created an entirely different duty -- to take affirmative steps to preserve potential evidence. The Committee's proposal does not tackle several disturbing aspects of this development, but its rule has the potential -- with some editing -- to address the problem of inconsistency and have a small effect on the expense of preservation. The Second Circuit's reliance on negligence as sufficient to support sanctions has skewed preservation practices everywhere, and this should be put right. Particularly given the complexity and variety of sources of ESI, this negligence standard is increasingly unfair. Therefore, "willful" should be removed from the rule as a standard for sanctions, and (B)(ii) should also be removed. In addition, the factors list should be removed. They do not provide definitive answers and leave out some important considerations.

William Butterfield (2034): It is too soon to be making further changes to the rules. The proponents of change started their campaign before the ink was dry on the 2006 amendments. The studies on which they relied were ill conceived, and relied often on unscientific surveys of biased sample populations. In addition to these general reactions to the package, I support efforts to achieve uniformity regarding conduct giving rise to sanctions and provide guidance to avoid imposition of sanctions. I think that the separation between remedial measures and sanctions is sensible, and that avoiding the stigma of calling a minor remedy a "sanction" is desirable. I would therefore revise proposed 37(e)(1)(A) to say "permit non-sanction-based curative measures, such as additional discovery, ordering the party to pay reasonable expenses . . ." I also think that a showing of information loss should not be a condition for the curative measures. Additional discovery, in particular, may often be needed to determine whether curative measures are in order, and if so which ones. The Committee Note should make clear that other rules, particularly Rules 16 and 26, are available to respond to these concerns.

Kirk T. Hartley (2057): I urge the committee to recruit expert economic and scientific advisors about data management. This could cut through the clutter of partisan papers on the economics of data storage and searching through data. It would also be a partial antidote to the reality that the incredible pace of scientific change means that many of yesterday's computer problems have been solved, and that costs continue to plummet. In my view (having done this sort of work for courts under court appointment), the Committee should make decisions on e-discovery only with the benefit of neutral, expert advice about the future and costs. I note also that spoliation of evidence is a tort in most states, but proposed 37(e) seems to set substantive

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standards. Moreover, the criteria set seem to have much less salience to toxic tort litigation (my area of experience) than to breach of contract litigation. For example, in my field old insurance policies are often the focus of litigation. Will Rule 37 permit insurers to discard the information about those old policies? An insurer might go to federal court seeking a declaratory judgment that Rule 37(e) permitted it to discard such old information, realizing that the rule is more favorable than state law on the subject.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases. We also think that the "least severe sanction" provision should be in the rule, not the Note.

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. It generally supports the amendments in their present form, believing that it will be useful in weighing what constitutes "reasonableness" under Rule 37(e)(2). We believe that, although adopting a nationally uniform rule is desirable, true success in reducing the cost and complexity of litigation will come primarily from technological changes in the corporate office environment, coupled with greater education of the bench and bar on how ESI may be managed appropriately. The growth, and growing importance, of "big data" provide evidence of this technological shift. Arguments about whether "over-preservation" will be reduced by the new rule seem to us to miss what is clearly the essential message, that legal holds in the near future will necessarily involve orders of magnitude of information larger than the levels reached in 2014. Attention to information governance necessarily incorporates greater concern with respect to the life cycle of records and developing defensible deletion policies. Although the use of sophisticated technologies will not by themselves fully conquer the challenges of expanding data, these tools give lawyers and parties much greater ability to manage their data sets in ways that hold out the potential to drive down e-discovery costs.

David R. Cohen (2174): I disagree with Judges Francis and Schiendlin and believe that these rule changes will reduce over-preservation, and I know that my views are shared by many companies that frequently have to make preservation decisions. Faced with severe consequences, the default response may be to try to comply with the most extreme preservation rules that have been adopted by any judges. Although the concerns about the term "willful or in bad faith" are legitimate, they are not a valid reason for desisting in the effort to generate national standards. So far as objections about the "burden" of showing prejudice or bad faith are concerned, I do not think it is necessary for the rule to try to allocate burdens. Judges are accustomed to making many kinds of decisions where burdens of proof are not pre-assigned. Judges should have the freedom to make these determinations based on the circumstances of the individual case, with neither side having a pre-determined handicap.

Ariana Tadler (2173): I oppose proposed 37(e), which I regard as the most complex and challenging of the amendment proposals. Preservation has long been a difficult feature of e-discovery; in the efforts leading up to the 2006 amendments it was considered but ultimately considered too thorny and set aside. It is not surprising that it was extraordinarily difficult to

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develop the current proposal. As late as April 2013, the Committee was still considering alternative versions, and wordsmithing continued until publication. Since the proposal was published, the commentary has featured a vigorous debate about the most fundamental issues, such as the difference between curative measures and sanctions, culpability standards and the bearer of the burden on these questions.

This controversy is mirrored in the experience of Sedona Conference Working Group 1 -- which exists for the very purpose of forging consensus on discovery issues. It could not reach consensus on an acceptable rule governing sanctions. Although the Steering Committee (not the full Working Group) did ultimately submit a proposed rule founded on "good faith" (rather than "bad faith") that process was also extremely difficult and the end result was a proposal that did not reflect a unanimous agreement. The disclaiming footnote was added to the proposal and its significance should be readily apparent. The division about these topics has been deeper and darker than any I have seen on a proposed rule change regarding discovery. That alone should lead the Advisory Committee to reconsider this proposal.

If the costs of preservation are too high, that is not due to a fault in the rules. Prof. Hubbard's study yielded no strong evidence on costs of preservation to support the idea that adopting this rule will produce major savings. Education and information governance -- not rulemaking -- will be the key to controlling preservation costs. And there is finally a real movement afoot on this front. The Sedona Conference is actively working in this area, and information governance was the hottest topic at Legal Tech in New York in Feb., 2014. If empirical evidence in the future shows that there is a problem that a new rule would solve, that would justify adopting a new rule. We are not there yet. But if the Committee decides to proceed, I urge that it give serious consideration to the alternative draft submitted by Judge Francis, with a new public comment period to follow.

Prof. William Hubbard (U. Chicago) (2201): (Prof. Hubbard submitted with his comments a 50-page report on his survey of preservation costs at corporations he studied. This study was commissioned by the Civil Justice Reform Group in Spring, 2011. (That group is an organization formed and directed by general counsel of Fortune 100 companies concerned about America's justice system.) Prof. Hubbard's cover letter clarifies his testimony at the Dallas hearing that the adoption of proposed 37(e) will produce "a modest change from the status quo and should have modest effects." But because the costs of preservation are very high for a number of companies, those effects (say a 3% reduction) would still produce considerable savings (for some companies, over \$1 million per year). In addition, it is important to note that this study focused only on preservation activity related to impending litigation or governmental investigations, not to retention activity required by various rules or statutes applicable to companies in various fields. There is also an 11-page Summary of Findings. A review of the full findings, or at least the Summary of Findings, is superior to a summary here, but at least some points may usefully be made:

- (1) A total of 128 companies responded to the survey. The companies ranged in size from those with fewer than 1,000 employees (31 companies -- 24%) to those with more than 100,000 employees (18 companies -- 16%). Roughly the same number of the remaining companies had between 1,000 and 10,000 and 10,000 and 100,000 employees. Federal cases are a major concern for companies of all sizes; for the largest companies, government investigations are also a particular concern.

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- (2) Interviews were conducted with representatives of 13 of these companies, and in those interviews respondents often reported that preservation costs "have become an important factor in whether to litigate or settle."
- (3) Preservation problems are most frequent with email and hard drives, but the rating of problems is relatively similar for each of 8 types of preservation mentioned in the survey.
- (4) Smaller companies are less likely to have specialized resources to deal with preservation, in part because they are less likely to have in-house expertise. For large companies, fixed (non-case-specific) costs of preservation are high. But for all companies case-specific costs are significant.
- (5) A small proportion of cases account for a very large share of the preservation costs. In most litigation matters, preservation scope is not broad. Of 390 matters on which data were available from a sample company, fewer than 20 custodians were subject to a hold in 240 of those matters (60%), while more than 475 employees were subject to a hold in about 15 of the 390 matters (about 4%). See Figure 6, p. 40 of report. With regard to the six companies for which data is available, 5% of the matters account for over half of all litigation hold notices.
- (6) The amount of information preserved greatly exceeds the amount collected and processed for litigation. In one company (Figure 8 in the report), more than 5,000 custodians were subject to preservation, but fewer than 10% of those custodians' preservation was actually subject to collection, and a slightly smaller number had their data processed.
- (7) Reducing the amount of preservation will have little or no negative impact on the availability of information needed in litigation.

The Executive Summary concludes: "The costs imposed by the uncertainty created by the current environment of conflicting legal precedents is a repeated refrain from companies in this Survey. By addressing the standards for sanctions for failure to preserve, the proposed amendments to Rule 37 focus on an issue of expressed need. A benefit of the proposed amendments is a likely modest but meaningful reduction in preservation costs. Greater stability and less uncertainty in the law of preservation will have its most direct effect on the phenomenon of 'overpreservation.'"

David E. Hutchinson (2205): The focus on "proportionality" underscores a nagging disconnect between the rules and practice that has worsened in recent years and will continue to do so unless it is directly addressed. The greatest factor affecting civil discovery in recent years has been the development of legal technologies. There has been a global paradigm shift in the technologies used to create and store information. One 2013 estimate was that the volume of data is growing at a rate of approximately 33% per year. Because technologies continue to develop at an exponential rate, any "proportionality" requirement for discovery needs to include consideration of the process and technologies underlying preservation and production of electronically stored information. Between 1986 and 2007, the total storage capacity for digital data grew about 100-fold. But the 2007 figures already appeared quaint in 2014, and the ESI landscape will likely continue to develop rapidly and somewhat unpredictably. Focusing on preservation sanctions, the substantial growth in sanctions decisions since 2006 suggests that the

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2006 amendments were not sufficient to deal with these issues. But the focus on "proportionality" is limited in its effectiveness because it fails to give due weight to the impact of developing technologies. Proportionality should therefore include consideration of the technologies used and/or available, because they essentially dictate the reasonableness and burdens associated with e-discovery.

David J. Piell (2208): The e-discovery crisis is largely an invented crisis. While it is true that e-discovery costs money, it costs less and provides far more comprehensive information than when armies of associates spent months in warehouses searching through mountains of physical documents. For companies that do not have their ESI organized, forcing them to organize it for litigation purposes leaves them with better access for business purposes. The rules regarding discovery should not be modified to accommodate entities that cannot keep their records in a reasonably ordered and accessible manner. Similarly, the movement to reject Residential Funding is misguided; why should sanctions not be imposed against a party that loses information due to its own negligence?

David Beck (former member of Standing Committee) & Alistair Dawson (2212): The adoption of a consistent standard for issuance of sanctions creates predictability and encourages compliance. We therefore strongly support the proposal to clarify the standard for issuance of sanctions. Despite the implementation of "best practices," data can still be lost unintentionally, but such losses should not be sanctionable. But for sanctions bad faith should be the guiding standard.

Karl A. Schieneman (ReviewLess) (2237): "I do not believe the proposed amendments do enough to encourage the use of more technology to solve e-discovery and specifically they do not promote transparency and motivate litigants to share how technology is being used to improve e-discovery and reduce e-discovery burdens." I have developed a career of creative use of technology to solve discovery problems, including service as a special master in e-discovery cases. I have found that lawyers are not embracing technology to solve what is a technology-driven problem. This situation is due both to unfamiliarity with these technological issues and to the fact that current case law and rules do not promote or foster transparency, leading to expensive motions as parties on the receiving end try to understand what they will be receiving from productions using predictive coding. I think the solution is for the rules committee to encourage the use and experimentation with technology from its pulpit, at least in the Note. The goal should be to reduce the barriers to sharing information between parties created by 80 years of case law that do not require a sharing of information because it would be impractical to have parties second guess each other about production of individual documents. Those sorts of issues are sharply reduced by technology-assisted review. I should emphasize that I am not advocating any particular type of technology (including predictive coding), but only pointing out that technology used properly can result in less ESI being reviewed and produced.

Washington D.C. Hearing

David R. Cohen (Reed Smith): The rule change is absolutely necessary. Sanctions motions are used as tactical devices. The stakes are too high. You can't afford to be wrong about preserving things.

Jonathan Redgrave (Redgrave LLP): Current Rule 37(e) has failed. The replacement has promise, but I have drafting issues. (I will submit detailed comments later.) The Committee

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should move forward with these rules. We can't wait forever for the ever-elusive empirical data to develop.

Thomas Allman: I endorse proposed 37(e), and agree it should be used to replace the current rule. My reason is that it cabins inherent power. As Judge Sutton said in *U.S. v. Aleo*, 681 F.3d 290, 310, that is important; when the rules address something judges should not attempt to escape the limits of the rules by falling back on "inherent power." The current lack of uniformity is an affront to the legal system, and the goal of restoring it is worth the candle. The rule will incentivize reasonable conduct.

Anna Benvenuti Hoffman: We are a small civil rights firm, with a focus on police misconduct. We routinely face difficulty obtaining needed information from defendants. This rule change would encourage stonewalling. An adverse inference is not a heavy sanction. She thinks that the rule change should be rejected entirely. If that does not happen, it should at least be limited to electronically stored information. Overall these amendments send a signal that there is too much discovery. Some judges are hostile to our claims. There is no reason to bolster the arsenal of defendants.

Dan Troy (GlaxoSmithKline): Preservation imposes great waste on his client. Something like 57% of our email is preserved for possible use in litigation. We have about 203 terabytes preserved. That's more than 20 times the entire collection of the Library of Congress. And the amount we have to preserve is rapidly increasing; since 2010 it has gone up a lot. We need a uniform national standard, and we also need a reasonable standard.

Robert Levy (Exxon): Exxon has 5200 people (including former employees) on litigation holds right now. This is a major problem. We have to evaluate all this material on our E-Discovery platforms. Assuming each of these people has to spend ten minutes per day to comply with this extra duty (a reasonable prediction) that means about 327,000 hours per year are used up dealing with litigation holds. This extraordinary effort is necessary because judges evaluate our performance only by hindsight. As a consequence, preservation is a big part of our design of our information systems. Preservation concerns affect our ability to make changes in those systems. Something that would deal with the conflicts among the circuits would be helpful to us. Under the present circumstances, it is very difficult to make a semi-confident decision about how to handle preservation issues. If the standard is negligence, how can I ever feel safe? That's why some people feel they must preserve everything. True, this set of problems is a result of improvements in technology, and any rule will be somewhat imprecise. But a rule could significantly improve on the current corrosive uncertainty.

Lily Claffee (U.S. Chamber of Commerce): Preservation exacts a heavy psychic toll on U.S. business and American global competitiveness. These burdens don't just affect mega-corporations, and may be even more significant (and potentially crippling) for small firms. It would be even better for the rule to go farther and address specifics on trigger, scope, and duration of preservation obligations. "I can drive a truck through relevance" under the current rule. It would be better to say "material and relevant." Without those additional specifics, I would be tempted to continue to overpreserve.

Jennifer I. Klar (Relman, Dane & Colfax): This rule change would produce bad results and also change substantive law. It would impede the search for truth. Indeed, the D.C. Circuit has held that there is a need in employment discrimination cases for adverse inferences where

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information is lost. A negligence/gross negligence standard is sufficient protection for defendants. Anything more provides too much protection. So this is a substantive change, not a procedural change. It also raises grave fairness issues. Defendants have documents, and even now the plaintiff must prove negligence in connection with destruction to obtain any relief. To require proof of something more creates a perverse incentive. At least, limit the rule to electronically stored information and don't apply it to paper documents. Those are critical to employment discrimination cases. The cost claims made by big corporations do not provide a ground for this change. Residential Funding gives them sufficient protection.

Malini Moorthy (Pfizer, Inc.) (testimony & no. 327): She is head of the Civil Litigation Group E-Discovery team. Pfizer supports the proposed changes to Rule 37(e). The current situation confronts companies like this one with vastly disparate obligations to preserve. The need for action can be illustrated by an example involving Pfizer. In litigation about hormone therapy, a court ordered the company to preserve 1.2 million backup tapes. That order remained in effect for a long time. These tapes had about 100 gigs per tape, resulting in preservation of a total of about 100 petabytes of data. This preservation cost an estimated \$40 million over the six years the order was in effect. But the company never had to use a single one of the backup tapes. It produced a total of 2.5 million documents to the plaintiffs (25 million pages). Only 400 of those documents were used in the litigation, mainly 100 of them produced early in the case and before the huge bills began running up. The shift in the culpability standard in the rule would help avoid this sort of thing, as would the emphasis on proportionality.

Phoenix hearing

Robert Owen: Rule 37(e) is a "tremendous step in the right direction." But it is vital that the rule be tightly written. There must be no wiggle room. Some judges will try to bend the rule. One S.D.N.Y. judge has already construed "willful" very broadly. A particular benefit of adopting the rule would be to prevent courts from relying on inherent authority. The goal should be to (a) establish a single national standard, and (b) make clear that it is higher than the negligence standard that the Second Circuit adopted in Residential Funding. Preservation has become much more complicated than it was in 2002 when Residential Funding was decided, particularly with the advent of multiple portable devices. It's almost impossible to train employees to avoid mistakes or keep everything.

Timothy Pratt: He was general counsel of Boston Scientific, and came to appreciate the litigation costs such an entity must bear. It is certainly not possible to eliminate all costs, but the scale of costs preservation can impose is extremely wasteful. For some years, Boston Scientific had \$5 million in costs to outside vendors for preservation. Since 2005, Boston Scientific had preserved about 107 terabytes of information, most of that in the last three years (as the volume of information escalated). "Everyone knows there's huge over-preservation and over-production."

David Howard (Microsoft): Microsoft has updated the report it offered during the Dallas mini-conference. In an average case, it now finds that the breakdown of number of pages preserved as opposed to the number used at trial is huge -- only 1 in 1,000 of the pages produced is used at trial, and only a very small percentage of those preserved is even produced:

Preserved -- 59,285,000 pages
Collected and processed -- 10,544,000 pages

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Reviewed -- 350,000 pages
Produced -- 87,500 pages
Used at trial -- 88 pages

Microsoft is forced to over preserve by the current rules, which do not clearly define the duty to preserve. It has spent \$600 million to preserve and to manage discovery, including vendor costs. On being asked, witness is uncertain how Microsoft could identify the 88 pages used at trial in the case example above, or the 87,500 produced, before litigation is filed. But the burden is mounting. In 2013, Microsoft found that it was preserving 1.3 million pages per custodian, a 400% increase by this measure since 2010. Proposed 37(e) will help deal with this problem. We have to keep information to prove our side of the case, but the current attitudes towards, and uncertainties about, preservation mean that we must preserve much, much more. This does not really benefit our opponents, but it does really benefit our opponents in terms of availability of needed evidence.

Paul Weiner (Littler, Mendelson): There are recurrent gotcha tactics that exploit the "crushing" burdens of E-Discovery. Plaintiff lawyers rely on overbroad cut-and-paste preservation demands. He would add "preservation" explicitly to Rule 26(b)(2)(C) to address this sort of problem. Rule 37(e) is a good start in dealing with these problems. If it achieves consistency across circuits, it will be a very good thing. The addition of proportionality is a bedrock concern. It would be good also to incorporate a Rule 26(g) undertaking with regard to preservation demands. He has written about the preservation obligations of plaintiffs, and sees that new 37(e) could provide them with benefits also. One way to do so would be the reference to "sophistication" in the Committee Note.

Thomas Howard: Proposed 37(e) will solve real problems. The theme should be to make sure that the rules continue to be predictable. That can minimize motion practice. Note that in products cases (which he handles) most of the defendant's documents offered at trial are offered by the defendant.

Stephen Twist: Preservation and discovery costs amount to more than what his company pays the plaintiff on the merits for cases in which plaintiffs are successful. The leading factor in managing litigation is cost, not the merits of the claims involved. But he is not certain how much he would save if 37(e) were adopted, and intends to submit that information later.

Jill McIntyre: Adoption of 37(e) will enable companies to preserve less without denying adversaries access to any important information.

John Rosenthal: The burdens of preservation are real. Last year, Winston & Strawn lawyers spent 100,000 hours on preservation. He strongly supports the package. Corporations must overpreserve. Proposed 37(e) will provide predictability. But further refinements would be desirable. He co-chaired the Sedona drafting group, and favors its approach. But he does not think that changes that would require re-publication and delay the amendment process a year or two are important enough to justify that delay.

Dallas Hearing

Matthew Cairns: (He is a former officer of DRI, but two officers of DRI will be testifying for the organization later in the hearing.) In his practice, he finds himself representing

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municipalities, and finds that they cannot afford the sort of rigors that E-Discovery can impose. One example is a case involving a town that had only one computer, located in the town hall. But to be suitably careful, he concluded it was necessary to impose a hold also on the computers of 10 volunteers, even though their computers included all their personal information. (These volunteers were sued in their individual capacities.) Prof. Hubbard will provide empirical evidence about this topic, but the point is that these burdens are real. Opponents of change use hypotheticals; proponents of change use real life data and examples. Nonetheless, he cannot say that adopting the proposed rule would actually have resulted in doing things differently in the case described.

Rebecca Kourlis: Broad research supports the conclusion that the current system is unduly burdensome for both sides and that it invites gamesmanship. (Almost) all agree that increased judicial management is a good thing. But it cannot be said that there are compelling data on any of the topics addressed by the amendment package. More data might be helpful, but more data are not likely to answer all questions. IAALS believes that the proposed changes are moving in the right direction.

John W. Griffin: It is true that there are myriad standards for preservation. But in essence everybody knows the rule -- if evidence is important it should be preserved, or at least it should not be destroyed. The new rule would seem to accept loss of evidence due to a party's negligence. That should not be accepted, for if it is the system will break down. The courts will suffer if parties that "lose" evidence are "blessed by the courts" despite these failures. Regarding one case he litigated against the government on whether a diabetic could be in the FBI, he was able to prove his case only after getting the medical records of all the current officers in the country and demonstrating how many of them were allowed to serve despite seemingly serious health problems.

Mark P. Chalos: All agree that having a national standard is laudable. We represent plaintiffs, and with corporate defendants we don't see "one document" missing, but rather "big gaps in data." Our concern is that this rule change would make it almost impossible to obtain sanctions to demonstrate the culpability required by the amended rule. The heightened standard of showing that something that was lost is essential to the case is also problematic. Making inadvertence an safe harbor in fact will have broad implications. The burden should be on the spoliator to prove "no harm, no foul."

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) G.E. operates in 160 countries and is involved in thousands of civil cases. The burden of preservation can be immense. To illustrate, GE has a Microsoft Outlook Exchange email system with 450,000 mailboxes distributed across 141 servers in 8 locations around the world. Each month, about 550 million emails are sent through those servers, but generally not stored on them. These realities impose great burdens on GE when it tries to comply with its preservation obligations. Focusing on email alone, GE faces a potential universe of 4,770 terabytes of email alone, located in hundreds of thousands of devices around the world. GE's lawyers have to define some sort of litigation hold appropriate to a case, and then send notices and reminders. Enterprise-wide, this is a herculean task. Often we cannot anticipate the twists and turns of litigation, and our efforts will be measured years later using 20/20 hindsight. That retrospective evaluation of preservation will happen in an adversarial atmosphere frequently leading to "gotcha" tactics. Altogether, this situation has led GE to engage in what must be tremendous

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over-preservation. Ultimately, very little of the material preserved is actually produced (in those instances where litigation in fact ensues), and very little of what is produced is actually used in the litigation. Since GE operates world-wide, this experience causes it to contrast the U.S. litigation burdens it faces with its experience in other countries. Simply put, there is no comparison; the U.S. system is in a league all its own. The breadth of discovery and the uncertainty of preservation obligations contribute to this wasteful behavior. GE therefore supports the change to Rule 37(e) to provide a nationally uniform standard and limit sanctions to cases involving bad faith destruction of evidence. It also thinks that the word "willful" should be removed and the "no fault" (B)(ii) provision should be removed. GE is also concerned about the "curative measures" provision because it could become the avenue through which judges would reintroduce sanctions under a different heading.

Michael Harrington (Eli Lilly & Co.): Since 2008, he has found that the total litigation spend on discovery has increased 60%; for preservation in particular, the cost may approach \$40 million for his company. Rule 37(e) is an improvement, although imperfect. It is not clear, however, that adopting the proposed rule will actually change his company's preservation practices, at least at first. He would look to the factors in 37(e)(2) in making decisions; they would provide guidance, although he does not like all of them as they are presently articulated.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. "We have a wonderful system, but nobody can afford it." Details are provided in Don Bivens' letter of Feb. 3 (no. 673 -- to be summarized separately). Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

Gregory C. Cook: The costs to litigate have gone up, particularly due to E-Discovery. We should have a uniform national standard, and curtail ancillary litigation. Before the advent of ESI, there was no need to tell people that they did not to keep their post-it notes, but with ESI everything might be preserved. (B)(i) should say "willful and bad faith," and (B)(ii) should be removed.

Thomas P. Kelly (Pfizer): The amount of ESI is staggering. For example, Pfizer has about 300 active legal holds involving about 80,000 people. It has 5 billion emails in legacy archives, a number that grows by a billion a year. It also has 250,000 boxes of documents, totalling about 750 million pages of material. It has to engage in preservation of these dimensions because there is no consistent standard on what it has to do. As things are now, we have to keep everything. If proposed 37(e) were adopted Pfizer would not have to preserve as much; standards would develop to guide it.

David Warner (Shell): He is the manager of global litigation information management for Shell. Technology is changing, and opportunity for unintentional mistakes is much greater than it was when Residential Funding was decided. The rules have not kept up with the changes in technology. The current rules are too broad; we have to keep millions of documents on permanent hold. Eventually only 1% of these are actually produced. The constraints mean that he has to stand in the way of Shell technological innovation designed to improve company operations. But technology will not provide solutions to these problems. No search tools exist to search different systems, and systems proliferate and evolve. On one matter, the cost of Shell

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of maintaining information on a hold was \$20 million to \$80 million. What it needs is something that narrows the scope of preservation.

Stephen Puiszis: Favors removing "willful" from (B)(i), which would correspond to the standard for sanctions in the 7th Circuit. He is also unnerved by the idea of curative measures, which involve no element of prejudice or harm. On (e)(2), he would take out Factor C on demands to preserve.

Megan Jones (COSAL): She is a member of Sedona. ESI has only been with us for about ten years. Although it has been a challenge to deal with "the tidal wave of electronic discovery," we should recognize how rapidly things can and do change. What technology created technology can manage. Her organization is focused on enforcing the antitrust laws, and it is concerned that under the proposal emails will be deleted with no recourse for those trying to prove anti-competitive practices. She supports Judge Francis's example for Rule 37(e). How could a plaintiff prove substantial prejudice? For example, suppose an employee testifies that "from time to time he talked to a competitor about pricing." Without emails to prove the details, how can she demonstrate that she has lost critical evidence?

Prof. William H.J. Hubbard (U.Chi.Law School): He has performed an empirical study and provided with his testimony the Summary of Findings of that study: It looked to a sample of 126 companies, including companies of all sizes and in a broad range of industries. Over 79% reported a "great extent" or "moderate extent" of preservation burdens. Companies report "overpreserving" to protect against serious uncertainty under current law. Rules amendments that clarify and define the standards for sanctions should reduce the phenomenon of overpreservation. Because only a small proportion that preserved information is ever used, reducing overpreservation would likely not have any negative impact on the production and use of data in litigation. The final report will not be ready until Feb., 2015. In testimony, Prof. Hubbard stressed three points: (1) Preservation is not a problem only for big companies; (2) A small fraction of matters generate high costs -- 0.5% of the matters generated 60% of the costs; and (3) Most preserved data is never collected or reviewed. Asked whether adoption of 37(e) would make a change in preservation activities, he said that one could expect a small but meaningful reduction in preservation as a result. At the same time, concerns about detrimental effects of adopting the rule seemed nil to him. Asked about whether much of what's preserved is kept not due to potential litigation but because of other preservation requirements, such as regulatory requirements, he said that the survey did not distinguish between these two types of preservation. Most of what is preserved today will be preserved even if the rule is adopted. Core records will be preserved; we are talking about data and the margins. For example, federal requirements may mandate keeping some kinds of email exchanges.

John Sullivan: There are entire law firms dedicated solely to preservation. These amendments will improve the situation, but (B)(i) should say "willful and bad faith."

Lee A. Mickus: Uniform standards are needed, and "willful" should not be used. There is confusion about what that word means.

Gilbert S. Keteltas: He co-chairs his firm's e-discovery team. He often sees 100 custodians under a hold, and a terabyte or more of information preserved.

David Rosen: Proposed 37(e) is a path for protecting corporate interests. Highlighting

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proportionality is not desirable. Although it is true that preservation can be costly, it should be remembered that plaintiffs bear real costs for preservation also.

Stuart Ollanik: He wrote "Full Disclosure" (1994) and joined in comments submitted by Paul Bland. It is important to remember that there is usually a substantial asymmetry of assets between individual plaintiffs and corporate defendants. He challenges the notion that defense discovery costs are a result of overbroad preservation or production efforts. Instead, those costs result from defense efforts to avoid discovery -- defendants litigate very vigorously to keep from turning over evidence. It seems that they now treat that activity of theirs that raises costs and a reason to curtail discovery and preservation. Proposed 37(e) will eliminate disincentives to keep needed information. He agrees with the comments of Judges Francis and Scheindlin.

Conor Crowley: He is Chair of one Sedona Conference Working Group. The bifurcation of curative measures and sanctions does not achieve the goal of a uniform national standard. See Sedona's October, 2012, submission to the Advisory Committee. It would be better for the rule to require that the party act in good faith than to focus on whether it acted in bad faith. If bad faith is the focus, it should be defined as acting with a specific intent to deprive the opposing party of evidence. In addition, "substantial prejudice" should be defined as materially burdening a party in proving its case. (B)(ii) is too broad in suing the "meaningful opportunity" criterion. The list of sanctions should be made more extensive, and the rule should itself direct that the least severe sanction be used. Factor C should be removed from (e)(2). Factor (B) could be interpreted too narrowly. In addition, (e)(2) should be expanded to include another factor -- whether the party destroyed information known to be relevant. He does not favor republishing, and thinks that these changes can be made without republication.

Daniel Regard: He is the CEO of iDiscovery Solutions. He is appearing as a technologist, not to take sides. From that perspective, "willful or bad faith" seems ambiguous. All automatic systems are intentionally set up by somebody. There are myriad such "automatic" activities. Data movement is really copying and deleting of data. Data changes move data and eventually lead to deletion of some. Use of cloud computing means that the cloud provider may be the one specifying or regulating such things; this may result in much less ability for control by the person subject to the duty to preserve. And these challenges are likely to increase. One can forecast 26 billion devices on the internet by 2020. The amount of location and time information all these devices will generate will be enormous, even by contrast to the already enormous amount of big data presently. But it is not reasonable to expect technology to solve all these problems. For one thing, the demand for solutions is simply not comparable to the demand behind the creation of new devices and development of new functions for devices. He recommends moving forward with the amendments.

John D. Martin: He is the manager of an e-discovery practice with 30 professionals. He generally supports the package. But his clients find themselves in "preservation paralysis." In one case, the client preserved about a half million backup tapes at a cost of \$1 million per year (\$2 per tape?). He supports amending 37(e), but worries about "willful" being too uncertain. As things now stand, there is little real incentive for plaintiffs to tailor their discovery requests. One suggestion is addition of the word "the" before "litigation" to make it clear that this is not about whether certain materials should have been preserved for some litigation, however remote from the present one, but whether they should have been preserved for this case. But he acknowledges that this line should not exclude attention to preservation for the first case involving an allegedly defective product when the current suit is the 50th case.

Summary of Rule 37(e) Comments

Ashish Prasad: He is CEO of Discovery Services, LLC. The big ticket over the past five years has been the impact of TAR on e-discovery costs. His prediction is that it will lead to a "small reduction" in review costs, but that other developments will offset this effect. Most lawyers are not comfortable with having only machines look at documents and will insist that lawyers do so. One reason is to identify trade secrets and the like. So the real savings will probably be something like 25%. At the same time, there will be large increases in data volume, so improved methods may largely be a way to stay in place and not fall farther behind.

Ariana Tadler: She represents plaintiffs. She is concerned about an escalation of motions practice under amended 37(e), and also about the challenge of proving substantial prejudice. The current problems were not caused by the rules, but by the behavior of lawyers. The solution is cooperation, not 37(e). How will this rule really stop over-preservation? She supports a rule like Judge Francis's proposal. Sedona really struggled to reach consensus on these issues; they are very difficult. And now Prof. Hubbard reports that there won't be much effect even in terms of what the corporate litigants want.

Jennifer Henry: Amended 37(e) would be an important change to provide guidance for preservation. It would assist litigants. The State of the law is in flux, and parties live in fear of the consequences of failure to preserve. An example is an airline client that has five full-time employees who manage preservation only, not review of materials for production. This leads to massive over-preservation. She would remove "willful" from (B)(i) and add a bad faith requirement to (B)(ii).

David Kessler: He is Chair of the e-discovery practice at Norton Rose Fulbright. He is a huge proponent of using TAR. But it should not be written into the rules. But the requirement of specific objections under Rule 34 will not help so long as plaintiffs are still making overbroad requests.

Summary of Rule 37(e) Comments

2. Rule 37(e)(1) -- Failure to preserve

Eli Nelson (284): This provision sets out an ambiguous standard for proof. Who determines whether information should have been preserved? What is the context of such a determination -- a priori or ex post? What test is applicable? I suggest changing the rule to say "which the party knew or should have known needed preservation." This would clarify that the standard is reasonableness.

Washington Legal Foundation (285): The rule should articulate a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information. Much of the wasteful cost of discovery stems directly from the ever-increasing burden of over-preservation, which is largely a result of guesswork resulting from fear of sanctions. The current "anticipation of litigation" standard is largely unworkable and impractical because these decisions must be made before litigation begins, and without the benefit of the scope of discovery provided by the pleadings. Moreover, before suit is filed there is no judge able to resolve discovery disputes or preservation issues. The rule should adopt a decisive and clear-cut "commencement of litigation" standard, triggered by the filing of a complaint. This rule would set uniform expectations while preserving a party's ability to prove or defend a case.

Lynne Thomas Gordon (287) (American Health Information Management Assoc.): Although AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information, the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." Provisions of the proposed amendments are still subject to considerable interpretation, thereby bringing into question whether these amendments will achieve the goal of uniformity. For example, the lack of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of those terms by the courts.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges that the rule adopt a "commencement of the litigation" trigger for determining when preservation obligations are imposed. The proposal would required preservation "in anticipation" of litigation. This trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming.

Andrew B. Downs (359): Often the prospect of litigation is foreseen far earlier well down the corporate organizational structure than at the level where the individuals with the training, background, and authority to initiate litigation holds are located. The "anticipation of litigation" standard is subjective and fails to recognize the fundamental traits of human nature -- humans are slow to recognize they may have erred, they react slowly to unforeseen events, and do not like to deliver bad news to superiors. For these reasons, I urge you to replace the "anticipation of litigation" standard with a two part either/or standard under which the duty to preserve begins when notice of the suit is received, or when the party receives a written request from the other party to preserve relevant information.

International Assoc. of Defense Counsel White Paper (390): The rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard requires preservation decisions to be made prior to the receipt of a scope-defining

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complaint. Litigants need a clearer roadmap in this area. The IADC recommends that the rule adopt a clear "commencement of litigation" trigger.

William Lockett (415): There should be a defined point in time when a duty is imposed on a party to preserve information. Perhaps it is when a notice of claim letter is received and the claim is defined with relative certainty, or perhaps it should be the date of service or other notice of commencement of litigation. Whatever the "marker" ends up being, it should be clearly stated.

Harlan Prater (418): Though I generally support the amendment, I am concerned with the adoption of the "anticipation of litigation" standard. The new rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. One would be a "commencement of litigation" standard balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary.

Federal Magistrate Judges' Ass'n (615): We note a possible ambiguity in Rule 37(e)(1), which refers to the failure "to preserve discoverable information that should have been preserved in anticipation or conduct of litigation." The predicate of any sanction must be that the information was not only discoverable but actually sought in discovery. Failing to preserve information in the abstract should not result in any sanction. It is the failure to produce information sought in discovery because of the failure to preserve it that justifies sanctions. We recommend inserting qualifying language in the rule to make this meaning clear:

If a party does not produce information sought in discovery because the party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may . . .

New York County Lawyers' Ass'n (2072): We agree with the Rules Committee that it is wise not to set "bright line" rules regarding preservation. They are inappropriate in this fact-specific area. The idea of a broader rule encompassing a duty to preserve was considered during the drafting of the 2006 amendments, but it was recognized then that drafting such a rule would be too difficult. But we would like to see clarification on what "anticipation" means. Does it mean that a duty to preserve is triggered when a party "reasonably anticipates litigation" or when a party believes "litigation is imminent"? The rule should make this clear.

Phoenix hearing

Timothy Pratt (Federation of Defense Counsel): What we need is a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. We think that it would be best to adopt a "commencement of litigation" trigger for that obligation. The "anticipation of litigation" test is uncertain and forces parties to make preservation decisions before they know whether a lawsuit is even coming. Such a rule is bound to lead to differing standards in different courts. The "commencement of litigation" standard is desperately needed.

William Butterfield: There should be a clear separation between a curative measure and a sanction. One way to do that would be to refer in the rule to a "non-sanction-based curative measure."

Summary of Rule 37(e) Comments

3. Rule 37(e)(1) -- Curative measures

John K. Rabiej (272): The proposed amendments helpfully carve out "curative measures" from what have been sanctions, but in so doing they fail to retain a showing of prejudice as a prerequisite for use of such measures. Because curative measures may have consequences comparable to the severest sanctions, a showing of prejudice should be required. Accordingly, the Committee Note should be amended along the following lines: "Although a party need not make a showing that the opposing party is culpable in losing discoverable information, the party should typically make a showing of the actual degree of prejudice resulting from the lost information before a curative measure is imposed." Examples of serious curative measures include a directive to restore backup tapes, or permitting introduction of evidence at trial concerning the loss of information, along with attorney argument about that subject. Most judges will have the good sense to require a showing of prejudice before employing such measures, but history has taught that outlier decisions can have profound impact on ESI discovery jurisprudence, and that they are rarely subject to appellate review. Unfortunately, the Committee Note as presently written says that the court may impose a curative measure to restore lost ESI even though it would otherwise be precluded under the proportionality test of Rule 26(b)(2)(C). Meanwhile, proposed 37(e)(1)(B)(i) requires "substantial prejudice," and (B)(ii) requires a higher degree of prejudice. Altogether, this may invite arguments that no prejudice at all is required for imposition of curative measures. An early example of judicious consideration of prejudice is *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90 (D. Colo. 1996), which notes that prejudice is important along with culpability when making sanctions decisions. Typically, the courts have recognized prejudice in later decisions (noting a number of recent decisions). In *Gates Rubber*, plaintiff argued that because terminating sanctions were not involved no showing of prejudice was necessary. It would be best to guard against such arguments in the future; this may seem a small point but an ounce of prevention may be warranted here.

Washington Legal Foundation (285): The proposed rule authorizes imposition of "curative measures" without a showing of willfulness, bad faith or substantial prejudice. Presumably the party needs only to establish that lost information was relevant. But curative measures may sometimes have consequences every bit as severe as sanctions, at least some meaningful threshold should be satisfied before curative measures are authorized. A minimal showing of substantial prejudice should be required in the rule before curative measures are imposed. Unless such substantial prejudice can be shown, no curative measures should be necessary.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. "The Advisory Committee's proposal has the salutary effect of re-focusing attention on the 'remedial' aspects of a spoliation motion."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section applauds the Committee's attempt to bring order out of the chaos of differing standards for remedial measures for spoliation. It agrees that there should be a showing of substantial prejudice and willfulness or bad faith to impose sanctions.

Thomas Y. Allman (308): The distinction between "sanctions" and "curative measures" is quite murky and will allow a district court to avoid the ban in (B)(i) on all but the harshest

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sanctions simply by invoking the "curative measures" provision. This suggests that curative measures will become the primary remedy, rather than "sanctions," and that adverse inferences will fall into the former rather than the latter. The Sedona Conference, in comparison, defined the full spectrum of "sanctions" without differentiation, but separately acknowledged the role of case management and remedial orders as necessary to "effectuate discovery or trial preparation."

The Sedona Conference Working Group 1 (346): We have a number of concerns about the curative measures provisions. First, we believe that the Committee Note should be clarified to avoid any misunderstanding of this provision to suggest that courts would be limited in their authority to utilize similar measures to manage their cases, such as ensuring compliance with their orders. More basically, however, we believe that "curative measures" should not be treated separately from "sanctions" under Rule 37(e). Instead, the rule should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies ("sanctions") for failures to preserve relevant information, and that it should emphasize that where a party has acted in good faith in its preservation efforts, such sanctions should only be imposed in exceptional circumstances. The rule could undermine the Committee's goals by permitting "curative measures" without a showing of either exceptional circumstances or of prejudice and culpability. In practice, there is often no difference between the ultimate effect of many "sanctions" and "curative measures." Moreover, courts have characterized serious sanctions, such as a permissive adverse inference jury instruction, as remedial rather than as a "sanction." See *Mali v. Fed'l Ins. Co.*, 720 F.3d 387, 393 (2d Cir. 2013). Interpreted in this way, the "curative measures" provision would undermine the goal of reducing overpreservation. As detailed below, Sedona's October, 2012, proposal would forbid imposition of sanctions "if the party acted in good faith." This approach (with an "exceptional circumstances" exception) should be adopted for sanctions for failure to preserve evidence. When courts use such remedial or case management orders under another rule, neither prejudice to the requesting party nor culpability need be shown. Accordingly, the Sedona submission in Exhibit A says that "Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation." But "curative" sanctions potentially affect parties and counsel long after the case in which those sanctions are issued. For example, *pro hac vice* applications sometimes require counsel to report whether they have ever been sanctioned.

John Beisner (382): I enthusiastically endorse the portion of the proposal that authorizes courts to order curative measures. Under the current rule, the only option for a court faced with a party's loss of information is to sanction that party. But the goal of the rule should not be punishment, and giving the courts the option of ordering curative measures is logically.

Alan Morrison (383): Curative measures are a better option than sanctions.

Hon. James C. Francis IV (395): The differentiation between curative measures and sanctions in the proposed rule is a positive contribution. Particularly because there are professional repercussions for lawyers subjected to sanctions, this is a positive development. But the proposed rule puts the boundary in the wrong place. Each of the so-called "sanctions," including case-ending orders, may be curative if it is necessary to rectify the substantial loss of evidence.

Hon. Shira Scheindlin (398): In *Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013), the court indicated that a permissive adverse inference instruction is akin to a curative measure,

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making a finding of culpable intent unnecessary. But how many judges would so regard a jury instruction?

David Kessler (407): There should be a requirement that a finding of negligence is included in the curative measures provision. That would make it clear that the adverse inference sanction is just that -- a sanction -- and not a "curative measure." In general I support the bifurcation of curative measures and sanctions. But I am concerned that it may not be clear that the listing of curative measures does not seek to limit a court's authority to use similar measures to manage its cases. I agree with Sedona that the Note should clarify this point. I also agree with Sedona that an adverse inference is, in all forms, a punitive sanction. It is very difficult to recover from, and too often case-dispositive. Since discoverable information will almost always get lost (to some extent), it should be absolutely clear that adverse inferences are not available unless the findings required for sanctions are made. Curative measures should not be case-altering (or career-altering). Therefore, courts should be prohibited from using curative measures to correct a failure to preserve discoverable information where the party has acted reasonably or where the requesting party cannot establish some prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The changes to 37(e)(1)(A) say that permitting additional discovery is a "sanction." It seems to us that this means plaintiff can only get further discovery on proving spoliation. But discovery should be available without proving spoliation. The rule then says that the court can also "order curative measures." But the only curative measure that will deter spoliation is to strike defenses. The only other curative measure that comes to mind is an adverse jury instruction.

Robert D. Curran (448): The changes to 37(e)(1)(A) propose "sanctions" for failure to preserve. But the first proposed sanction is to "permit additional discovery." Thus, it would seem that the plaintiff has the burden to uncover the spoliation and then is granted only the right to pursue more discovery, a right which should have been accorded anyway. The second sanction is to order curative measures, but the only one that will deter spoliation is to strike defenses. It is unclear what "curative measures" exist other than striking defenses or providing a jury instruction regarding a rebuttable presumption as to what information would have shown. The third sanction is to shift attorney fees, but those fees will usually not amount to much.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully

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that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost. We think the Note should list examples of measures that might be considered curative measures and make clear that this listing does not preclude other remedial measures that the court may devise in view of the facts of a particular case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): I question the assumption that "curative measures" are somehow significantly less harmful and dangerous than "sanctions." The potential for a personal-interest conflict with a client under Rule 1.7 of the Model Rules of Professional Conduct is the same with either type of negative result. And the negative impact on the client is also the same. Practically speaking, there is no principled distinction between the concepts of "curative measures" and "sanctions" under proposed 37(e). So having the curative measure provision will promote motion practice because there is no culpability standard for those outcomes. So at least a meaningful threshold of harm or culpability should be required before these are available.

P. David Lopez (EEOC) (1353): Many measures that are not "adverse inference instructions" should be permitted in the absence of a finding of bad faith or willfulness. Such measures can range from comment by the court regarding a party's loss of information with no suggestion as to which party the information would have favored, to an instruction that if the court determines that the party with control over the information was at fault in the loss of the information it may, but is not required to, infer that the information was unfavorable to that party. EEOC believes a new rule should give the courts maximum flexibility in addressing the loss of information whatever the degree of fault that caused the loss. EEOC also believes that it will be appropriate in some cases to permit attorney comment to the jury about the loss of information even though the court has not commented or instructed on the matter. So long as the evidence would permit a jury to conclude that it was lost due to the fault of a party. EEOC therefore believes the Note should be augmented with something like the following: "Attorney comment to the jury on the loss or destruction of relevant information generally should be permitted when there is sufficient evidence in the record for a reasonable juror to accept the attorney's contentions regarding the reason the information is missing and any inferences the attorney suggests that the jury draw from the loss or destruction of the information."

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA applauds the emphasis on curative measures. This new authority to "adopt a variety of measures that are not sanctions" represents a common-sense principle that preservation rules should be concerned primarily with fairness in litigation, not with punishing parties for inadvertent spoliation. The rule's emphasis on whether loss of discoverable information was caused by "the party's actions" is also an important clarification to make clear that potential parties need not fear sanctions when they acted in good faith but outside factors resulted in loss of information. The rule should make clear that the measures specified in proposed 37(e)(1)(B)(i), including the adverse inference instruction, are not curative measures. Some courts say that adverse-inference instructions are remedial, and litigants might urge courts to employ them in this guise.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ urges that the rule, if adopted, should allow courts to use some adverse inference jury instructions as curative measures and not sanctions. There are different types of instructions that range from strict mandatory instructions to permissive instructions. Permissive instructions leave the jury with authority to determine

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whether relevant facts are missing, and if so whether that information would have been helpful to the party who was innocent in its loss. Such an instruction can level the evidentiary playing field. There should be room to separate the severe adverse inference instructions from less severe ones.

J. Barton LeBlanc (AAJ) (1732): The Committee's proposal blurs the distinction between sanctions and curative measures and thereby inadvertently preempts state common law in diversity cases. The current rule is limited to sanctions "under these rules." That phrase clearly excludes duties under state law and places a breach of that duty to the court, which is within the Enabling Act. But the amended rule does not include that phrase, and it proposes to include a breach of duty to a litigant, even though that is usually a matter of state common law. Many states have found that the failure to preserve evidence is a violation of a duty owed to the litigant and that a curative measure is an adverse inference jury instruction. The use of adverse inference jury instructions as a curative measure is distinct from sanctions and requires no additional standards that must be met. The Judicial Conference should not be in the business of protecting large corporations from having to preserve evidence, particularly when the impact would be to preempt state law.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases.

John Rosenthal (2146): The bifurcation between "sanctions" and "curative measures" should be abandoned. Permitting "curative measures" with no showing of culpability will weaken the rule, as will the absence of prejudice from the requisites for "curative measures." The distinction is basically false, and unsupported by decades of case law. There is often no practical difference between "sanctions" and "curative measures." Moreover, in the overwhelming majority of cases courts granting what they seemed to regard as "sanctions" were doing what the Committee seems to think is using "curative measures." Permissive adverse inference instructions are an example. *Mali v. Fed'l Ins. Co.*, 720 F.3d 387, 395 (2d Cir. 2013), said that such an instruction "is not a sanction" but rather "an explanation of the jury's fact-finding powers." Compare *Arch Ins. Co. v. Boran-NuTone LLC*, 509 Fed. Appx. 453, 459 (6th Cir. 2012), saying that a permissive adverse inference instruction is a sanction and recognizing that it is "dressed in the authority of the court, giving it more weight than if merely argued by counsel." The rule proposal is also bereft of a standard or guidance as to when and under what circumstances to grant such measures, likely producing years of litigation about what the rule means.

David R. Cohen (2174): Several of those submitting comments question whether any limitations on sanctions is necessary. Some do not seem aware of the devastating impact that any sanctions can have, whether severe or merely intended to be curative, on the reputation of companies and their counsel. One of the great benefits of the proposed amendments to Rule 37(e) is that they retain the ability to allow curative measures in non-egregious circumstances without the stigma of the "sanctions" label. For a company, the reputational impact of having been sanctioned may be far worse than the monetary cost involved. It can have negative impacts for years to come. For counsel, the result may be loss of a job or the ability to practice law. For

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example, when I seek admission pro hac vice, one of the invariable questions is whether I have ever been sanctioned by any court in any jurisdiction. If I had to answer "yes," that could disqualify me from many representations.

Washington D.C. Hearing

Jeanna M. Littrell (FedEx Express): As an LCJ member, FedEx urges attention to the comment from John Rabiej about including a prejudice requirement in relation to "curative measures," which can be very serious consequences.

David Cohen: The Committee was wise to leave in remedial measures so that parties can still get additional discovery if they need it, even sometimes with attorney fees as well. We used to call those things "sanctions," but we're no longer placing that bad label on them because you don't have to be guilty of bad conduct for these to be used.

Jonathan Redgrave (Redgrave LLP): The curative measures provision is not tethered to any notion of culpability, which is unfortunate. Supports John Rabiej's suggestion regarding need for showing of prejudice.

Robert Levy (Exxon): We agree with John Rabiej on the need to emphasize prejudice as a prerequisite for "curative measures." Those can be very significant.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) GE is concerned about the introduction of "curative measures." This could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation and, if unwarranted, be equally unfair. Moreover, the absence of any prejudice requirement in (e)(1)(A) means that the curative measures could provide a means to evade the substantial prejudice requirement in (b)(i), creating, in effect, a no-fault, no-prejudice loophole in the rule. That would produce a step backwards in most jurisdictions from the current situation. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions.

Lee A. Mickus: He generally represents auto companies. He favors dropping (B)(ii). On the other hand, he has no problem with missing evidence instructions.

Brian Sanford: He is a plaintiff lawyer. In his opinion, adverse inference instructions are curative measures and the rule should so recognize.

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4. Rule 37(e)(1)(B)(i)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The burdens on an injured party are so high as to render this "sanctions" provision essentially meaningless. First, it must show that the offending party failed to preserve discoverable information. Then it must establish that it should have preserved that information in anticipation of litigation. Then it must show that due to the loss of this information it has suffered "substantial prejudice." Even if it proves these things, the party must also prove that the failure to preserve was either "willful" or done in "bad faith." These are "both impossibly high (and subjective) standards that tend to be very difficult to establish without the proverbial 'smoking gun' to establish scienter."

Lawyers for Civil Justice (267): The conjunction should be changed from "or" to "and" so that the rule says sanctions may be imposed only on a finding that the failure to preserve was "willful and in bad faith." Permitting a "willful" failure to preserve as sufficient could include any deliberate conduct. This is confirmed by Judge Scheindlin's decision in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013), which applies the following standard: "The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently." Under this standard, establishing a standard auto-delete function could be characterized as "willful." The standard should make clear that sanctions are allowed only on a finding that the failure to preserve resulted from a desire to suppress the truth. Alternatively, the rule could define "willful" to include scienter or knowledge.

Daniel B. Garrie (281): The proposed amendment does not adequately deal with how the moving party proves the need for the missing information. As Judge Scheindlin eloquently said in Sekisui American Corp. v. Hart, 2013 WL 4116322: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it would allow parties who have destroyed evidence to profit from that destruction." Now counsel must advise their clients that destroying evidence is risky, as the burden is on the destroying party to prove good faith. If the burden shifts to the innocent party to show prejudice or harm, companies will not be as fearful of deleting evidence. Imagine a corporation who stumbles upon very harmful evidence, but destroys it knowing that the opposing party could never prove the value of its contents. The amended rule inadvertently protects the bad actor. If the rule is amended, "spoliation will run rampant."

Eli Nelson (284): There are currently differing interpretations of the threshold for sanctions, and this rule change will make it harder to order sanctions. Without the teeth of sanctions, there is no credible disincentive for those tempted to act badly. Document preservation is not something on the radar for many lawyers. Sanctions provide an excellent vehicle for promoting ethical behavior by lawyers, and the fact they can be ordered in the judge's discretion provides a desirable prod to lawyers. But requiring a finding of willfulness or bad faith will make it easy to defeat sanctions. With this change, it may become appropriate for counsel to advise their clients to roll the dice, or to remain ignorant of their preservation obligations. If they are "merely negligent" in that regard, the clients will actually improve their chances of winning on the merits. In particular, this strategy will assist them in winning the war of attrition. "Discovery about discovery" will become necessary to vindicate the rights of the victims of such conduct. At a minimum, "gross negligence" or "recklessness" should be added

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to willfulness and bad faith as a sufficient finding. This would make litigants pay more attention to the preservation obligations than they have so far.

Washington Legal Foundation (285): WLF believes that the use of the disjunctive is highly problematic. Conduct that is merely willful does not necessarily spring from a desire to suppress the truth, so "willfulness" alone should not suffice to establish the requisite scienter for imposition of sanctions. Some judges will not hesitate to impose sanctions if the rule can plausibly be read to permit them. See Sekisui Am. Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly even if without intent to [breach the duty to preserve it], or negligently."). Finding culpability under such circumstances would undermine the goals of this amendment. It would be better to require that the court find that the loss of information was "willful and in bad faith" before sanctions can be imposed.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA is concerned that the proposed amendments shift the burden to prove the need for missing information to the missing party. As Judge Scheindlin noted in Sekisui American Corp. v. Hart: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators."

National Center for Youth Law (292): This amendment would reject case law that holds negligence to be sufficient culpability to support sanctions. It essentially requires the innocent party to prove that it has been substantially prejudiced by the loss of relevant information, even where the party destroyed information willfully or in bad faith. "Not only does such a change incentivize negligence (as long as it's not 'willful or in bad faith') but it creates an almost insurmountable burden on the plaintiff."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party that acted willfully or in bad faith to spoliator relevant material. Concerns have been raised regarding whether the proposed rule is inconsistent with the goals of sanctions, including deterrence and shifting risks to parties destroying evidence. For precisely such reasons, many courts have applied a presumption of prejudice where a party has willfully destroyed evidence. Burdening parties with the necessity of proving the relevance of information that no longer exists presents obvious problems. Finding alternative sources may often be possible, but often it is not.

Thomas Y. Allman (308): Under (B)(i), a potential producing party will be immune from sanctions even if discoverable information is lost through negligent or grossly negligent conduct, and even if the conduct is deemed "willful" it is still protected unless there is proof that "substantial prejudice" has resulted. A safe harbor of that nature is essential to create predictability, particularly for potential parties implementing preservation obligations prior to suit. But the ambiguity of the word "willful" significantly weakens that effect. It may be described to include anything that is "intentional." Similarly, the requirement that prejudice be shown could be compromised by courts that conclude the "willfulness" implies substantial prejudice. Beyond that, (B)(i) risks being undermined by (B)(ii), which makes sanctions available outside the tangible property realm in the absence of culpability. It would also be desirable to make it clear in the Note that the Committee has rejected *Residential Funding*.

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Kaspar Stofflemayr (Bayer Corp.) (309): Granting authority to impose sanctions for loss of information that is "willful" though not in bad faith is not sufficient protection. And the non-exclusive list of factors in proposed 37(e)(2) confuses rather than clarifies the matter. Parties who are concerned to avoid sanctions at all costs will continue to overpreserve evidence unless the Rules delineate a clear line between a bad faith failure to preserve evidence and less culpable failures. We endorse LCJ's proposal to replace "or" with "and" in (B)(i).

Jonathan Smith (NAACP Legal Defense Fund) (310): Moving parties will often be unable to demonstrate the degree of harm suffered since they will not fully know what the lost information would have revealed. As Judge Scheindlin recently said (Sekisui American Corp. v. Hart, 2013 WL 4116322), this shift "incentivizes bad behavior on the part of would-be spoliators." This does not mean that the moving party should be exempt from having to establish prejudice in order for sanctions to be imposed; those results should occur only in cases in which real harm has occurred. But the proposed amendment places a burden on the moving party that is too heavy. Civil rights plaintiffs, in particular, must often obtain their evidence from the defendants. LDF suggests that the rule be changed so that if the court concludes that the spoliating party has acted culpably (even in only a negligent manner) it bears the burden of demonstrating that the lost information is not relevant to any of the claims being asserted by the other party.

John F. Murphy (Shook, Hardy & Bacon) (314): Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring "substantial prejudice" and actions that were "willful or in bad faith." The present divergence in standards has created confusion, particularly for institutional clients such as corporations, businesses or governments. To enhance the revisions, the Committee should consider changing the standard from "willful or in bad faith" to "willful and in bad faith" to prevent the bad faith element from fading away or disappearing altogether. Doing so would be a reasonable extension to the Committee's work on the rule to ensure that those who make reasonable efforts to preserve information not suffer sanctions.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the culpability standard should require proof of both willfulness and bad faith. Allowing sanctions for conduct that is willful but not in bad faith undermines a core purpose of the proposed amendment -- to punish intentionally harmful conduct only. Pursuant to the articulated standard, Pfizer could be sanctioned for loss of material pursuant to an existing document retention policy, even if the policy had been implemented in good faith. Because willfulness does not require bad faith, the current wording of the amended rule appears inconsistent with the intention of the Committee.

U.S. Chamber Institute for Legal Reform (328): The ILR believes that the standard should be willful and in bad faith. At least one judge has interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind. See Sekisui A. Corp. v. Hart, 2013 WL 4116322 at *4 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that the use of the word "or" in this subsection would authorize sanctions for willful conduct. That could include deliberate conduct that was void of any evidence of bad faith. One often cited willful act is the use of a standard auto-delete function. The use of such a function could be willful, but not

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in bad faith. FDCC recommends that the Committee consider substituting "and" for "or" to make clear that the conduct must be both willful and in bad faith.

The Sedona Conference Working Group 1 (346): Sedona believes that "willful" should be removed from the culpability standard and that "bad faith" should be replaced with "did not act in good faith" for the goal of uniformity. The specific Sedona proposal (submitted to the Committee in October, 2012 and included in Appendix A to this submission) provides as follows:

Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

This determination should be made with reference to a number of elements:

In determining whether a party acted in good faith in its preservation efforts * * *, a court must consider whether the party:

- (A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;
- (B) intentionally destroyed information relevant to the claims or defenses;
- (C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;
- (D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and
- (E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

The Sedona proposal then directs that the court "must select the least severe sanction necessary to redress the failure to preserve" and provides the following enumeration of possible sanctions:

- (A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;
- (B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;
- (C) staying further proceedings until the order is obeyed;
- (D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;
- (E) directing that the matters embraced in the order or other designated facts be taken

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as established for purposes of the action as the prevailing party claims;

- (F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (G) striking pleadings in whole or in part;
- (H) dismissing the action or proceeding in whole or in part;
- (I) rendering a default judgment against the non-movant; or
- (J) treating the failure as a contempt of court, if there has been a violation of a previous order.

Andrew B. Downs (359): The rule should say that sanctions are unavailable unless the loss was "willful *and* in bad faith," not willful *or* in bad faith. Conduct can often be willful without there being any intent to cause the resulting harm, or even when the actor could not reasonably foresee the resulting harm. Conduct which is willful and in bad faith should not be tolerated. Good faith conduct that is "willful" in a strict meaning of the term should not be sanctionable.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We think that "willful" is the wrong term to use if the intention is only to authorize sanctions against one who acted with intent to spoliator. Some courts define "willful" as synonymous with volitional action, but no connotation of bad faith. We think that willful either should be deleted from the proposal, or the disjunctive "or" should be replaced with "and."

John Stark (381): Limiting sanctions to willfulness and bad faith combined with substantial prejudice in the litigation is a wise standard to keep litigation from devolving into a game of document management. Willfulness or bad faith should be defined as intent to destroy evidence to prevent a party from prevailing in litigation. The problem with leaving "willfulness" undefined is that it may be deemed to mean a simply intent to dispose of information. The exception where there is no willfulness or bad faith -- "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" -- provides a reasonable escape valve for a truly catastrophic situation caused by the destroying party's actions.

John Beisner (382): I applaud the proposal requiring a party to demonstrate "substantial prejudice" to support a sanctions request. This will limit the parties' ability to exploit spoliation traps. But the culpability standard should focus on whether the party's actions were "willful and in bad faith." Some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind (citing Sekisui). But sanctions should be authorized only when a party has engaged in intentionally culpable conduct -- knowingly destroying evidence that it knows should have been preserved. With ESI, it may be impossible to keep all information on a given subject. Sanctions for spoliation should be available only when the party knew it had a duty to retain the information.

Alan Morrison (383): I think that one aspect of the sanctions provision should be clarified. It does not appear to authorize the court to impose attorney's fees as a sanction.

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Sanctions under Rule 37(e) are limited to those listed in Rule 37(b)(2), but most lawyers would regard attorneys' fees as not included. But Rule 37(b)(2)(C) does allow attorney's fees. It is unclear, however, whether (C) is included. I would add "and (C)" after "Rule 37(b)(2)(A)" on line 22 unless the Committee wants to exclude attorney's fees. I find the standard -- "willful or in bad faith" -- uncertain because there is no definition of those terms. Of the two, bad faith is less problematic; presumably it means something more than lack of effort or sloppiness, but the focus on the party's subjective intent is problematic, particularly when it is an organization with many individuals having potential responsibility for retaining records. Instead, objective tests like recklessness or gross negligence are clearer and should be sufficient, particularly since the level of sanctions can make the punishment proportionate to the level of misconduct. Willful is more of a problem; as Judge Posner has written willful is "a classic weasel word. Sometimes it means with wrongful intent but often it just means with knowledge of something or other." Unless some clear guidance can be provided, I would leave it out and rely solely on an objective standard such as recklessness or gross negligence.

International Assoc. of Defense Counsel White Paper (390): The use of "willful" is problematic because some courts define willfulness as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. The problem could be solved by substituting "and" for "or" in (B)(i).

Steven J. Twist (296): The word "willful" should be removed, making it clear that the test is "bad faith." Some courts interpret "willful" to mean simply intentional, and if that word remains in the rule it will remain impossible for companies to make reasonable decisions about preservation. Moreover, several circuits have higher standards, so adopting the published standard would lower the standard in those circuits.

Hon. Shira Scheindlin (398): Substantial prejudice is an open-ended concept that will be interpreted differently by each judge facing the question. It is a subjective determination. Worse yet, "willful" must mean something other than "bad faith" given that the latter term is preceded by "or." What, then, does it mean? My research shows that it varies depending on the context in which it is used. I would not like to see this problem cured by eliminating "willful" and leaving only "bad faith." That sets the bar too high. Such a rule would encourage sloppiness and disregard for the duty to preserve. If the Committee wishes to keep the focus on state of mind, then I would urge that the language include "gross negligence," "reckless," or "bad faith" rather than "willful" or "bad faith." I am very concerned about the burden of proof with regard to "substantial prejudice." It is unreasonable to require the victim to prove not only culpable state of mind but also to prove prejudice when it cannot know the value of the information that it does not have. The better approach would be to presume that the lost information was important if the culpable conduct was done with a sufficiently egregious state of mind. The presumption can be rebutted by the spoliating party. That is the fair approach.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): We already know that the failure to produce information by defendants often causes substantial prejudice. But having to show that failure to preserve was willful or in bad faith imposes an extraordinary burden on a claimant seeking to obtain curative measures or sanctions against a party that destroyed evidence. Defendants will simply claim that their "retention" policies made the evidence unavailable. Then they get a "pass" and no sanctions will ensue. But the cost of keeping information in this electronic age is de minimis. Moreover, locating relevant materials is easy also. "Instead of

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manually sorting for weeks through what can often be tens of thousands of pages, or in many of my cases millions of pages, now we do an electronic search in moments to find relevant information to assist in prosecuting or defending a claim. * * * No matter what is claimed about the cost of preserving and producing information electronically, anyone can see that it is far cheaper to handle than on paper."

John Kouris (Defense Research Institute) (404): DRI believes that the use of the disjunctive in this proposal ("willful or in bad faith") is highly problematic. Some courts (see *Sekisui*) define "willful" as intentional or deliberate conduct without any showing of a culpable state of mind, such as by establishing a standard auto-delete function. We think "or" should be changed to "and."

David Kessler (407): The word "willful" should be stricken. In addition, the rule should be amended to require the court to use the least intrusive curative measure or sanction to remedy the failure to preserve.

Michael Reed (on behalf of members of the ABA Standing Committee on Federal Judicial Improvements) (409): We believe that the language is problematic. The term "willful" is hopelessly ambiguous. We believe that the threshold standard for the award of sanctions instead should be a demonstration of gross negligence or recklessness by the movant. We also believe that it's unfair to place an initial burden on the moving party on a spoliation motion to prove prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This amendment practically imposes a scienter requirement that will rarely if ever be met. This will cause the plaintiff to engage in massive discovery to prove scienter.

Mark S. Stewart (Ballard Spahr) (412): The rule should be changed to say there must be a finding that the loss of information was "willful and in bad faith." Without that change, some courts may find the willfulness component satisfied because a party had purposefully acted in a way that caused data to be lost without intending to prejudice a litigant. In *Sekisui*, for example, plaintiff deleted computer files to free server space six months before sending a notice of claim. Despite finding that plaintiff acted without a "malevolent purpose," the court found that the intentional destruction of evidence after the duty to preserve attached amounted to willful destruction. The language of the proposed rule should be revised to avoid this sort of result.

William Adams (419): The rule should say willful "and" bad faith.

Ryan Ferguson (433): The rule should say willful "and" bad faith. Merely requiring that the conduct was willful leaves open the possibility that parties will be sanctioned for following what would otherwise be legitimate document retention policies.

Robert D. Curran (448): The requirements for getting sanctions under this provision impose impossible conditions. There is practically a scienter requirement, which will never be met. And it would require plaintiff to engage in massive discovery to prove scienter.

Thomas Wilkinson (461) (with copy of article from Penn. Bar Ass'n Fed. Prac. Comm. Newsletter): Judge Scheindlin's point about the dubious nature of putting the burden on the party seeking sanctions to prove substantial prejudice is persuasive; it is well-established that the

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burden should lie with the party best able to provide information about the question at issue. But her further charge that the amendment creates perverse incentives and encourages sloppy behavior is not so persuasive. Although the amendment would limit the court's ability to issue sanctions, it also encourages the court to order curative measures. The court could, for example, direct a party to restore lost information or to develop substitute information or permit the introduction of evidence at trial about the loss of information or allow argument to the jury about the possible significance of that lost information. These adverse consequences serve to encourage litigants to engage in reasonable and diligent document and data preservation practices.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

Gwen D'Souza (Maryland Employment Lawyers Assoc.) (660): Currently, negligent destruction of evidence will support an adverse instruction allowing the jury to infer the defendant's bad faith and possible retaliatory or discriminatory animus. We oppose the change in (B)(i) requiring the plaintiff to prove wrongful intent in the destruction of evidence before proving wrongful intent in the underlying employment is too onerous. Placing on the plaintiff the additional and new burden of proving harm is also unwarranted. And these pro-defendant changes are unlikely to produce savings for defendant. It is unclear how it can really save money spent on preservation just because the rule is amended this way.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We strongly oppose including "willful" as an alternative to "bad faith." We attach in our Appendix a compilation of citations to varying interpretation of the word "willful" in the various circuits. We also think that any standard less demanding than "bad faith" would be wrong for the serious consequences Rule 37(e) addresses. If the term "willful" really means the same thing as "bad faith," we don't need it, and if it means something else, we do not want it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): The Committee does not explain why it has decided to treat an "adverse inference jury instruction" as a "sanction" under Rule 37(e)(1)(B) rather than as a "curative measure" under Rule 37(e)(1)(A). Certainly many of the courts that have approved this remedy have viewed it as a necessary corrective to address the particularly discovery failure at issue. If it is a permissible "curative measure" to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of that evidence. See *Mali v. Federal Ins. Co.*, 720 F.3d 387, 391-94 (2d Cir. 2013) (explaining that an adverse inference instruction may be appropriate to explain trial testimony even where it is not a sanction). It may be that the adverse inference instruction must be addressed separately from other curative measures. But we think that requiring a high showing of culpability before it can be used sets the bar too high. We also think

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that the Committee should explain why it is rejecting the Second Circuit's Residential Funding decision. Requiring a finding of bad faith or willfulness before an adverse inference instruction can be given swings too far the other way even though it is a legitimate concern that negligent behavior could cause this result.

We suggest that the rule be amended to treat the adverse inference instruction separately, and to require a showing of gross negligence or recklessness, plus substantial prejudice, before it can be employed. In addition, we think that the rule should be revised to permit sanctions if the party's "actions or omissions" caused prejudice. We are also uncertain whether the rules process can preclude district courts from imposing sanctions under other sources of authority, particularly when they are authorized by state law in diversity cases. One member of the Committee (Julia Brickell) dissented from this point, urging that a willfulness or bad faith standard should be used for adverse inference instructions because they influence a jury's determination of the merits of a case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Using the term "reckless" in the rule, either to define "willful" or to support an inference of bad faith, should be avoided. It is critical to define "willful" if it is to be used in the rule to avoid possible incorporation of common law meanings of the word. As the Supreme Court has recognized, "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007). The word "willful" should be removed from the proposed rule. If it is retained, it should be defined as the Sedona Conference has recommended -- "acting with the specific intent to deprive the opposing party of material evidence relevant to the claims or defenses." Keeping the term will mean that the standard for sanctions will be lowered in the circuits that now require bad faith. And using "reckless" instead is not a good solution. The critical point is that only bad faith supports the adverse inference that the lost evidence was harmful to the party that lost it. As the Supreme Court also recognized in *Safeco*, the term "recklessness" is not self-defining. See 551 U.S. at 68. Moreover, recklessness is a quasi-negligence standard.

ARMA International (1263): "Willfulness" is a risky standard if it includes discarding information pursuant to a responsible preservation policy. Such discard of information is consistent with established records management standards. The heart of information governance is the concept that documents have a life cycle, and that means they are intentionally destroyed or discarded when that cycle ends. This is good information governance, and is the part of the rule proposal our members are struggling with the most. The contradictions for information governance professionals would become worse if companies could be sanctioned for spoliation for intentionally deleting data after they have followed, in good faith, a disposition protocol that included reasonable due diligence.

Jonathan Marcus (CFTC) (1366): Courts define "willfulness" in myriad ways across the country and in various contexts. Sometimes a finding of gross negligence is said to suffice. For example, in *U.S. v. Krizek*, 111 F.3d 934, 941-42 (D.C.Cir. 1997), the court said that "reckless disregard lies on a continuum between gross negligence and intentional harm." In the context of a False Claims Act case, the court regarded reckless disregard as an extension of gross negligence. In *Phillips v. U.S.*, 73 F.3d 939, 943 (9th Cir. 1996), the Ninth Circuit upheld an instruction for recklessness that the lower court had borrowed from an earlier definition of gross negligence in a case in which the government had to prove willfulness under 26 U.S.C. § 6672. "Like Euclid's axiom that 'things equal to the same thing are equal to each other,' courts could

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find that reckless conduct equals both willful and grossly negligent conduct." Accordingly, if "willful" and "bad faith" are retained in the rule the Note should define them.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA urges adoption of a simple bad faith standard. "Willfulness" could be interpreted to mean mere deliberateness, without any specific intent to destroy information relevant to litigation. Courts could conclude that even activity protected under current Rule 37(e) -- "information lost as the result of the routine, good-faith operation of an electronic-information system" -- describes "willful" conduct in that the system itself was adopted pursuant to an intentional business decision.

Anna Benvenuti Hoffman (1918): "An adverse inference is not a very powerful sanction -- it merely permits the jury to find that evidence that defendants should have kept, but cannot produce, may have been helpful to plaintiffs. But it does provide some incentive for defendants to look for and produce files. With this change, that would be gone, and it would be essentially impossible to meet the threshold required for sanctions."

New York County Lawyers' Ass'n (2072): We are concerned that the rule does not allow a court to sanction an unsuccessful bad faith attempt to destroy crucial information because that can't be said to have caused substantial prejudice. Even where egregious actions did not result in prejudice, we think that the court should have discretion at least to impose monetary penalties.

Washington D.C. Hearing

Jeana Littrell (FedEx Express): If courts interpret "willful" to include settings on an auto-delete function, that might mean we would have to stop using auto-delete on all our systems, or at least all subject to a litigation hold. That would be very costly, and would strain the limits of existing technology for finding responsive ESI.

David R. Cohen (Reed Smith): The present formulation of creates a risk because some courts interpret "willful" very broadly. It would be better to say "willful and in bad faith."

Jonathan Redgrave (Redgrave LLP): Using both "bad faith" and "willful" will lead to disputes. He favors using "bad faith" and defining it. Also, the rule should say that the least severe sanction should be employed; saying that only in the Note is not enough.

Thomas Allman: It is good to reject Residential Funding. But some recent decisions have defined "willfulness" too broadly. It may be that a good definition of willfulness in the Note will be an antidote to that risk. It is important to make very clear that the old Second Circuit view is not to be followed under the new rule.

Peter Strand (Shook, Hardy & Bacon): We think it would be much better to say "willful and bad faith." "Folks don't destroy documents."

Dan Troy (GlaxoSmithKline): We favor having the rule say willfulness and bad faith.

Alexander Dahl (Brownstein Hyatt Farber Schreck): The current formulation that treats "willful" action as sufficient to justify sanctions is too elastic. For example, see Judge Scheindlin's decision in Sekisui, where she defines willfulness in a very broad manner. True, she

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also expresses opposition to this committee's current proposal in that decision, but the point is that some judges will regard the current proposal as authorizing sanctions in a broad swath of cases. In short, so long as decisions like the Sekisui ruling scare the people who have to make preservation decisions, the rule change will not achieve its purpose of reducing the huge burden and cost now resulting from divergent approaches to preservation. The rule should say that bad faith is required, and that it requires a showing of a decision based on consciousness of a weak case or awareness that evidence helpful to the other side would be destroyed.

Jennifer Klar: Negligence or gross negligence would be more appropriate standards than what the Committee has proposed. That would protect parties that have acted reasonably. Under the willfulness or bad faith standard, the destruction of evidence will go unchecked, creating an incentive to destroy evidence. Moreover, including adverse inference instructions with sanctions is wrong because that is a remedial measure, not a sanction. The D.C. Circuit has proclaimed that such measures are "fundamentally remedial."

Michael C. Rakower (N.Y. St. Bar Ass'n): We recommend including a definition of willfulness. It should stress intentional action. It also should focus on a party's "actions or omissions", not just on actions. Omissions may more often be the reason these problems arise.

Phoenix hearing

Robert Owen: Retaining "willful" as sufficient will dilute the rule. One judge in the S.D.N.Y. has already indicated a very broad interpretation of that word. It would be best to substitute "and" for "or" in the rule -- "willful and in bad faith."

William Butterfield: The requirement that a party seeking sanctions prove that the loss of information caused "substantial prejudice" is a large burden. For this reason, the rule should provide that the alleged spoliator should have the burden of proving that there was no substantial prejudice. That would matter only if the court were persuaded that the necessary level of culpability were established. In those cases, given that the alleged spoliator has more knowledge of its own information than the other side, it makes sense to place the initial burden on that party to show that there has been no significant prejudice. "Willful" is also a "problematic" standard in the rule. The Committee Note should provide examples of bad faith. One would be failure to take any steps to preserve, allowing the auto-delete function to destroy evidence.

Stephen Twist: The word "willful" should be removed.

Jill McIntyre: The "substantial prejudice" standard will be helpful to companies. Usually they don't delve into the data to determine what to preserve; no company will make a detailed evaluation of the data at the preservation stage, unless litigation is imminent. So rather than do that, it will avoid risks by overpreserving. Although reducing preservation does not save much money all by itself, it does reduce costs later on for collecting, processing, and producing. Asked how the "substantial prejudice" standard assists companies in making such decisions, witness answers that it shows that it's o.k. to risk loss of some information.

John Rosenthal: The distinction between sanctions and curative measures is illusory and should be abandoned. One illustration of this illusiveness is that "permissive" adverse inference instructions are sometimes regarded as curative measures presently by judges. On the other hand, some case law calls things we seem to regard as curative measures "sanctions." Yet our

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draft would allow "curative measures" to be imposed without a showing of either prejudice or culpability. If curative measures are left in, a prejudice requirement should be added.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) Regarding the standard for allowing sanctions should clearly make them unavailable for anything like negligence. Therefore, he would be concerned about adopting a "reckless disregard" standard. The Sedona standard is better.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

John H. Martin: Texas has a lot of jurisprudence on what "willful" means. If you use that word, you should define it.

Neva Lusk: (B)(i) should say "willful and bad faith." Otherwise any intentional action could result in sanctions. There are a lot of mom and pop operations that do intentional actions that should not suffice to support sanctions. Does not like "reckless disregard" as a standard either. Instead, one should use a totality of the circumstances standard. Asked whether a party that simply decided not to comply with preservation obligations because of the cost of doing so could be sanctioned if it was indifferent to, but not aware of, what was lost, answered that this conduct would not indicate a specific intent to deprive another party of relevant evidence.

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5. Rule 37(e)(1)(B)(ii)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): This proposal is even more troubling than (B)(i). "First of all, the phrase 'irreparably deprived' is past tense and, therefore, suggests that an injured party proceeded with the litigation of its case and was, as a result of the offending party's conduct, not able to pursue its claims during the course of the litigation. But if an injured party has to wait until it has failed on its claims at trial as a result of vital evidence being destroyed then none of the sanctions provided for under Rule 37 will matter." And what does the term "irreparably" add to "deprived"? That seems to establish some higher standard that an injured party must meet to show its entitlement to relief. Finally, the use of the word "present" raises concerns among those who have the burden of proof. "[A]n injured party may be deprived of vital evidence necessary to *prove* its claim by the wrongful conduct of a defendant, but still have a scintilla of evidence sufficient to *present* its claim to a jury."

Lawyers for Civil Justice (267): This provision should be stricken. There is no need to include this provision since ample measures exist to handle the rare kind of case in which this problem can arise. Removing the provision would not weaken existing spoliation law. The Silvestri case, for example, could have been handled the same way it was handled under this rule without (B)(ii) because the court could have deemed plaintiff's conduct to be willful or in bad faith. It was surely prejudicial. Moreover, under the proposed rule remedial or curative measures would have permitted the court to preclude plaintiff's experts from testifying or allowed defendant's attorney to comment at the trial. Other cases confirm that this provision is not needed to justify needed sanctions results. But including this provision will likely result in an increase in motions seeking harsh sanctions. Indeed, this provision provides "a tort-based spoliation recovery" that is beyond the authority of the Rules Enabling Act, for "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from 'a court's inherent power to control the judicial process'" (quoting *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009)). Moreover, the "irreparably deprived" phrase is too amorphous, and results would tend to differ from judge to judge. In addition, "including the (B)(ii) exception in the new rule will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the 'irreparably deprived' language."

Washington Legal Foundation (285): (B)(ii) creates a risk that it will essentially swallow the rule by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. Although the Committee evidently intends that the "irreparably deprived" language will be applied narrowly, litigants claim "irreparable harm" as a matter of course in sanctions battles, and experience suggests that judges and litigants alike will some come to view the expression as a convenient way to circumvent primary operation of the rule. Absent willful or bad faith conduct, there should be no authority to impose sanctions on an innocent or merely negligent party. (B)(ii) should be removed from the proposed rule.

Alex Jennings (294): I think that (B)(ii) should be retained even if 37(e) is limited to electronically stored information. Although limiting the rule to ESI might lessen the effect felt if this part is removed from the rule, it still provides a narrow exception when sanctions are allowed even in the absence of willfulness or bad faith. This narrow exception has been used by courts. Due to the exceptional circumstances that are necessary for relying on this provision, such as tangible evidence, limiting the rule to ESI is not enough. The flexibility of (B)(ii) can be

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incredibly necessary.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section supports authority to impose sanctions without regard to culpability when a party's actions have "irreparably deprived a party of any meaningful opportunity to present or defend against claims." Were this provision not included, the Section would be concerned that an adverse-inference jury instruction or a direction establishing matters or facts could not be imposed when the spoliated information is central to the action but the spoliator was merely grossly negligent or reckless. The standard in (B)(ii) is sufficiently high that it likely will be only the rare case in which sanctions may be imposed when the spoliator does not act willfully or in bad faith.

Thomas Y. Allman (308): The (B)(ii) provision should be dropped. In its place, the phrase "absent exceptional circumstances" should be added to the rule to avoid overruling *Silvestri* and similar cases. The Committee Note could then explain that this exception is designed to help avoid courts using it inappropriately to impose liability without fault. If the Committee is not prepared to remove (B)(ii), it should consider limiting it to "documents and ESI."

Malini Moorthy (Pfizer) (no. 327): This provision creates a risk that courts will not narrowly apply what is meant to be limited to very exceptional cases. Plaintiffs routinely assert that they have been "irreparably deprived" of critical information.

U.S. Chamber Institute for Legal Reform (328): ILR urges that this section be deleted altogether. Allowing sanctions without a finding of wilfulness and bad faith would exacerbate the problem if spoliation "mini-litigations." It would also be unfair because an adverse inference instruction produces all but a declaration of victory for the side that obtains the instruction against the other side.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that this provision could swallow the rule by enabling judges to impose sanctions without any finding of willfulness or bad faith. It urges removal of the provision.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): I was asked whether my suggestion to add "absent extraordinary circumstances" to the beginning of (B)(i) and drop (B)(ii) would lead to greater uncertainty because it would be open ended. That would make the alternative a truly rare exception, not an equivalent alternative as in the current draft.

Doug Lampe (343) (Ford Motor Co.): Ford is concerned that retaining (B)(ii) would eviscerate much of the clarity sought by the Committee. All advocates for sanctions claim they have suffered "irreparable deprivation." All that "irreparable" means is that the information sought is gone, and "deprivation" only means that the loss of the information is regrettable and unfortunate. Ford urges that a bad intent component be included in any rule governing the imposition of sanctions. If that is not done, Ford urges that (B)(i) be changed to make it clear that the claim or defense must be so restricted by the absence of information that the court would be required to dismiss the claim or defense were there no relief under (B)(ii).

The Sedona Conference Working Group 1 (346): Sedona believes that if the "Absent exceptional circumstances" approach it has recommended is adopted (b)(ii) would not be

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necessary. We think that the wording of the Advisory Committee's proposal would be susceptible to inconsistent interpretations because the term "meaningful" is inherently subjective. The "absent exceptional circumstances" approach provides the court with appropriate flexibility to address situations where the loss of evidence has deprived a party of the ability to pursue or defend against the claims. If the Committee proceeds with (B)(ii), we believe it should be rewritten to focus on whether the party has been "irreparably deprived of the ability to present or defend against the claims in the litigation." This language seems to us much less susceptible to inconsistent interpretations than the Committee's "any meaningful opportunity" language.

Kenneth D. Peters & John T. Wagener (353): This provision should be deleted. It will generate motion practice as the courts struggle to determine what it means.

Andrew B. Downs (359): This provision is an invitation to sanctions motions. The irreparable loss of evidence should not convert otherwise unsanctionable acts or omissions into sanctionable ones. If there is an "irreparable deprivation" exception, lawyers will use it, but not as the Advisory Committee contemplates. It takes but one published decision expanding the scope of this provision to encourage yet more sanctions motions and more litigation of collateral issues.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We are concerned that courts may overread (B)(ii) because it applies to any loss of information that "irreparably deprives a party of any ability to present or defend the action." The rule should make clear that sanctions are permitted in the absence of culpability only where the adverse party cannot, as a result, submit any evidence in support or defense of the claim. It may be best that this provision be eliminated, but at least it should be explicitly cabined.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that sanctions for loss of evidence should be limited to cases of bad faith. To create a lesser standard of culpability for loss of evidence that causes catastrophic prejudice would encourage counsel who cannot show that the loss of evidence was due to bad faith to claim that the impact of the loss satisfies the standard of no "meaningful opportunity" to prosecute or defend. This in turn would require opposing counsel to argue that the party seeking sanctions could nonetheless prevail -- in effect arguing the other side's case.

John Beisner (382): (B)(ii) should be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation claims as a litigation tactic and impose significant costs on American companies by encouraging them to store every last byte of information.

Alan Morrison (383): I believe the use of the word "any" on line 30 of the proposal places too heavy a burden on the party seeking sanctions. I would substitute "a" for "any," to lessen the burden and produce a fairer balance. In line 32, the use of "all claims" seems to mean that the deprivation must affect all claims; should it not be "any" claim. Beyond that, why not use "claim or defense," as used in Rule 26(b)(1) and several other places in the rules. Thus, the provision could read "irreparably deprived a party of a meaningful opportunity to litigate a claim or defense in the action."

International Assoc. of Defense Counsel White Paper (390): (B)(ii) could be problematic and allow courts to impose sanctions absent any willfulness or bad faith. It is likely that some

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courts would use the exception to avoid the primary rule. The IADC recommends that the exception be removed from the proposed rule.

Steven J. Twist (396): (B)(ii) should be removed from the rule. It is likely some courts would use the exception to avoid the primary rule.

John Kouris (Defense Research Institute) (404): This provision could swallow the rule and defeat the basic goal of the amendment to constrain use of sanctions for failure to preserve. It is likely that some courts would simply use this provision to sidestep the requirements of (B)(i).

David Kessler (407): This provision should be removed. It makes the responding party the insurer of its opponents' ability to sue.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This provision at least offers the possibility (compared to (B)(i)) of having some teeth. But we ask, at what point this decision is to be made? Is it only at the end of the trial? If it is toward the beginning of the litigation, it would be almost impossible for plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to present or defend against the claims in the litigation? This would require massive evidentiary hearings and certainly will be almost impossible to determine at the beginning of the process.

Mark S. Stewart (Ballard Spahr) (412): This provision may paradoxically undermine the amendment's purpose. The exception should theoretically apply only rarely, but courts may use it to avoid the rule. Requiring intentional conduct to justify sanctions is necessary to achieve the amendment's goals. We think that this provision should be removed.

William Lockett (415): This provision should be removed. There is plenty of strength in the rule as written when there is any indication of willfulness or bad faith with respect to failure to preserve evidence.

Thomas Kirby (435): This provision is seriously ambiguous and should be clarified. The language "any meaningful opportunity to present or defend against the claims in the litigation" could be read in several different ways. It could mean that severe sanctions are proper if any one meaningful opportunity to present or defend any one claim is foreclosed, even if other equally meaningful opportunities or defenses remain. Or it could mean that sanctions are proper only if every meaningful opportunity has been foreclosed. I suggest that the rule be rewritten to say "one or more meaningful opportunities to present or defend against one or more claims in the litigation" or "all meaningful opportunities to present or defend all [or at least one of the] claim[s] in the litigation."

Robert D. Curran (448): At what point is the determination called for by (B)(ii) to be made? Is this only at the end of the trial? If it is toward the beginning of the process, it would be almost impossible for the plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to litigate. This would require massive evidentiary hearings. And no party would be willing to admit, much less try to prove, that it cannot prove its case.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit

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litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): There were multiple suggestions on how to address the concerns of the (B)(ii) exception to the requirement to prove culpability. A significant number of participants urged that (B)(ii) should be removed entirely, and that the Committee Note should state that 37(e) does not overrule the Silvestri line of cases. Others raised the issue that the Committee Notes themselves are not approved by the Supreme Court, making this a less-than-ideal way to address these concerns. One participant endorsed an idea proposed by Thomas Allman that would delineate between documents, ESI, and tangible things. This provision could be removed, it was suggested, if new 37(e) were applied only to ESI and documents, but not to tangible things.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We support the proposition that, in that rarest of cases where a party's non-bad faith conduct destroys evidence such as to make it impossible for the other party to litigate, extreme sanctions might be appropriate. We do not agree with the suggestion -- implicit in a question the Committee asked -- that such unintentional catastrophic destruction cannot happen to ESI. It can, and the rule should apply to all manner of information.

Philadelphia Bar Ass'n (995): While dropping (B)(ii) might make sense if the rule were limited to ESI, we think that it serves a purpose to provide relief in a case involving a catastrophic harm to a party's ability to litigate that cannot be remedied by any curative measure. We understand that such a finding is limited to extremely rare circumstances and that the harm must be the result of a party's actions, not to an Act of God or of some third party.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We strongly support retaining this provision. There may well be circumstances where the consequences of the loss of electronically stored information could be so severe as to warrant the imposition of sanctions even in the absence of willfulness or bad faith.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA believes that this provision should be eliminated. Allowing sanctions without any culpability would undermine the goal of proposed 37(e). Because the focus is on the value of the information to a potential opposing party, which is not within an organization's control, there is no stopping point under this standard short of "keep everything." Moreover, the sanctions specified, particularly the adverse inference instruction, should depend on whether there has been litigant misconduct.

New York County Lawyers' Ass'n (2072): We think that this provision should be retained. The Note makes it clear that this will apply only in exceedingly rare cases, and even then only when the loss was a result of "the party's actions." It is important to retain judicial authority to use sanctions in such extreme circumstances. Moreover, in such a catastrophic loss of information it seems at least unlikely that negligence would be the explanation. Some in the

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legal community claim that this provision will lead to a spate of motions, if those motions are made courts will sensibly use curative measures in most instances, for most cases do not involve such exceptional losses of information. It does not seem likely to us that this provision will "swallow the rule," for the Note makes it clear that this is only for the truly extraordinary case.

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): The focus should be on the importance of the lost information to the action; materiality is key.

Thomas Allman: Drop (B)(ii) from the rule. The better solution is to preface the rule with "Absent exceptional circumstances, . . ." That will take care of any exceptional case that might fall within (B)(ii).

Alexander Dahl (Brownstein Hyatt Farber Schreck): This provision creates a risk that judges seeking a ground for imposing sanctions but unable to fit within (B)(i) will distend (B)(ii) into something much broader than what the Committee has in mind. The provision is unnecessary. Problems of the sort addressed can be solved by curative measures.

Michael Rakower (N.Y. St. Bar Ass'n): We support the Committee's formulation of sanctionable conduct, but recommend that willfulness be defined. We propose that it be either intentional conduct or conduct that's sufficiently reckless so as to enable someone to foresee a high likelihood of harm. Our report is more precise on the formulation of this preferred standard. We also think it is important to add "or omissions" after "actions."

Phoenix hearing

Robert Owen: This provision should be eliminated. It will produce adverse results and dilute the goals of the rule rather than solve a real problem.

Timothy Pratt (Federation of Defense Counsel): This provision should be eliminated.

Thomas Howard: This provision should be limited to tangible things. That is where the problem exists -- loss of the instrumentality of injury. ESI is simply different.

Robert Hunter: Imposing sanctions for nonculpable loss of evidence is wrong. This sort of thing can happen often. For his company, employees servicing units often remove, discard, or alter units as part of servicing. Even if they ask "Have there been any problems?" they may not find out about something that comes up long afterwards.

Stephen Twist: (B)(ii) should be removed.

John Rosenthal: This provision should be eliminated. It deals with a mythical situation and will cause myriad problems.

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6. Rule 37(e)(2)

Lawyers for Civil Justice (267): The factors in Rule 37(e)(2) do not belong in the rule. Originally (at the time of the Dallas mini-conference in September 2011) the Subcommittee was considering "bright line" rules to specify clear preservation standards and bring certainty to this area. In particular, specificity on the "trigger" would have been welcome. The Subcommittee abandoned this approach, however, leaving it to the courts to determine whether information should have been preserved. But the list of factors is incomplete and potentially misleading. There is no relative ranking of the importance of the various factors. Although some emphasize attention to whether a party behaved reasonably, there is little discussion of the impact of the absence of reasonableness. If these provisions are included in the rule, there is a significant risk that they will spur ancillary discovery. Courts may "cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the rule." For example, the Note states that the prospect of litigation may call for altering routine operations and says that issuing a litigation hold is often important. "It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate." See *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409 (S.D.N.Y. 2009). The specific factors compound the uncertainty:

Factor A does not define with any precision the circumstances that constitute notice that litigation is likely or that information would be discoverable.

Factor B calls for evaluating the reasonableness of preservation efforts, but reasonableness is an inherently vague standard and the fact some information was lost does not mean reasonable efforts were not employed.

Factor C regarding good-faith exchanges about preservation could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.

Factor D regarding proportionality does not spell out presumptive categories of data which need not be preserved absent prior notice. Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands.

Factor E may be useful in some cases, but requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to provide guidance.

Washington Legal Foundation (285): The list of factors is not particularly helpful. None of these "reasonableness" factors sheds any relevant light on the central question -- whether the failure to preserve material was willful or in bad faith, resulting in substantial prejudice. Because it is an incomplete catalog of considerations, it risks being misinterpreted as mandates whose violation would justify the imposition of sanctions irrespective of the culpability and prejudice requirements. WLF urges the Committee to eliminate these factors from the rule altogether. At the most, they could be mentioned in the Note.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): (This is an article from the Federal Courts Law Review concerning the proposed amendments.) Preservation issues are best addressed by the parties as early as possible and from a reasonable, good faith perspective.

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Counsel should not send pro forma preservation letters with overbroad demands, and the recipient of a preservation demand should view the request as an opportunity to open a dialogue on the scope of any preservation obligation, rather than an affront to be ignored. "Conferring with opposing counsel does not place the responding party at a tactical disadvantage, particularly if the recipient has already concluded that the preservation demand letter was sufficient to trigger a litigation hold."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): Although the Section strongly endorses the concept of describing with particularity these and other such factors in the text of the rule, we are concerned that the language and the factors do not clearly express the Advisory Committee's intent. We think that the factors include everything in current Rule 37(e) and that it should accordingly not be retained if the new provision is adopted. But the introductory language saying that the factors bear on whether discoverable information that should have been retained has been lost singles out willfulness and bad faith as topics without considering the extent to which these factors also bear on whether an action was negligent or grossly negligent, which could affect what is an appropriate corrective measure under proposed 37(e)(1)(A). In addition, although the Committee Note says that the Committee has an "expectation" that only the least severe sanction necessary in the circumstances will be used, there is nothing in the rule that says so. The Section thinks that the introductory material should be revised as follows: "The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information, including"

Thomas Y. Allman (308): The Committee rejected the inclusion of a detailed rule on preservation in favor of the "factors" listed in proposed 37(e)(2). But there is a dark side to the choice to merely hint at what the Committee might see as desirable by listing idiosyncratic "factors." The factors listed identify only selected aspects of the mix of issues involved and do not provide the type of practice commentaries issued by more nimble entities such as the Sedona Conference. The Committee seems to assume that the factors will ensure that if a potential party makes reasonable preservation planning decisions it will not be branded a "spoliator." But the rule does not allow a party to safely rely on its ex ante assessment of proportionality in designing the scope of an initial preservation effort, even in the absence of access to the opposing parties or to a court. There is also a serious risk that courts will unfairly or inadvertently turn the encouragement of reasonable conduct on its head by determining that the protection from sanctions will be forfeited in the absence of following the advice in the Committee Note. For example, the Note unequivocally advocates the interruption of routine operations and touts the use of litigation holds, implicitly endorsing their use regardless of the circumstances. Courts have so used statements in the Committee Note to the 2006 amendments. The factors listed in Rule 37(e)(2) do not belong in the Civil Rules and should, at most, only be described in the Committee Notes as a checklist of possible issues to consider. But if the current formulation is retained, the Committee should make it clear that sanctions may be imposed only upon proof of heightened culpability and substantial prejudice. In addition, the Note should clarify that the diminished scope of discovery under amended Rule 26(b)(1) due to proportionality concerns is equally applicable to the scope of preservation under proposed 37(e).

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer strongly urges the adoption of a clearly defined and easily identifiable triggering event, such as the commencement of litigation, that would initiate a defendant's obligation to take affirmative steps to preserve information. The ill-defined "reasonable anticipation of litigation" standard under current law is too vague to provide

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useful direction to a party who wishes to avoid the risk of sanctions while still limiting preservation and costs to what the law requires. An example illustrates the problems under the present rule: In late 2012, an attorney sent the company a letter attaching a federal court complaint he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. It also rejected the demands, but so far as it knows no lawsuit has been filed. Meanwhile, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information. Current law gives scant guidance on when the company should no longer "anticipate litigation."

U.S. Chamber Institute for Legal Reform (328): This provision should be deleted from the rule. None of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitute reasonable conduct in the preservation context.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges deletion of this section of the proposed rule. The factors do not assist in determining whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice. If the Committee does not delete the factors, FDCC suggests that they be included in the Committee Note rather than the text of the rule itself. Including the factors in the rule suggests that they are mandatory considerations.

The Sedona Conference Working Group 1 (346): Sedona has proposed a set of factors to use in determining whether a party acted in good faith, its preferred standard for sanctions. It believes that its factors are superior to some identified in the Committee's draft. In particular, it believes that receipt of a "preservation letter" should not be mentioned. The existence of a preservation duty really has little to do with such letters; the duty can arise without any such demand, and demands are often made when there is really no duty. This factor may result in gamesmanship. We agree that the reasonableness of the party's preservation efforts should matter, but are concerned that the Committee's language is too narrow and might be read as limited to whether sufficient efforts were made to preserve the specific information that was lost. Instead, the focus should be on the "overall reasonableness" of the party's preservation efforts.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): Regarding proposed 37(e)(2)(D), we note that it does not say what factors inform proportionality in this context. The Committee Note suggests that courts should consider the same factors that inform the proportionality inquiry under new Rule 26(b)(1), and we expect that most courts will do so. But we think the text of the rule should explicitly refer to the Rule 26(b)(1) factors that courts should consider.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): In Rule 37(e)(2)(E), we propose changing "the party" in the first line to "any party." There may be circumstances in which it would be reasonable for the requesting party to seek the court's guidance on the responding party's obligation to preserve evidence. In addition, we think that the invitation in the Committee Note (see pp. 45-46) for consideration of a party's lack of sophistication in evidence-preservation practices would encourage lack of diligence or, worse, sharp practices by parties insincerely profess to be "unsophisticated."

John Beisner (382): I think these factors should be deleted from the proposed rule. None

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of them relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Instead, they emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Reasonableness is a highly elastic standard, and using it will only foster greater uncertainty over whether a party may or may not delete information. There is also the risk that some courts will view failure to satisfy any one of these factors as sufficient to justify sanctions in a case where the loss of information was not the result of the party's willfulness or bad faith.

Alan Morrison (383): I worry about the focus in factor (A) on whether the information would be "discoverable." Particularly if the change to Rule 26(b)(1) invoking proportionality is adopted, that determination may be quite difficult to make. It also seems to me that requiring this sort of inquiry is ill-advised, and to create incentives for parties to destroy evidence, or allow it to be lost, on the ground that they had a reason to think it would not "discoverable under Rule 26(b)(1)." Similarly, paragraph (D) makes proportionality to "any anticipated or ongoing litigation" pertinent. Is that the same as the proportionality idea now introduced into 26(b)(1)? Does it include all the factors in 26(b)(2)(C)(iii) or 26(b)(1)?

International Assoc. of Defense Counsel White Paper (390): Although (e)(2) is illuminating and potentially helpful, it provides too tempting an opportunity for trial courts of varying judicial temperaments to bend the rule to achieve their own objectives instead of providing a bright line rule for litigants to understand and follow with confidence. The IADC recommends that the list of factors be eliminated, or at most included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts.

Hon. James C. Francis IV (395): Perhaps the most beneficial aspect of the proposed rule is the non-exclusive list of factors that courts are directed to use in assessing a party's conduct. Proposed (e)(2) makes clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect. Further, the factors properly encourage the parties to engage with one another with respect to preservation and to bring disputes that cannot be resolved informally to the court for resolution.

Hon. Shira Scheindlin (398): These factors reveal little or nothing about willfulness or bad faith. Rather, they are factors that assess the reasonableness of the conduct. This creates a disconnect. If the standard for the imposition of sanctions included negligence or gross negligence the factors would make sense. But as the rule is written now they are not helpful.

John Kouris (Defense Research Institute) (404): This list of factors is not helpful and should be deleted or, at most, included in the Committee Note rather than the rule text. What the rule should do is articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. The current, ill-defined boundaries of discovery drive over-preservation. The "anticipation of litigation" standard in particular causes real difficulties.

Stuart Delery (U.S. Dep't of Justice) (459): The Department strongly supports including the concept of proportionality, as is included in the current factors. Disputes about the proper scope of ESI discovery or recovery efforts often involve exponentially greater cost than comparable disputes involving paper documents. Too often the accusations of lost information,

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and expensive and time-consuming efforts to address or prepare for accusations, or to recover long-discarded emails, outweigh the value of the case. We recommend that the Note clarify that the scope of discovery a party anticipates should be consistent with the scope of Rule 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information" because some will claim a disconnect between the scope of information covered by this new rule and the scope of information that is otherwise available in discovery. We also think that factor (A) on foreseeability should be modified. The Department has confronted situations in which a party repeatedly "loses" data while claiming ignorance of its preservation obligations. We think that "was on notice" might not capture this situation, and that the rule should allow the court to take account of prior instances of the same or similar conduct by the party. We therefore propose that (A) be revised as follows:

- (A) the extent to which the party reasonably should have known ~~was on notice~~ that litigation was likely and that the information would be discoverable;

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): A few expressed support for the factors in (e)(2), but most supported revising them. A significant number favored substantially revising (e)(2) to remove the "laundry list," leaving the analysis flexible to be tailored for specific cases. One participant expressed the concern that the factors include many items that occur after the fact, which could result in gamesmanship. Factors (A) and (B) garnered the most support, and several argued that the rule should be limited to those alone. One participant also suggested collapsing the introductory language. Other factors drew criticism. (E) was said to be confusing and unhelpful, based on the ambiguity of the word "timely." The same thing was argued with respect to "proportional" in factor (D). Others argued that the list of factors should be made explicitly non-exhaustive.

Charles Ragan (494): With respect to the factors listed in (e)(2), I suggest that less would be more, and that the factors should be limited to:

- (A) the extent to which the party was on notice that litigation was reasonably likely and that the information would be relevant; and
- (B) the reasonableness of the party's efforts to preserve the information.

I think that proposed factors (C) through (E) are subsumed within the first two. I suggest adding "reasonably" to (A) to conform to the majority rule in case law for triggering legal hold obligations. I suggest the substitution of "relevant" for "discoverable" because the scope of relevance is elastic -- it can contract or expand, as claims are modified. In particular, there may be information the discoverability of which is not apparent when notice occurs that litigation is reasonably likely. A party should not be subject to sanctions if it secured the core information at the outset, but did not foresee the final configuration of the claims, and that information that is ultimately "discoverable" in regard to added claims but has been lost in the interim might lead to sanctions.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations) (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the

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information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that including the factors in the rule is a bad idea. It will encourage courts to place too much weight on the enumerated "checklist" elements while ignoring others, and might even erode the essential point that the imposition of extreme sanctions depends on a finding of actual bad faith. Beyond that, we unanimously and particularly object to Factor (C), for it portends sanctions for not "consulting" in response to a request to preserve information. The factor seems to assume that such consultation is always required. This factor should be eliminated even if the factors list is retained. We are also uncomfortable with Factor (E), for it seems to presume that it is the duty of the recipient of the request to go into court to have its decision what information to preserve confirmed.

James Heavner (The Hartford Financial Serv. Group) (748): This list is unnecessary and risk creating uncertainty in application if retained in the body of the rule. Several of the factors listed yield answers that do not contribute to the underlying issues.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We believe the factors in proposed 37(e)(2) are relevant and appropriate to be considered in assessing the reasonableness of a party's efforts to preserve information for use in litigation. This is one of the reasons we think the rule should apply to all types of information, not only electronically stored information. Those factors should be used for assessing preservations with regard to other types of evidence also.

Robert Kohn (Federal Bar Ass'n) (1109): By providing that whether a party timely sought the court's guidance on any unresolved disputes about preserving discoverable information, the amendment may lead to earlier and more economical case management to resolve preservation issues. More generally, the standards in the rule simplify the job of litigating and deciding a spoliation motion, and may lead to more compromises about these topics, thereby obviating applications to the court.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Including pre-suit consultation among the parties is tantamount to implicitly imposing a pre-suit obligation to meet and confer. That is unwarranted. My experience is that pre-suit letters demand that everything be preserved but the kitchen sink, and that nothing is gained by trying to negotiate the issues. But if there are to be factors, the Committee should considering adding a party's good faith in attempting to preserve information, the relevance and materiality of the information and the degree of prejudice or harm suffered because it was lost.

Denise Taylor (Assoc. of So. Cal. Defense Counsel) (1463): Making the adversary's efforts to communicate its preservation expectations part of the calculus for what is reasonable under the circumstances fosters cooperation, and may require it. "Adding a consideration of the proportionality of the preservation efforts to any anticipated or ongoing litigation is another helpful guideline, and it is in line with rule 26(b)(1). This reflects not only the wisdom of

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ensuring that litigation resources are not wasted, but also demonstrates the comprehensiveness and uniformity of the proposed rule amendments." Including attention to whether the court's guidance was sought will helpfully encourage parties to seek guidance from judges.

Gregory Cook (1464): (Supplementing testimony and responding further to questions raised during the hearing at which he testified.) I favor eliminating the factors. Judge Grimm asked what factors I would include and indicated a concern about a rule without any guidance. My main concern is that the failure to comply with these factors would be construed to mean bad faith. The factors emphasize reasonableness, which is a markedly less rigorous standard than bad faith. One solution might be to make the factors apply only to curative measures and not to sanctions. I am also concerned that the factors mix together pre-suit and post-suit matters. I also believe that "anticipation . . . of litigation" is uncertain for class actions. Finally, the factors refer to proportionality of the preservation efforts but not of the request to preserve.

William Butterfield (2034): I applaud the Committee's attempt to provide guidance on the factors used to assess whether a party's conduct was willful or in bad faith. But many have assailed proposed factor (C), which focuses on whether there was a preservation demand. I think that factor should remain in the rule. Those who complain about mentioning such communications also complain that they don't know what to preserve. This is inconsistent. These same objectors stress that they regard such letters as often overbroad, but the rule gives weight to the demands only if they are "clear and reasonable" and only if negotiations were conducted in "good faith about the scope of preservation."

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. We think that the Note on published factors (B) and (D) (regarding the reasonableness of efforts to preserve and proportionality) would benefit from further commentary that acknowledges the exponentially accumulating growth in the amount of data that institutional actors possess and control. There is a "generic acknowledgement" in the introductory Note material, but we favor greater emphasis with a link to these factors. The larger the corporate or organizational entity, the greater the difficulties faced in terms of its ability to manage data. This reality is a factor that should enter into any calculus of what constitutes "reasonableness." A Note could also mention advanced technologies that may be employed as an aid in preservation efforts (such as the use of email archiving with autocategorization). Thus, the Note on B might be augmented with something like: "Additional considerations might include the volume and complexity of the information subject to a preservation requirement, as well as the familiarity of the party with and its ability to employ advanced technologies in the aid of preservation."

David R. Cohen (2174): I think the factors should be retained. Judge Scheindlin is right that they seem to make more sense in a determination of negligence or recklessness than of bad faith, but I also believe that some courts may still find this non-exclusive list helpful when determining whether a party failed to preserve information that should have been preserved. Indeed, Judge Francis correctly notes that the salutary benefits of listing those factors include "making clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect."

David E. Hutchinson (2205): Factor (B) has a glaring problem because the rule does not provide any reference point for which technologies and/or management processes are relevant,

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emerging, or obsolete. And the amendment seems to place the onus on the court to make an informed decisions on these issues. But "proportionality" decisions need to be contextualized in the broader ESI landscape. Discovery rules and decisions are limited in their ability to guide when they are premised on a particular state of technological development. E-discovery under the current rules is problematic because the rules are tacked onto rules written for hard copy discovery. I therefore urge that the "proportionality" consideration include the following: "whether the discovery or preservation at issue involves a reasonably tailored protocol based on the available technologies for data management and the volume of data covered."

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): These factors should not be in the rule. Put this type of material in the Committee Note. On the other hand, the notion that the court must limit itself to the least severe sanction, now only in the Note, should be put into the rule itself.

Thomas Allman: Consider dropping (e)(2) from the rule. The provision is trying to do too much. The goal should be to write a good Committee Note. I am not happy with the factors beyond reasonableness and proportionality. Even if they do foster uniformity they are troubling.

Michael C. Rakower (N.Y. St. Bar Ass'n): The directive that the court use the least severe sanction should be in the rule, not just the Note.

Phoenix hearing

Robert Owen: Factor (C) is troublesome. It seems to invite blanket overbroad preservation demands. Particularly in the pre-litigation setting these are formless demands and provide no content from which the recipient can determine what really needs to be preserved.

Timothy Pratt (Federation of Defense Counsel): The "factors to be considered" should be eliminated from the rule. The discussion should be limited to the Note.

Paul Weiner (Littler, Mendelson): Factor (C) should include a 26(g) feature, making lawyers certify that their preservation demands are justified and not designed to impose costs on the other side.

Thomas Howard: The (e)(2) factors should be removed from the rule. Perhaps discussion should be included in the Note. The concern is that they will be applied uniformly and in a wooden manner. It might be said that consistency on application of the factors is to be avoided.

John Rosenthal: The factors should be revised along the lines recommended by Sedona. For one thing, any judicial "remedy" for loss of information should be proportional to the loss. For another, the rule should say that the court must use the least severe sanction.

Dallas Hearing

Michael Harrington (Eli Lilly & Co.): He is uncertain whether the adoption of proposed 37(e) would produce immediate or dramatic changes in his company's preservation practices. But he would look to the factors spelled out in the rule for guidance. So he likes the idea of

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having factors, although he is not entirely happy with all the factors that are in the proposed rule now.

William T. Hangley (ABA Section of Litigation leadership): As a general matter, the idea of having factors is useful and the factors included are useful. But factor C is not helpful. It seems to presume that failure to respond to such a demand is likely to produce trouble. But some demands are not worth answering, so the mere fact of not responding should not support negative actions. He also does not like Factor E. It does not take account of the fact that often these demands are delivered to nonparties or before litigation commences.

Gregory C. Cook: He does not favor the factors. Particularly with class-action litigation, Factor A presents great difficulties before suit is filed. Case law could develop to provide guidance in the way that the factors attempt to provide guidance. But if the list is retained, it will be regarded as an exclusive list, and rigidify the analysis.

Karl Moor (Southern Company): His company is a utility. The factors don't provide much guidance. You have to imagine the largest scope of plaintiff's claim. The proportionality test would help. But I have to help them build their case by informing them about our systems. So even though reasonableness and proportionality factors would help there would still be large burdens.

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7. Need to retain provisions of current Rule 37(e)

Lawyers for Civil Justice (267): Because proposed Rule 37(e) covers all of the conduct that the current rule does, LCJ believe that it is unnecessary to retain the current 37(e) language in the proposed rule.

Alex Jennings (294): I think existing 37(e) should be abrogated and completely replaced. The new rule appears to cover all situations in which the current rule would apply. Including the old rule might only serve to confuse lawyers as to when each part might apply, assuming it could be parsed. Additionally, the rule has been invoked only rarely, as the Committee notes. I think that is because it needs to be refined. If the original rule is retained, it might simply encourage courts to continue awarding sanctions for behavior that they deem to be exceptionable, sanctionable under other rules, or not result from good-faith operation.

Thomas Y. Allman (303) I was originally a proponent of targeted amendments to current Rule 37(e). But I have come to believe that the proposed rule is a superior formulation to support a "fresh start" on a meaningful national rule. It comprehensively occupies the spoliation sanction field to the exclusion of inherent sanctioning power. This provides a significant advantage over the current rule. As noted by Judge Sutton in *U.S. v. Aleo*, 681 F.3d 290, 310 (6th Cir. 2012), "a judge may not use inherent power to end-run a cabined power."

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that current Rule 37(e) need not be retained.

U.S. Chamber Institute for Legal Reform (328): If the Committee makes the changes proposed by the ILR to the proposed new rule, there is no need to retain current 37(e).

Doug Lampe (343) (Ford Motor Co.): Ford believes that there is no reason to retain the current provisions of Rule 37(e).

The Sedona Conference Working Group 1 (346): We believe that existing Rule 37(e) need not be retained if the amended rule adopts a good faith standard, as we have urged. But if the Committee retains the provision authorizing imposition of "curative measures" without regard to culpability or prejudice, we believe that the provisions of current 37(e) should be included lest the protection it currently provides be lost.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): It would be important to retain the current 37(e) provisions if proposed (B)(ii) is adopted. The current rule precludes the imposition of sanctions for the loss of ESI due to the routine, good faith operation of an electronic information system. Otherwise, parties who claim they have lost "any meaningful opportunity" to prosecute or defend a case as the result of the ordinary, good faith operation of an electronic information system will seek sanctions. If proposed (B)(ii) is not adopted, and if the standard for (B)(i) sanctions is limited to bad faith, there would seem to be no need for current 37(e).

David Kessler (407): The current rule should not be retained. As detailed by the Committee, the current rule has not been effective.

Mark S. Stewart (Ballard Spahr) (412): In practice, Rule 37(e) has not been widely

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applied and has done little to stem the tide of discovery sanctions that arise out of the failure to preserve data. It applies only in a very limited situation -- "good faith operation of an electronic information system" -- which has proven to be a nebulous and confusing standard for courts to apply. The rule does not take into account either the intent of the party or whether the loss prejudiced the receiving party.

Vickie Turner (450): We see no reason to retain current Rule 37(e). We agree that the amended rule is sufficient, and the proposed Committee Note clearly explains the robustness of the amended rule.

Stuart Delery (U.S. Dep't of Justice) (459): The Department does not support the proposed removal of current 37(e). Many Executive Branch agencies strongly believe that the current rule should remain and is a necessary protection. Unlike hard-copy documents, electronically stored documents can be generated in almost unlimited quantities and can eventually impose significant burdens in storage and maintenance. Essentially, the removal of 37(e) will suggest that discovery sanctions may be available simply as a result of the typical -- and economically necessary -- routine deletion of old electronic content. Such a revision seems to fail to accord with the realities of modern business and electronic communications. Although the revised rule seems to accommodate some of these concerns, it still leaves an important gap by allowing for sanctions in (B)(ii). Since a governmental entity will be unable to predict the full slate of future claims that may arise against it, this carve-out will work to undermine the safe harbor recognized in the remainder of the rule. Even though the Committee has made it clear that it intends (B)(ii) to be used only rarely, litigation about whether the exception to the required proof of willfulness or bad faith will undoubtedly arise in a much wider set of matters. The amended rule does not expressly provide a safe harbor for routine operation of a computer system. Although the case law is sparse on current 37(e), it is relied on when creating a document retention policy and has been used in litigation in negotiating resolution of discovery issues. Many of the Executive Branch agencies we have consulted do not support the removal of current 37(e). At a minimum, the Department suggests the following modification to (B)(ii):

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. Subsection (ii) does not apply to electronically stored information that is lost as a result of the routine, good faith operation of electronic information system before the anticipation or conduct of litigation.

Charles Ragan (494): I see no good reason to retain current 37(e). It was initial described as a "safe harbor," but barely served as a shallow cove.

Edwin Lowther, Jr. (629): Retaining the current provisions of 37(e) is unnecessary because the proposed rule covers all the conduct that the current rule covers.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that maintaining this provision would serve the salutary purpose of making clear that automated elimination of information is not sanctionable when it is not a product of bad faith. By the same token, the excision of the existing provision might lead some courts, somewhere, to conclude that the existing law is no longer the law.

Wendy Butler Curtis (Orrick) (864): The current rule should be retained because it provides important clarity that loss of information "as a result of the routine, good faith operation

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of an electronic information system" will not result in sanctions. That is a crucial point for honest litigants.

Philadelphia Bar Ass'n (995): We see no advantage to retaining the current rule, particularly since it actually runs counter to the more detailed and elaborate analysis under proposed 37(e)(1)(B)(i) and (ii). Retaining the current language would only serve to undermine the analytical processes at work in either of the sections and present a potential unintended "safe harbor" for parties seeking to avoid the type of diligent preservation efforts required under both sections.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no need to retain current 37(e). As the Advisory Committee has noted, it is invoked only rarely. The reason it has not been invoked is that it really does not address or answer the key questions. It is well settled at this point that a party faced with litigation cannot simply allow the continued operation of an electronic information system to result in the loss of relevant electronically stored information, but must impose a litigation hold. Current Rule 37(e) provides no guidance on when such steps must be taken, how broad they should be, etc. The proposed rule provides at least a framework for evaluating the reasonableness of the decisions a party has made in answering those questions, and therefore is a useful step forward.

P. David Lopez (EEOC) (1353): EEOC believes that current 37(e) should not be retained.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): If the changes AICPA recommends are made in the rule, there would no need to retain the current provisions. If those changes are not made, retaining something in the rule that makes clear that loss of information due to the routine good-faith operation of an electronic-information system is not sanctionable is a good idea. Although the Note saying that nothing protected by the current rule should be subject to sanctions under the amended rule, the various interpretations of "willfulness" in court opinions raise concerns.

New York County Lawyers' Ass'n (2072): It would be a mistake to retain current 37(e) as it would run counter to the analysis under the revised rule. Retaining the current rule would perpetuate the practice of "defensive preservation" and lead to continued spoliation/sanction battles. As Judge Scheindlin has said, the current rule "is the flip side of a safe harbor. It says if you don't put in a litigation hold when you should, there's going to be no excuse if you lose information. That's how I read 37(e). It says you are only excused if this was lost as a result of a routine, good-faith effort to destroy records." Panel Discussions, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 Fordham L. Rev. 1, 30-31 (2009).

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8. Limiting rule to electronically stored information

Lawyers for Civil Justice (267): The rule should apply to all types of discoverable information. A single standard is vastly superior to having two separate standards. For one thing, distinguishing between ESI and physical evidence is likely to become more complicated in the future.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information (not just electronically stored information).

Alex Jennings (294): The rule should continue to be limited to electronically stored information. The rules are still struggling to catch up with the volume of material that companies and individuals store electronically, which is the main reason the sanctions issue is a preoccupation for lawyers. Until we find a way to store everything forever in a way that doesn't completely overload the discovery system as well as the storage system, I think that this proposed rule uses a fair standard for ESI. There are other mechanisms already in the rule that allow for proper handling of sanctions in relation to other material. Rule 37(e) does not need to be expanded in this way to give judges another way to assign sanctions with regard to non-electronic materials.

Jonathan Smith (NAACP Legal Defense Fund) (310): LDF recommends that, if it is adopted, new Rule 37(e) be limited to electronically stored information. There are unique costs and challenges associated with that information, particularly as to preservation and spoliation, justify continuing to limit 37(e) (as currently limited) to electronically stored information. Given that these amendments to 37(e) are substantial, it may be best first to limit their effect to electronically stored information.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the rule should not be limited to loss of electronically stored information, but should apply to all discoverable information.

U.S. Chamber Institute for Legal Reform (328): The rule should not be limited to electronically stored information. Having separate rules for electronically stored information and other evidence will create confusion for litigants. Because the proposed rule sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): Along with dropping (B)(ii), it would be desirable to focus the rule on discoverable "information." As defined in Rule 34(a), that includes (A) any designated documents or electronically stored information, and (B) any designated tangible things. But it might suffice if (B)(ii) were limited to the latter -- excluding not only electronically stored information but also documents. In his ongoing study of current spoliation cases, fully 90 to 95% deal only with documents and electronically stored information, not tangible things. This would greatly assist in pre-litigation efforts, and minimize over-preservation.

Doug Lampe (343) (Ford Motor Co.): Ford does not see a principled basis for distinguishing among different types of discoverable evidence based on the manner in which it is stored. A single standard applicable to all evidence would encourage consistency from courts in

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addressing motions for sanctions and provide better guidance to parties.

The Sedona Conference Working Group 1 (346): We do not believe that the rule should be limited to electronically stored information. The issues arise equally with preservation of hard copy documents and other tangible things. Many litigated matters involved significant quantities of hard copy documents, and their preservation should be treated consistently. Moreover, future technologies might involve storage we would not consider "electronic."

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): The rule should not be so limited. ESI may be the biggest issue in discovery today, but the destruction or loss of documents and tangible things is just as important as the destruction or loss of ESI. Limiting the rule to loss of ESI would suggest that there can be different standards for the imposition of sanctions for the loss of other sorts of evidence, leading to divergent rulings from court to court on issues such as whether sanctions can be imposed if the loss of physical evidence is due to negligence. A uniform rule would promote certainty and reduce the likelihood of unproductive satellite litigation.

David Kessler (407): The rule should not be limited to electronically stored information. Not only is a single standard easier to follow and enforce than multiple standards, but there is no principled reason to differentiate between the spoliation of electronic and paper documents.

Vickie Turner (450): We do not think the rule should be limited to electronically stored information. A uniform standard applicable to all evidence would be best. The distinction is murky at best and should not be introduced into the rule.

Stuart Delery (U.S. Dep't of Justice) (459): If a spoliation rule is promulgated, it should apply equally to electronic documents, paper, and tangible things. The Note should make the scope of application clear. There is a risk that divergent, complicated, and confusing spoliation case law will develop if the rule does not apply equally to all potential evidence. Cases almost always include a mixture of electronic information and documents/objects in other forms. The rules should not provide that a party who diligently saves its email on the one hand, but shreds key hard-copy notes on the other to be treated differently depending on the form of the information lost.

Federal Magistrate Judges' Ass'n (615): The FMJA believes that the rule should not be limited to loss of ESI, but should extend to all discoverable information. Different standards for failure to preserve ESI and failure to preserve other discoverable information would almost certainly generate substantial motion practice about the practical differences between ESI and other discoverable information.

Edwin Lowther, Jr. (629): The rule should adopt one clear standard applicable to all types of discoverable information.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): The rule should not be limited to ESI. The obligations to preserve ESI and other information should not be different. This will become more true as the line between ESI and other documents blurs and transforms.

James Heavner (The Hartford Financial Serv. Group) (748): A unitary standard is the

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most appropriate architecture for the rules going forward. We see no distinction between paper and electronic documents when it comes to defining core preservation obligations. And applying the rule to all preservation would make for more efficient judicial policing.

Philadelphia Bar Ass'n (995): The impetus for the proposed changes to the rules is clearly electronically stored information, but there is a virtue to applying uniform standards to all spoliation issues. Although existing case law is likely adequate to deal with most non-ESI spoliation issues, the factors delineated in proposed Rule 37(e)(2) should prove helpful in assessing the reasonableness or fault surrounding the preservation of all discoverable material. In addition, although dropping proposed 37(e)(1)(B)(ii) might make sense if the rule were limited to ESI, we think that, on balance, the interests in uniformity justify wider application of the rule.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no reason why the principles set out in the proposed rule are not equally applicable to any issue regarding failure to preserve evidence.

P. David Lopez (EEOC) (1353): EEOC believes that the rule should cover all discoverable information.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): There would be no benefit to limiting proposed 37(e) to ESI. Although the costs of preservation may be greater with respect to electronic data, there is no reason to think that these harms are unique to that context. Furthermore, the rule's displacement of inherent authority should not be confined to ESI.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ is opposed to this rule. But if the Committee nevertheless goes forward, AAJ strongly believes that it should not expand the rule to all discoverable information but instead limit the rule to ESI. ESI is the source of the problems the Committee has focused upon, and should be the focus of the rule also.

Washington D.C. Hearing

Thomas Allman: One way to deal with the problem presented by the current inclusion of (B)(ii) is to limit the rule so that cases like Silvestri are excluded from it. But distinguishing between "electronically stored information" and "documents" is unlikely to work. Perhaps a better way would be to exclude "tangible things." Those are treated as a separate category in Rule 34, and seem to be distinct in the sense that they are likely to be the sorts of things that might be so central as to justify sanctions in the absence of willfulness or bad faith.

Phoenix hearing

Thomas Howard: The rule should not be limited to ESI.

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9. Additional definition of "substantial prejudice"

Lawyers for Civil Justice (267): Yes. The standard should be that the information is material to claims and defenses. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y.) at *4 FN 48.

Alex Jennings (294): I think a further definition would be helpful. The Committee even observes that prejudice in this part of the rule need not be as cataclysmic as the prejudice that would justify sanctions under other parts of the rule. A definition might look like: "substantial prejudice -- such that it results in the party being unable to present its case successfully, prevents it from substantiating its claim, or results in unfair dismissal of its claim"

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section sees no reason to define "substantial prejudice" any further. It will always be context specific. The report cites a number of examples of judicial handling of this issue.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that an additional definition of "substantial prejudice" is important.

U.S. Chamber Institute for Legal Reform (328): Yes a definition would help ensure a national uniform standard. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. For example, one court says the standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the claim] or defense." Sekisui Am. Corp., 2013 WL 4116322, at *4. But "substantial prejudice" should be defined as a more stringent standard, that the loss of information is somehow material to a party's claims or defenses.

Doug Lampe (343) (Ford Motor Co.): Courts would benefit from additional guidance regarding this term. The courts should be reminded that meeting this factor requires demonstration of a direct and meaningful impairment of a party's ability to advance a claim or defense.

The Sedona Conference Working Group 1 (346): We support the Committee effort to require that a party seeking sanctions show that it has been seriously prejudiced in its ability to prove its case. But we believe that the rule should make clear that sanctions are allowed only if the party was materially hindered in presenting or defending against the claims in the case. For that reason, the rule should specify that a party is not substantially prejudiced where the lost relevant information has not materially prevented a party from presenting or defending against the claims. We also believe it is important that the rule state that the sanctions motion must be timely, a requirement that is currently absent from the proposed rule.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We do not believe that any further definition is necessary. Judges routinely exercise their discretion to decide issues of prejudice. Prejudice may arise in myriad factual scenarios, and a rule defining what constitutes prejudice might inadvertently exclude situations in which true prejudice exists that do not strictly fall within the definition. The availability of alternative sources of the information and the importance of the lost information are rather obvious factors to be considered in assessing

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prejudice, and incorporating them in the rule appears superfluous.

David Kessler (407): Yes, there should be such a definition, though this conclusion is tied in with how the Committee addresses "willfulness or bad faith" in (B)(i). Although "substantial prejudice" is not easy to define, there are some things it is not. It must be more than just prejudice, which means that it must be more than merely relevant, even if it was supportive of the requesting party's case. Thus, the standard used in *Sekisui* ("a reasonable trier of fact could find that [the lost evidence] would support [the] claim or defense") is too low. Substantial prejudice should mean that the requesting party is materially impaired in prosecuting its claims or defenses due to the destruction of the evidence, because no other similar evidence of a similar kind and character is available.

Vickie Turner (450): We favor adding a definition, and propose that "substantial prejudice" "equates to significant harm to a party's ability to advance a material claim or defense."

Stuart Delery (U.S. Dep't of Justice) (459): We believe there should be an additional definition in the rule. We proposed a new 37(e)(3) as follows:

- (3) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:
 - (A) The availability of reliable alternative sources of the lost or destroyed information;
 - (B) the materiality of the lost information to the claims or defenses in the case.

This proposed rule language is consistent with the Committee's intent to have reasonableness incorporated into a court's preservation analysis. This language provides the appropriate and explicit framework for the court's analysis, and provides parties with clear guidance on what elements of prejudice must exist before they consider filing a motion for sanctions. This language also helps the court focus on the actual harm to the requesting party.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "substantial prejudice."

Edwin Lowther, Jr. (629): The rule should provide a definition to clarify when substantial prejudice exists, and it should be tied to materiality of the information to claims and defenses in the case.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We do not believe that an additional definition is necessary. Judges will consider all factors relevant to the circumstances. Enumerating factors risks overemphasizing the listed factors and devaluing legitimate factors that do not happen to be included in the list.

James Heavner (The Hartford Financial Serv. Group) (748): We support including an additional definition, and think a focus on materiality to claims and defenses is warranted.

Philadelphia Bar Ass'n (995): An additional definition of this phrase does not, in the

Summary of Rule 37(e) Comments

unanimous view of the Association, appear necessary. The variety of factual backgrounds in cases does not seem to allow for such a definition. The requirement of willful or bad faith conduct, coupled with the five factors set forth in proposed 37(e)(2), while not exclusive, seem to provide helpful measures for determining the gravity of the arguably sanctionable conduct. The extent of harm to a litigant's case can only be assessed in the context of the particular claim or defenses allegedly impaired by the fact-specific degree of preservation failure and its causes. Like Justice Stewart's definition of pornography, the court will know it when it sees it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

Summary of Rule 37(e) Comments

10. Additional definition of "willfulness or bad faith"

Lawyers for Civil Justice (267): The standard in proposed 37(e)(1)(B)(i) could define "willful" to require scienter or knowledge. See, e.g., *Micron Tech, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests); *Vadusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his wilful conduct resulted in its loss or destruction"); *Goodman v. Praxair Serv., Inc.*, 632 F.Supp.2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction). In short, willfulness should be defined to include an element of malice. Doing so would make it clear that sanctions are limited to acts executed in bad faith.

Alex Jennings (294): I don't think any additional definition of willfulness or bad faith is required. Courts are familiar with these concepts and the application of them. An additional definition could lead to situations in which they are applying criteria they are not acquainted with.

Thomas Y. Allman (308): The term "willful" would benefit from clarification. The rule could specify the necessity of showing that the conduct was undertaken for the purpose of hiding adverse information or a similar formulation showing purposeful conduct. Connecticut has already done so. Two other viable options are (1) delete the "willfulness" category entirely, or (2) insert "and" for "or" and require that both elements ("willfulness" and "bad faith") be proven.

Malini Moorthy (Pfizer) (327): Pfizer believes that the standard should require a finding that the loss of information was willful and in bad faith. If that is not done, it believes that an additional definition of willfulness would be helpful.

U.S. Chamber Institute for Legal Reform (328): Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith, such as pursuant to a routine document preservation system. Sanctions should be allowed only when the party acted knowing that it had a duty to retain the information.

Doug Lampe (343) (Ford Motor Co.): Willfulness, standing alone, should not be a sufficient basis for imposing sanctions. If the Committee nevertheless retains it in the disjunctive, it should be clarified that it means purposeful intent to preclude the availability for use in litigation. Millions of documents are destroyed "willfully" every day, but it is only pertinent to the discovery process if the documents were willfully destroyed in apprehension of litigation.

The Sedona Conference Working Group 1 (346): Sedona recommends that the rule should speak in terms of whether the party "did not act in good faith" rather than relying on either willfulness or bad faith. Using "willful or bad faith" risks having courts impose sanctions for negligent or grossly negligent conduct. Additionally, emphasizing good faith would prompt development of a set of factors that incentivize good behavior. But if the Committee is not willing to make this change, we encourage that it clarify that its culpability standard requires a finding that the alleged spoliating party acted with "specific intent" to deprive the opposing party

Summary of Rule 37(e) Comments

of material evidence relevant to the claims or defenses. We have rejected the false distinction between curative measures and sanctions. Our standard should apply to all measures adopted to respond to failure to preserve.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that the only standard of culpability for the imposition of sanctions should be bad faith, which should be defined to mean "taken with the intent to destroy or delete potentially relevant evidence or in a reckless disregard of the consequences of the party's actions." As a suggestion, we propose that "willful" be deleted but that after "bad faith" the following be added: "that is, were taken with intent to destroy or delete potentially relevant evidence or in reckless disregard of the consequences of the party's actions." This change would accomplish three things: (1) it would eliminate the terribly ambiguous concept of "willfulness"; (2) it would provide a uniform standard that should be easily understood by lawyers, judges, litigants, and witnesses; and (3) it would make clear that the sanctions provided are not to be imposed on a showing of negligence. It is the same as the standard advanced by the Leadership of the ABA Section of Litigation in a letter dated March 13, 2013, to Judge Campbell.

David Kessler (407): Yes, this is the single most important thing the Committee could do to improve the amendment. The standard should be that loss of information is "willful" if it is "the intentional destruction of evidence for the purpose of depriving an opponent or the Court of the evidence." This standard runs closest to the purpose of sanctions and goes furthest in preventing preservation and spoliation being used as weapons in discovery.

Vickie Turner (450): We recommend that both willfulness and bad faith be required. Defining both terms will be necessary to provide clarity. We suggest defining "willful" and "bad faith" to include an element of intent to preclude availability of evidence for use in litigation, as well as knowledge of wrongdoing. The definition should say that only obstructionist efforts plainly meant to gain an unfair advantage in litigation are sanctionable.

Stuart Delery (U.S. Dep't of Justice) (459): We agree with others who have urged clarification for (B)(i). We suggest that "willful" and "bad faith" be defined to require purposeful, harmful intent. One way to do that would be to change the rule to "willful and in bad faith." Spoliation sanctions should not be issued if a party did not take purposeful, intentional action to destroy information. Parties will nevertheless take care to preserve information absent the threat of sanctions because curative measures can also be burdensome, costly, and affect case strategy. Other preservation obligations may also exist, and parties have their own needs to preserve evidence to use to prove their own cases. In addition, the rule should encourage good information management practices in their normal IT operations.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "willfulness or bad faith."

Edwin Lowther, Jr. (629): The rule should include some language making it clear that good faith but intentional acts are not cause for spoliation. "Willful" should be defined to include an element of scienter.

Philadelphia Bar Ass'n (995): We do not recommend an additional definition for "willfulness." It clearly imports intentional conduct and is explicit in its meaning. We do, however, perceive some ambiguity in the term as used in relation to potentially sanctionable

Summary of Rule 37(e) Comments

behavior. If a party intentionally disposes of ESI in the ordinary course of business, is that "willful" conduct under the rule, or must the party act for the purpose of preventing discovery? This could be clarified in the Note. We do not recommend a specific definition of "bad faith," given the wide variety of contexts to which the rule might apply. We do, however, think that the Note could refer to the types of sanctionable conduct contemplated so as to provide guidance.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that the term "willful" should be deleted. But we believe that courts have substantial experience interpreting the concept of bad faith, and that a further definition is not needed.

James Heavner (The Hartford Financial Serv. Group) (748): We believe the conjunction should be "and," not "or." This would relieve uncertainty about the meaning of "willful."

Phoenix hearing

Robert Owen: The definition should be the one offered by Sedona -- an intent to deprive the adverse party of evidence.

Timothy Pratt: Willful should be defined. He favors the Sedona definition. It's not clear that "willful and bad faith" is different from just saying "bad faith."

David Howard (Microsoft): We favor the Sedona definition of willful.

Thomas Howard: Willfulness should be defined. He favors the Sedona definition.

Robert Hunter: The rule should define willfulness as destroying information with knowledge that it will impact a claim.

I.C. ABROGATE RULE 84 AND OFFICIAL FORMS; AMEND RULE 4(d)

The Committee recommends approval for adoption of the proposal to abrogate Rule 84 and the official forms that was published last August. It further recommends approval of the parallel proposal to transfer present Forms 5 and 6 to become incorporated in the Rule 4(d) provisions for requesting a waiver of service.

Abrogation is recommended in large part because this Committee has not been able to spare any significant share of its agenda for regular review and potential revision of the official forms. Any careful discharge of this task would demand much time that should not be diverted from more important tasks.

A secondary consideration has been the tension that may be found between the forms and modern pleadings standards. The forms were initially adopted in 1938, and later made sufficient under the Rules, to illustrate the simplicity and brevity originally contemplated by the pleading rules. Functioning as simple pictures, they played that role well. The original concept of notice pleading came to be well understood, but developments in motions to dismiss under Rule 12(b)(6), Rule 11 requirements, modern statutory causes of action and pleadings requirements, Supreme Court decisions on the requirements of Rule 8, and a general increase in the complexity of litigation now lead most lawyers to plead far more than the minimum thresholds illustrated by the forms. There is serious ground to wonder whether the pleading forms could be revised in a way that would assist lawyers in pleading modern causes of action. Part of the uncertainty lies in extrapolating from the narrow subjects illustrated by most of the forms to the many and frequent types of litigation that have no representation in the forms. And some of the uncertainty lies in determining whether a single form could be crafted to address the wide variety of factual circumstances that might arise with respect to any particular type of claim, such as patent infringement. Developing a suitable generic form complaint for patent infringement could prove surprisingly difficult, to say nothing of the need to confront or sidestep the risks that a form for direct infringement might inadvertently affect a complaint for contributory infringement or the like.

The Committee has been concerned that most of the opposition to abrogation springs from the academic community. Much of the opposition ties to continuing unease over the direction of contemporary federal pleading standards. Some of the opposition is expressed by arguing that the Enabling Act process is not satisfied by simply publishing a proposal to abrogate Rule 84 and the official forms. On this view, each form has become an integral part of the rule it illustrates. Abrogating a form effectively amends the rule as well. So to abrogate the pleading forms, for example, the Enabling Act requires publication of each pleading rule that relates to each form.

The Committee believes that the publication actually made, with the full opportunity to comment, satisfies the Enabling Act. The opportunity to comment has been seized, as evidenced by the comments received on the Rule 84 proposal.

The Committee also believes that abrogation is still the best course. Weighing the competing concerns against the reasons for proposing abrogation, abrogation is appropriate.

1 **Rule 84. Forms**

2 **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**

3 ~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity~~
4 ~~that these rules contemplate.~~

1 **Committee Note**

2 Rule 84 was adopted when the Civil Rules were established in 1938 “to indicate, subject to
3 the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.”
4 The purpose of providing illustrations for the rules, although useful when the rules were adopted,
5 has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for
6 forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix
7 of Forms are no longer necessary and have been abrogated.

8 **Gap Report**

9 No changes were made after publication.

APPENDIX OF FORMS

[Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]

1 **Rule 4. Summons**

2 * * *

3 **(d) Waiving Service.**

4 **(1) *Requesting a Waiver.*** * * * The plaintiff may notify such a defendant that an action
5 has been commenced and request that the defendant waive service of a summons. The notice
6 and request must: * * *

7 **(C)** be accompanied by a copy of the complaint, 2 copies of ~~a~~ the waiver form
8 appended to this Rule 4, and a prepaid means for returning the form;

9 **(D)** ~~inform the defendant, using text prescribed in Form 5~~ the form appended
10 to this Rule 4, of the consequences of waiving and not waiving service;

11 * * *

12 ~~Form 5-~~Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

13 (Caption—~~See Form 1.~~)

14 To (*name the defendant or — if the defendant is a corporation, partnership, or association — name*
15 *an officer or agent authorized to receive service*):

16 **Why are you getting this?**

17 A lawsuit has been filed against you, or the entity you represent, in this court under the
18 number shown above. A copy of the complaint is attached.

19 This is not a summons, or an official notice from the court. It is a request that, to avoid
20 expenses, you waive formal service of a summons by signing and returning the enclosed waiver.
21 To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least*
22 *60 days if the defendant is outside any judicial district of the United States*) from the date shown
23 below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along
24 with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may
25 keep the other copy.

26 **What happens next?**

27 If you return the signed waiver, I will file it with the court. The action will then proceed as
28 if you had been served on the date the waiver is filed, but no summons will be served on you and
29 you will have 60 days from the date this notice is sent (see the date below) to answer the complaint
30 (or 90 days if this notice is sent to you outside any judicial district of the United States).

31 If you do not return the signed waiver within the time indicated, I will arrange to have the
32 summons and complaint served on you. And I will ask the court to require you, or the entity you
33 represent, to pay the expenses of making service.

34 Please read the enclosed statement about the duty to avoid unnecessary expenses.

35 I certify that this request is being sent to you on the date below.

36 (~~Date and sign—See Form 2.~~)

37 Date: _____

38 _____
39 (Signature of the attorney
40 or unrepresented party)

41 _____
42 (Printed name)

43 _____
44 (Address)

45 _____
46 (E-mail address)

47 _____
48 (Telephone number)

49 ~~Form 6:~~ Rule 4 Waiver of the Service of Summons.

50 (Caption — See Form 1.)

51 To (name the plaintiff's attorney or the unrepresented plaintiff):

52 I have received your request to waive service of a summons in this action along with a copy
53 of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy
54 of the form to you.

55 I, or the entity I represent, agree to save the expense of serving a summons and complaint
56 in this case.

57 I understand that I, or the entity I represent, will keep all defenses or objections to the
58 lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the
59 absence of a summons or of service.

60 I also understand that I, or the entity I represent, must file and serve an answer or a motion
61 under Rule 12 within 60 days from _____, the date when this request was sent
62 (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be
63 entered against me or the entity I represent.

64 (Date and sign — See Form 2.)

65 Date: _____

66 _____
67 (Signature of the attorney
68 or unrepresented party)

69 _____

70 (Printed name)

71 _____

72 (Address)

73 _____

74 (E-mail address)

75 _____

76 (Telephone number)

77 (Attach the following to ~~Form 6~~)

78 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

79 Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in
80 saving unnecessary expenses of serving a summons and complaint. A defendant who is located in
81 the United States and who fails to return a signed waiver of service requested by a plaintiff located
82 in the United States will be required to pay the expenses of service, unless the defendant shows good
83 cause for the failure.

84 “Good cause” does *not* include a belief that the lawsuit is groundless, or that it has been
85 brought in an improper venue, or that the court has no jurisdiction over this matter or over the
86 defendant or the defendant’s property.

87 If the waiver is signed and returned, you can still make these and all other defenses and
88 objections, but you cannot object to the absence of a summons or of service.

89 If you waive service, then you must, within the time specified on the waiver form, serve an
90 answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and
91 returning the waiver form, you are allowed more time to respond than if a summons had been
92 served.

93 (~~Date and sign—See Form 2.~~)

1 Committee Note

2 Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be
3 directly incorporated into Rule 4.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

APPENDIX OF FORMS

[Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]

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6 The notice and request must: * * *

7 **(C)** be accompanied by a copy of the complaint, 2 copies of the waiver form
8 appended to this Rule 4, and a prepaid means for returning the form;

9 **(D)** inform the defendant, using the form appended to this Rule 4, of the
10 consequences of waiving and not waiving service;

11 * * *

12 **Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.**

13 (Caption)

14 To *(name the defendant or — if the defendant is a corporation, partnership, or association — name*
15 *an officer or agent authorized to receive service)*:

16 **Why are you getting this?**

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18 number shown above. A copy of the complaint is attached.

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20 expenses, you waive formal service of a summons by signing and returning the enclosed waiver.

21 To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least*
22 *60 days if the defendant is outside any judicial district of the United States*) from the date shown
23 below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along
24 with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may
25 keep the other copy.

26 **What happens next?**

27 If you return the signed waiver, I will file it with the court. The action will then proceed as
28 if you had been served on the date the waiver is filed, but no summons will be served on you and
29 you will have 60 days from the date this notice is sent (see the date below) to answer the complaint
30 (or 90 days if this notice is sent to you outside any judicial district of the United States).

31 If you do not return the signed waiver within the time indicated, I will arrange to have the
32 summons and complaint served on you. And I will ask the court to require you, or the entity you
33 represent, to pay the expenses of making service.

34 Please read the enclosed statement about the duty to avoid unnecessary expenses.

35 I certify that this request is being sent to you on the date below.

36 Date: _____

37 _____
38 (Signature of the attorney
39 or unrepresented party)

40 _____
41 (Printed name)

42 _____
43 (Address)

44 _____
45 (E-mail address)

46 _____
47 (Telephone number)

48 Rule 4 Waiver of the Service of Summons.

49 (Caption)

50 To (*name the plaintiff's attorney or the unrepresented plaintiff*):

51 I have received your request to waive service of a summons in this action along with a copy
52 of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy
53 of the form to you.

54 I, or the entity I represent, agree to save the expense of serving a summons and complaint
55 in this case.

56 I understand that I, or the entity I represent, will keep all defenses or objections to the
57 lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the
58 absence of a summons or of service.

59 I also understand that I, or the entity I represent, must file and serve an answer or a motion
60 under Rule 12 within 60 days from _____, the date when this request was sent
61 (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be
62 entered against me or the entity I represent.

63 Date: _____

64 _____
65 (Signature of the attorney
66 or unrepresented party)

67 _____
68 (Printed name)

69 _____
70 (Address)

71 _____
72 (E-mail address)

73 _____
74 (Telephone number)

75 (Attach the following)

76 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

77 Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in
78 saving unnecessary expenses of serving a summons and complaint. A defendant who is located in

79 the United States and who fails to return a signed waiver of service requested by a plaintiff located
80 in the United States will be required to pay the expenses of service, unless the defendant shows good
81 cause for the failure.

82 “Good cause” does *not* include a belief that the lawsuit is groundless, or that it has been
83 brought in an improper venue, or that the court has no jurisdiction over this matter or over the
84 defendant or the defendant’s property.

85 If the waiver is signed and returned, you can still make these and all other defenses and
86 objections, but you cannot object to the absence of a summons or of service.

87 If you waive service, then you must, within the time specified on the waiver form, serve an
88 answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and
89 returning the waiver form, you are allowed more time to respond than if a summons had been
90 served.

RULE 84: OFFICIAL FORMS: RULE 4 FORMS

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The proposal to abrogate all the forms will certainly help the problems caused by Form 18 for patent litigation. Rule 8 should reflect the new plausibility standard more directly.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports all aspects of the proposal. Doing nothing is unattractive, since "[i]n certain instances, the forms are no longer satisfactory." Devoting the work required to make the forms attractive and to keep them attractive "would require a substantial commitment without a substantial benefit, in light of the understanding that the Official Forms are not widely used." Abandoning the enterprise seems better, particularly given the availability of alternative sources of high-quality forms, including the Administrative Office. Notice pleading is now well understood, as modified to require something more than the pleading forms seem to require. And the choice to convert present Forms 5 and 6 to become forms attendant to Rule 4 is an "elegant solution."

342, Stephen C. Yeazell: The Forms have taught lawyers that pleadings can, and should be, simple. "That many lawyers eschew simplicity does not seem a good reason for failing to encourage it." Abrogation could be desirable, but only if it is prelude to a project to develop new forms "as a means of providing substantive guidance to litigants who must navigate current pleading doctrine, including *Twombly* and *Iqbal* — a move that, from the rest of the proposals, seems not to be on the Committee's agenda."

389: Professor Yeazell adds a post-script urging that Forms 1 through 6 be retained "clear and uniform." They are directed to members of the public, "some of whom will not have retained counsel." Incorporating Forms 5 and 6 as appendices to Rule 4 is fairly clumsy, at odds with the elegance of the Style Project. Keep them, at least, as they are.

383, Alan B. Morrison: Some of the Forms are outmoded, and their original purpose has been fulfilled. "But they still continue to serve as reminders as to how the Rules, especially Rule 8, should be interpreted." It would be good to arrange to have the Administrative Office forms included in publications of the rules.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves the Rule 84 and Forms proposals without further comment.

453, A. Benjamin Spencer: Professor Spencer opposes the amendment of Rule 84 and abolition of the Forms. Rather than abandon the forms, they should be updated and elaborated with additional examples that might give litigants more guidance. At a minimum, they should not be yoked to the monumental discovery proposals that have distracted attention from this important topic.

The forms provide a template for the uninitiated, both the pro se litigant and the novice practitioner. They "provide interpretive guidance to courts and practitioners seeking to understand the meaning of the federal rules," as Judge Clark so clearly pointed out. And they "provide a source for challenging wayward interpretations of the rules by courts." Form 30, for example, demonstrates that the *Twombly* and *Iqbal* pleading standards should not be extended to affirmative defenses. Finally, Rule 84 is the only rule after Rule 1 that serves a normative, hortatory function in encouraging simplicity and brevity. 648, Elise E. Singer: Joins this comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal, including

the adoption of present Forms 5 and 6 into Rule 4 to "serve the important interest of encouraging waivers of service of process in appropriate cases."

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

493, Jonathan R. Siegel, subscribed by 109 more legal academics: Rule 84 and the Forms should not be abrogated. (1) *Twombly* and *Iqbal* "have revived discredited and imprecise fact pleading." No one knows how to plead to satisfy them, even in a simple slip-and-fall case. (2) The point of the Forms is not to provide samples to be used by lawyers — no one uses them — but "to indicate to *judges* how simple and brief pleadings can be." That requires that the forms be official and suffice under the rules. (3) The suggestion that there is a tension between the Forms and emerging pleading standards "is a polite way of saying that the courts are violating the Federal Rules," at least if they dismiss a complaint that Rule 84 proclaims sufficient. 499, Beth Thornburg: Makes substantially the same arguments, and endorses the Siegel comment.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, and also endorses appending present Forms 5 and 6 to Rule 4.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The proposal rests on "casual empiricism and self-evident bias." The Committee began believing that no one uses the Forms, then selected a number of unidentified lawyers who confirmed the Committee's belief. (2) The memorandum prepared for the Committee shows the lower courts have struggled with the task of reconciling the *Twombly* and *Iqbal* decisions with the Forms. To rely on the "tension" between the Forms and plausibility pleading "resolves a question that the Committee has yet to fully consider." "This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process * * *." Abandoning the forms will effectively shut the door on reform of the pleading rules. (3) It is self-contradictory to assert that the original purpose of the Forms has been fulfilled and at the same time to describe a tension between the Forms and plausibility pleading. 2078, Judith Resnik for 170 added law professors: supporting this comment.

711, Eric Holland: "[W]hen I began to practice in 1991 and began to draft federal court pleadings, I often referred to the forms," including the form complaint for FELA actions. Throwing open the universe of other forms "will only cause confusion and chaos, not the certainty that the FRCP should stand for."

837, R. Seth Crompton: Form 13 shows that the proposed changes are a drastic departure from notice pleading and are designed to codify *Twombly* and *Iqbal*. There is an inherent contradiction in giving corporate entities less discovery and a heightened pleading standard.

915, Andy Vickery: Abrogating Rule 84 "is a travesty wreaked by *Twiqbal*." Rule 8(a)(2)'s "short and plain statement" "is now a farce from bygone days."

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position. The Association could not reach a consensus, indeed was greatly fragmented. (1) A lengthy statement opposing abrogation of Rule 84 observes that whatever tension there may be between the pleading reforms and *Twombly* and *Iqbal* does not arise from any form addressing antitrust claims or official-immunity cases. Much of the tension arises from Form 18, a complaint for patent infringement; that can be addressed by modifying or repealing Form 18. The AO has not provided pleading forms. Only anecdotal evidence supports the claim that the forms are not used by attorneys or

pro se litigants; arguably they continue to serve a useful function when employed by pro se litigants or attorneys. The forms have been successful for 75 years, belying the argument that it will take too much work to maintain them. If it is premature to take sides in the developing pleading standards, it is premature to abolish the Forms. (2) A lengthy statement supporting abrogation argues that the choice is between revising the forms or abandoning them. The Committee choice to abandon them should be supported. "[M]ost lawyers are not aware of the pleading forms and even fewer utilize them." "There is no evidence that the forms are used on more than rare occasions, and most lawyers in this Association were unaware of Rule 84 or the forms." Many of the Forms contain labels and conclusions, contrary to current pleading standards; the Forms and the standards conflict in some cases. Courts are split on the approach to reconciliation; most judges find the two standards cannot be reconciled. "The evolution of case law interpreting Rule 8(a) can proceed without Rule 84." Study of Rule 8, and possible amendments, would not be affected by abrogating Rule 84.

1219, John Leubsdorf: "We need more guidance, not less." Rather than force the courts and litigants to endure years of efforts to establish new pleading standards in the wake of Twombly and Iqbal, the Committee should undertake to devise form complaints for "newer kinds of claims." If need be to conform to emerging pleading standards, the current forms should be revised. "The labor and disagreement that could accompany the forging of new forms would help avoid the much greater burdens of trying to resolve that disagreement in court after court until a new consensus emerges." The Forms can provide invaluable guidance to lawyers and judges, and also to law professors and students. The Committee should undertake research into frequently recurring claims and provide forms for them.

1276, Erwin Chemerinsky: There is no pressing need to abrogate Rule 84. Iqbal "is the single most important case decided by the Roberts Court." It will take time and effort to determine whether heightened pleading should be addressed by the Rules and the Forms. But "I emphatically oppose abrogation of Rule 84 and the Forms because such an amendment will acquiesce to heightened pleading before such a rule has been fully considered by the Committee."

1335 Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Modestly opposes. "The forms still provide their original useful function, and we perceive no benefit from discontinuing their inclusion in future versions of the rules."

1411, Jerome Wesevich for Texas RioGrande Legal Aid (and many additional Legal Aid organizations): None of the excellent alternative forms is authoritative. Eliminating authoritative forms promotes uncertainty. There is no good reason to eliminate them. They may well need to be updated, "but the usefulness and need for authoritative forms has not changed."

1434, Su Ming Yeh for Pennsylvania Institutional Law Project: "PILP assists countless pro se litigants in federal court." They "rely on templates and forms to guide them. If the forms need to be revised and updated, then that is preferable to eliminating them."

1494, Evan C. Zoldan, Elizabeth McCuskey: Abrogating Rule 84 and the Forms is a step "toward unraveling the benefits of transparency and access to justice." The proposal "removes a significant bulwark against the relapse into the opaque world of common law pleading. The Committee should decide what level of pleading is required by the new plausibility standard, and then create forms that will guide unsophisticated litigants. Access to an AO forms website will not help people who have no access to the Internet, "including especially prisoners and others in institutions and many people of low income or who experience language barriers or are people

with disabilities." There should be some way to make forms available to them.

1535, Valerie M. Nannery & Andre M. Mura for Center for Constitutional Litigation: The Forms are the most important part of the rules. "[W]e fear that abrogation * * * will be interpreted as an implicit codification of the pleading standards announced in *Twombly* and *Iqbal*, which, after all, were new interpretations of the existing rules and not compelled by any other consideration."

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: Urges that Form 18 should be revised and retained. "Litigating the sufficiency of pleadings at the beginning of each patent lawsuit would be expensive and wasteful of judicial resources." A revised Form 18 would "require the identification of at least one patent claim that is infringed, a statement explaining such infringement, and a statement addressing indirect infringement, if alleged." "Pursuant to Rule 9, patent complaints should also specify the party's capacity to sue, the party's authority to sue, or the legal existence of an organized association of persons in all cases where such information is needed to show jurisdiction." [The Rule 9 allegations may reflect an opening line: "Certain entities are attempting to exploit the judicial system for financial gain through the unjustified assertion of patent rights in expensive litigation." Perhaps the theory is that nonpracticing entities may, at times, fail to meet the standards for a genuine "case" within Article III?]

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves the proposal. In recommending the restyled forms in 2007, the Standing Committee noted that it had refrained from substantive changes, "even though some of the forms represent approaches to pleadings and other submissions that may not be consistent with current principles." Many of the pleading forms contain "labels" and "conclusions," contrary to the standards set by *Twombly* and *Iqbal*. Courts have divided on whether Rule 84 and the Forms control when a Form seems inconsistent with the Court's interpretation of Rule 8(a). And those who choose Rule 84 over Rule 8 divide on whether a claim that is not illustrated by a form "can be evaluated by considering the pleading form for a different substantive claim." This tension between Rule 8(a) and Rule 84 should be resolved. Three alternatives seem available. (1) Modifying the Forms to comply with Rule 8 is attractive, but it would entail a great deal of work. New forms would have to be added now to reflect many substantive areas not now included in the Forms. As substantive law grows or changes, existing forms would have to be revised and still more forms would be needed. And it takes three years to change a form through the Enabling Act process. The view that this would too much work for the process to bear is persuasive. (2) Rule 8(a) could be amended to abrogate the new pleading standards. That "is neither practicable nor desirable." (3) Abrogating Rule 84 and the forms is beneficial because it eliminates the conflict between the forms and Rule 8(a). And it is the least burdensome.

2265, Leigh R. Schachter for Verizon Communications, Inc.: Applauds the proposal, agreeing that some of the forms have come to seem inadequate, particularly Form 18.

2266, Stephen N. Subrin: In deciding *Twombly* and *Iqbal* "[t]he Supreme Court acted in a manner that was an assault on the rule-making process * * *." "[T]he tension between the current Forms and the *ultra vires* opinions of the majority of the Supreme Court are better to live with than having" the rules committees and the Judicial Conference "acquiesce in what can only legitimately be called an illegal usurpation of power by some members of the Supreme Court."

January Hearing, Arthur R. Miller: p. 36, at 40: "[O]bliteration of Rule 84 in [sic] the forms is a very stealth-like signal that you're approving *Twombly* and *Iqbal*."

January Hearing, Brooke Coleman: p. 114 Rule 84 makes each Form an integral part of the rule it illustrates. Abrogating a Form "necessarily changes the rule to which it corresponds." Form 11, for example, has generated much attention because it remains an authoritative example of what Rule 8(a)(2) means, helping to understand the potential reach of the pleading decisions in the Twombly and Iqbal cases. To abrogate Form 11, it is necessary to publish Rule 8 as well for comment. It is no excuse that the Committee seeks to get out of the Forms business entirely, without taking any position on the impact of any Form on the interpretation of any Rule. 654, Brooke Coleman: These themes are summarized, then supported by a 17-page essay. February Hearing, Danya Shocair Reda: p 349 "I am actually in Professor Coleman's camp on this." "[A] number of the rules are promulgated in conjunction with the forms." Abrogation of Rule 84 "signals an approval of a heightened pleading standard." If the pleading standard is "out of whack with the form[,] [t]hat's a problem of the Supreme Court jurisprudence, and not a problem of our rules."

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 Form 18 sets a much lower standard for pleading direct infringement, so it has an impact on a motion to dismiss, but that is quickly mooted under rules in courts that require the plaintiff to provide detailed infringement contentions soon after filing.

I.D. RULE 6(d) AMBIGUITY

This proposal to amend Rule 6(d) was published for comment in August, 2013. The proposal corrects a potential ambiguity that is explained in the Committee Note. The proposal was supported by the few comments that addressed it. It is ready to be advanced for adoption.

Competing concerns bear on the time to send this proposal to the Judicial Conference. Delay may be appropriate because the further amendment of Rule 6(d) approved for publication last January may be published this summer, either alone or in combination with a parallel package of similar changes in the Appellate, Bankruptcy, and Criminal Rules. There may be some advantage in amending Rule 6(d) once, not twice at an interval of one year.

On the other hand, the professor who originally spotted this problem has reported that several unpublished opinions have read the present language to allow 3 added days for amendments by a party who served the pleading. It does not seem likely that any serious harm is done by a 3-day delay in making a first amendment; it seems likely that most of these amendments would have been allowed as a matter of discretion if they had not been held available as a matter of right. He does not report any cases that address the greater risk — that a party who reads these cases, or otherwise resolves the ambiguity, deliberately waits to the twenty-fourth day only to encounter a court that resolves the ambiguity the other way, finds the amendment untimely as a matter of right, and denies leave to amend as a matter of discretion. There may be some advantage in advancing this clarifying amendment to take effect in eighteen months, not thirty.

1 Rule 6. Computing and Extending Time; Time for Motion Papers

2 * * *

3 **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a
4 specified time after ~~service being served~~ and service is made under Rule 5(b)(2)(C), (D), (E),
5 or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

1 Committee Note

2 What is now Rule 6(d) was amended in 2005 “to remove any doubt as to the method for
3 calculating the time to respond after service by mail, leaving with the clerk of court, electronic
4 means, or by other means consented to by the party served.” A potential ambiguity was created by
5 substituting “after service” for the earlier references to acting after service “upon the party” if a
6 paper or notice “is served upon the party” by the specified means. “[A]fter service” could be read
7 to refer not only to a party that has been served but also to a party that has made service. That
8 reading would mean that a party who is allowed a specified time to act after making service can
9 extend the time by choosing one of the means of service specified in the rule, something that was
10 never intended by the original rule or the amendment. Rules setting a time to act after making

11 service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). “[A]fter being served” is substituted for
12 “after service” to dispel any possible misreading.

13 **Gap Report**

14 No changes were made after publication.

1 **Rule 6. Computing and Extending Time; Time for Motion Papers**

2 * * *

3 **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a
4 specified time after being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F),
5 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 6: TIME AFTER BEING SERVED

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

I.E. RULE 55(c) AMBIGUITY

This proposal to amend Rule 55(c) was published for comment in August, 2013. The proposal corrects an ambiguity that is explained in the Committee Note. The small number of comments all approve the proposal without further discussion.

1 **Rule 55. Default; Default Judgment**

2 * * *

3 **(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default
4 for good cause, and it may set aside a final default judgment under Rule 60(b).

5 * * *

1 Committee Note

2 Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b).
3 A default judgment that does not dispose of all of the claims among all parties is not a final
4 judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is
5 entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards
6 set by Rule 60(b) apply only in seeking relief from a final judgment.

7 Gap Report

8 No changes were made after publication.

1 **Rule 55. Default; Default Judgment**

2 * * *

3 **(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of
4 default for good cause, and it may set aside a final default judgment under Rule 60(b).

RULE 55(c): SET ASIDE FINAL DEFAULT JUDGMENT

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

TAB 2B

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II. RECOMMENDATIONS TO APPROVE FOR PUBLICATION

II.A. RULE 6(d): 3 DAYS ARE ADDED: E-SERVICE

An amendment of Rule 6(d) was approved for publication last January. The amendment is part of a package of proposals to amend other sets of rules to delete the provision that allows 3 added days to respond after service by electronic means. The parallel proposals are included in the reports of the Advisory Committees for the Appellate, Bankruptcy, and Criminal Rules. Rule 6(d) is set out here in order to complete the package:

1 **Rule 6. Computing and Extending Time; Time for Motion Papers**

2 * * *

3 **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a
4 specified time after being served² and service is made under Rule 5(b)(2)(C)(mail),
5 (D)(leaving with the clerk), (~~E~~), or (F)(other means consented to), 3 days are added after the
6 period would otherwise expire under Rule 6(a).

1 Committee Note

2 Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the
3 modes of service that allow 3 added days to act after being served.

4 Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although
5 electronic transmission seemed virtually instantaneous even then, electronic service was included
6 in the modes of service that allow 3 added days to act after being served. There were concerns that
7 the transmission might be delayed for some time, and particular concerns that incompatible systems
8 might make it difficult or impossible to open attachments. Those concerns have been substantially
9 alleviated by advances in technology and in widespread skill in using electronic transmission.

10 A parallel reason for allowing the 3 added days was that electronic service was authorized
11 only with the consent of the person to be served. Concerns about the reliability of electronic
12 transmission might have led to refusals of consent; the 3 added days were calculated to alleviate
13 these concerns.

14
15 Diminution of the concerns that prompted the decision to allow the 3 added days for
16 electronic transmission is not the only reason for discarding this indulgence. Many rules have been
17 changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow
18 “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the

² This anticipates adoption of the proposed amendment published in August, 2013.

19 occasions for further complication by invoking the provisions that apply when the last day is a
20 Saturday, Sunday, or legal holiday.

21 Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days
22 means that the 3 added days cannot be retained by consenting to service by electronic means.
23 Consent to electronic service in registering for electronic case filing, for example, does not count
24 as consent to service “by any other means” of delivery under subparagraph (F).

II.B. RULE 82: ADMIRALTY VENUE

The Standing Committee acted in January to approve publication at a suitable time of a proposal to amend the second sentence of Civil Rule 82 to reflect the enactment of a new venue statute for civil actions in admiralty. Publication was to await incorporation in a package with other rules proposals, and has not yet occurred. Publication was chosen because it was not clear whether the proposed rule text was the best means of accommodating the new statute. This conservative approach has proved wise. It was agreed that the message transmitting the proposal for publication should ask whether to delete the cross-reference to 28 U.S.C. § 1391, an issue explained below. Further reflection before publication suggests that indeed § 1391 should be dropped from the rule text, and that the text should be further revised to reflect the language of new § 1390. The version approved for publication is set out first below, followed by the revised version that was approved by the Advisory Committee in April, followed by a style revision that seems better yet. The Committee renews the recommendation to publish for comment.

1 *Version Approved in January*

2 **Rule 82. Jurisdiction and Venue Unaffected**

3

4 These rules do not extend or limit the jurisdiction of the district courts or the venue of actions
5 in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes
6 of 28 U.S.C. §§ 1390-1391-1392.

7 *Committee Revised Version*

8 These rules do not extend or limit the jurisdiction of the district courts or the venue of actions
9 in those courts. An admiralty or maritime claim under Rule 9(h) ~~is not a civil action~~ [invokes][is]
10 an exercise of the jurisdiction conferred by 28 U.S.C. § 1333 [for purposes of 28 U.S.C. §§ 1390
11 ~~1391-1392~~].

12 *Style Version*

13 These rules do not extend or limit the jurisdiction of the district courts or the venue of actions
14 in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390
15 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

1 Committee Note

2 Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Discussion

It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty and maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the “saving to suitors” clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court’s subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The occasion for amending Rule 82 arises from legislation that added a new § 1390 to the venue statutes and repealed former § 1392 (local actions). The reference to § 1392 must be deleted. And it is likely appropriate to add a reference to new § 1390 for reasons that are only slightly more complicated. Deleting the reference to § 1391 also is appropriate.

New § 1390(b) provides:

(b) Exclusion of Certain Cases. — Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 establishes “original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

Section 1390(b), by referring to cases in which the court “exercises the jurisdiction conferred by section 1333,” thus ousts application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction, and also for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h).

The proposed amendment carries forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. It is appropriate to refer to all of § 1390, not subsection (b) alone, because

§ 1390(a) provides a general definition of venue, while subsection (c) addresses transfer of an action removed from a state court.

The original proposal was submitted to the Maritime Law Association for review and approved. That seemed to provide adequate reassurance for publication. It had the virtue of making only a minimal change, retaining most of the amended sentence and revising only the statutory references.

Further review, however, suggests that the statement that an admiralty or maritime claim is not a civil action cannot be carried forward. This drafting was adopted in 1966 when the admiralty rules were merged with the civil rules. Rule 1 was amended to state that the rules govern “in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty.” Rule 2, then as now, stated that there is one form of action — the civil action. The Committee Note to Rule 82 said that by virtue of Rules 1 and 2, suits in admiralty have been converted to civil actions. So Rule 82 was amended to provide that an action that includes a claim designated for admiralty or maritime jurisdiction under Rule 9(h) is not a civil action for purposes of what then were §§ 1391-1393. That avoided disruption of the settled interpretation that those general venue statutes did not apply to admiralty claims.

The difficulty with carrying forward the 1966 qualification of the status of admiralty claims as civil actions is that new § 1390(b) twice describes the exercise of admiralty jurisdiction in “a civil action.” To say that a Rule 9(h) claim is not a civil action for purposes of § 1390 would be to attempt to take the claim outside of § 1390, the opposite of the intended accommodation.

Nor is there any apparent need to continue to refer to § 1391. Section 1390(b) takes care of that.

This revised proposal has been sent to the Maritime Law Association for further comment. No response has yet been received.

II.C. RULE 4(m): SERVING A CORPORATION ABROAD

The Committee recommends publication of a clarifying amendment to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m). Several of the comments on the version of Rule 4(m) published for comment as part of the Duke Rules Package in August 2013 suggest that many lawyers believe the Rule 4(m) limit applies. There is no apparent reason to believe that service abroad can be accomplished more expeditiously when the defendant is a corporation, not an individual. And the need for extra time will increase with adoption of the proposal to reduce the time from 120 days to 90 days.

1 **Rule 4. Summons**

2 * * *

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

1 Committee Note

2 Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some
3 confusion in practice. Service in a foreign country often is accomplished by means that require more
4 than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This
5 problem is recognized by the two clear exceptions for service on an individual in a foreign country
6 under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises
7 from the lack of any explicit reference to service on a corporation, partnership, or other
8 unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside
9 any judicial district of the United States “in any manner prescribed by Rule 4(f) for serving an
10 individual, except personal delivery under (f)(2)(C)(i).” Invoking service “in the manner prescribed
11 by Rule 4(f)” could easily be read to mean that service under Rule 4(h)(2) is also service “under”
12 Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur
13 in effecting service in a foreign country. But it also is possible to read the words for what they seem
14 to say — service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite
15 all, of Rule 4(f).

16 The amendment resolves this possible ambiguity.

Discussion

The Committee Note explains the proposal. Many of the comments on the 2013 proposal to reduce the time for service under Rule 4(m) argued that more time is needed for service in a foreign country, indeed that even 120 days often is not enough. These comments make sense only on the assumption that service under Rule 4(h)(2) is not exempt from the Rule 4(m) time limit. Among the comments, the comment from the New York City Bar Association notes the ambiguity and expressly recommends that Rule 4(h)(2) be added to the list of exceptions from Rule 4(m). There is no apparent reason to avoid the change. But publication may reveal complications that either defeat the whole proposal or require additional qualifications. If for some unforeseen reason it comes to seem desirable to subject service under Rule 4(h)(2) to the time limits of Rule 4(m), a nice question will be presented: how should the rule text be amended to clarify the ambiguity by going the other way? “This subdivision (m) applies to service outside any judicial district of the United States under Rule 4(h)(2), but does not apply to * * *”? (Any passing regret about the inability to revise a Committee Note without revising rule text is assuaged by reflecting that revising the Committee Note alone would alleviate the ambiguity only after an accumulation of cases, probably over a period of many years, pointing out the new approach.)

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TAB 2C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 10-11, 2014

1 The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland,
2 Oregon, on April 10-11, 2014. Participants included Judge David G. Campbell, Committee Chair,
3 and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery;
4 Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W.
5 Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M.
6 Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter.
7 Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated
8 as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, Liaison, and Professor
9 Daniel R. Coquillette, Reporter, represented the Standing Committee. Standing Committee member
10 Judge Susan P. Graber also attended. Judge Arthur I. Harris participated as liaison from the
11 Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also
12 participated. The Department of Justice was further represented by Theodore Hirt, Alison Stanton,
13 and James C. Cox. Judge Jeremy Fogel participated for the Federal Judicial Center. Jonathan C.
14 Rose, Andrea Kuperman, Benjamin J. Robinson (by telephone), Julie Wilson, and George Everly
15 represented the Administrative Office. Observers included Judge Lee H. Rosenthal, past chair of the
16 Committee and of the Standing Committee; Professor Steven S. Gensler, a former member of the
17 Civil Rules Committee; Joseph D. Garrison, Esq. (National Employment Lawyers Association);
18 Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); Patrick
19 Coyne, Esq. (American Intellectual Property Law Association); John Vail, Esq.; Valerie M. Nannery,
20 Esq. (Center for Constitutional Litigation); Thomas Y. Allman, Esq.; Jonathan Redgrave, Esq.;
21 Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

22 The first morning of the meeting was devoted to a Symposium honoring Judge Mark R.
23 Kravitz, former chair of the Civil Rules Committee and former chair of the Standing Committee. The
24 Symposium included tributes by Chief Justice John G. Roberts (read by Dean Klonoff), Elizabeth
25 Cabraser, Charles Cooper, Judge Jeremy Fogel, Peter Keisler, and Judge Anthony Scirica (also read
26 by Dean Klonoff). Two panels completed the symposium. Judge Sutton moderated a panel on The
27 Rulemaking Process, which explored papers by Edward J. Brunet, Edward Cooper, and Richard
28 Marcus. Judge Campbell moderated a panel on Applying The Rules, which explored papers by Judge
29 Rosenthal and Steven S. Gensler, and by Judge Diane P. Wood. The symposium will be published
30 in the Lewis & Clark Law Review.

31 Judge Campbell began the afternoon portion of the first day by noting that it was a privilege
32 for all present to be part of the tribute to Judge Kravitz.

33 Judge Campbell noted that there have been no changes in Committee membership to
34 occasion welcoming introductions or fond farewells. He also expressed the Committee's
35 appreciation of the presence of Judge Sutton, Judge Gorsuch, Judge Graber, and Professor
36 Coquillette for the Standing Committee, and of the presence of Judge Fogel for the Federal Judicial
37 Center.

38 Judge Campbell concluded the introduction by stating that through the Subcommittees,
39 Committee members had worked harder in preparing the materials for the agenda than any group he
40 had ever observed doing volunteer work purely for the good of the public order. "This is a full-
41 participation rulemaking enterprise."

42 *April 2013 Minutes*

43 The draft minutes of the April 2013 Committee meeting were approved without dissent,
44 subject to correction of typographical and similar errors.

45 **I. PROPOSALS FOR ADOPTION**

46 *A. Duke Rules Package*

47 Many of the proposals published for public comment and testimony in August 2013 were
48 initially prepared by the Duke Conference Subcommittee chaired by Judge Koeltl. They included
49 changes in Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. Judge Campbell noted that the voluminous
50 public comments and extensive testimony had provided both new reasons for supporting the
51 proposals and serious challenges. The Subcommittee evaluated these ideas and has suggested
52 changes both in rule texts and in Committee Notes. Publication of the April agenda materials
53 prompted a few comments on the proposed revisions that have further illuminated the issues,
54 including a letter from four United States Senators. These comments too have been considered by
55 the Subcommittee and presented to the Committee. Judge Campbell then asked "the indefatigable"
56 Judge Koeltl to present the Duke Conference Subcommittee Report.

57 Judge Koeltl introduced the Subcommittee Report as one that recommends a few changes
58 in some of the published proposals, withdrawal of parts of the proposals, and several changes in
59 Committee Note language to respond to concerns raised in the hearings and comments.

60 The Duke Conference was the inspiration of Judge Kravitz. Preparations began a year and
61 a half before the conference. Participants were broadly representative of the bar, bench, and academy.
62 The lawyer participants in private practice were balanced between those who ordinarily represent
63 plaintiffs and those who ordinarily represent defendants. Other lawyers were drawn from house
64 counsel, combining the perspectives of lawyers with the perspectives of clients, and from
65 government. The enthusiasm of those invited to participate was extraordinary; only one person
66 declined to participate in the two days of panel discussions, and only because of a schedule conflict.
67 The participants accepted the direction to leave their clients at the door. The charge was to seek
68 consensus on measures that can be taken to advance the Rule 1 goals — the just, speedy, and
69 inexpensive determination of civil actions.

70 Three broad areas of agreement were expressed at the Conference. Improvements in civil
71 litigation can be made by enhancing cooperation among the parties and counsel; by limiting use of
72 procedural devices and opportunities to what is proportional to the needs of the case; and by
73 providing early and active case management by judges.

74 The Subcommittee began its work promptly after the Conference concluded in May 2010.
75 It met frequently, both in person and by conference calls. Minutes in the form of Notes were
76 prepared for all its meetings and made public. A diverse group of lawyers and judges were gathered
77 for a miniconference that discussed early drafts of rules proposals, some of which were later
78 abandoned. Notes on the miniconference also were made public.

79 Following publication, more than 120 witnesses testified at the three public hearings, and
80 more than 2,300 comments were submitted. Most of the witnesses and most of the comments
81 addressed parts or all of the Duke Subcommittee proposals. All of this advice was very helpful in
82 refining the published proposals.

83 The Subcommittee was able to achieve consensus on the recommendations made in the
84 Report. The recommendations are unanimous. The Report appears at pages 79-93 of the agenda
85 book. The proposals appear at pages 95-113. They will advance the goals of cooperation,
86 proportionality, and early and active judicial case management. Rather than follow the order of the
87 rules themselves, the proposals are presented in three steps: those that deal with discovery; those that
88 deal with case management; and the one that deals with cooperation beyond the elements of
89 cooperation built into the discovery and case-management proposals.

90 DISCOVERY PROPOSALS

91 Scope: Rule 26(b)(1): Four changes are proposed for Rule 26(b)(1).

92 Proportionality is emphasized by moving the factors found in present Rule 26(b)(2)(C)(iii)
93 to become part of the scope of discovery. Seven words are added to make proportionality explicit:
94 "proportional to the needs of the case." One consideration in moving this concept up to (b)(1) is that
95 "in fairness, many people never got down to Rule 26(b)(2)(C)(iii)."

96 Present Rule 26(b)(1) includes a list of examples of discoverable matter: "the existence,
97 description, nature, custody, condition, and location of any documents or other tangible things and
98 the identity and location of persons who know of any discoverable matter." The proposal deletes
99 these words. The purpose is to reduce the great length of Rule 26, in the belief that discovery of these
100 matters is so well established that the list is no longer needed or even useful. The Subcommittee
101 recommendations include adding language to the published Committee Note to emphasize that all
102 of these and other matters will remain as fully discoverable as they are now. The new language will
103 defeat attempts to argue that deletion of these examples implies that such matter is not discoverable.

104 Rule 26(b)(1) now includes two spheres of discovery. Discovery is available as a matter of
105 right as to nonprivileged matter that is relevant to any party's claim or defense. Beyond that, "[f]or
106 good cause, the court may order discovery of any matter relevant to the subject matter involved in
107 the action." The proposals eliminate this distinction between lawyer-managed and court-managed
108 discovery by deleting the provision for discovery of matter relevant to the subject matter. All
109 discovery must be relevant to a party's claim or defense. New language is proposed for the
110 Committee Note to address concerns raised in the comments and testimony. When the distinction
111 between "claims and defenses" discovery and "subject-matter" discovery was adopted in 2000, the
112 Committee Note recognized that it can be difficult to draw the distinction. Examples were given of
113 things that, suitably focused, would be relevant to the parties' claims or defenses. The proposed new
114 Note repeats that such discovery is not foreclosed by the amendments. The proposed new Note
115 language emphasizes the need to focus directly on what is relevant to the claims or defenses, and
116 recognizes that it may be appropriate to amend the pleadings to add new claims or defenses. In
117 addition, new Note language emphasizes the common purpose that was emphasized in the 2000
118 Committee Note — the purpose is to engage the court more actively in regulating the breadth of
119 discovery.

120 Finally, the next-to-last sentence of present Rule 26(b)(1) provides: "Relevant information
121 need not be admissible at the trial if the discovery appears reasonably calculated to lead to the
122 discovery of admissible evidence." This sentence would be revised to continue the concept that
123 discovery is not limited by the rules that govern admissibility in evidence, but also to make it clear
124 that inadmissibility does not expand the scope of discovery. All discovery is limited to matter
125 relevant to any party's claim or defense and proportional to the needs of the case.

126 Turning first to proportionality, many of the comments and many parts of the testimony have
127 questioned the need to add an explicit proportionality limit to the Rule 26(b)(1) scope of discovery.

128 But there was a consensus at the Duke Conference on the need for proportionality. It is in the rules
129 now. Several reports show that many lawyers believe that discovery now is often not proportional
130 to what the litigation needs. Rule 26(g) now makes proportionality an obligation of both the party
131 that requests discovery and the party that responds. It was added to the rules in 1983, along with the
132 proportionality requirement that now appears in Rule 26(b)(2)(C)(iii). An effort to reinforce
133 proportionality was made in the 1993 amendments. And yet another effort to reinforce it was made
134 in the 2000 amendments. The revised Committee Note describes these repeated attempts to achieve
135 thorough recognition and enforcement of the 1983 concept. The 2000 amendment is a particular
136 witness to the sense of frustration that surrounds proportionality. It added a completely redundant
137 final sentence to (b)(1); no new or independent meaning was added by the reminder that all discovery
138 is subject to the limitations imposed by Rule 26(b)(2)(C). This compelling sense of need carried
139 through the Style Project, defeating repeated efforts to strike this sentence as the surplusage that it
140 is. The present proposal is a fourth attempt that seeks to fulfill the purpose that has not yet been fully
141 implemented.

142 The Subcommittee recommends two changes in the proportionality factors as published. The
143 first transposes the first two considerations, to be "the importance of the issues at stake in the action,
144 the amount in controversy * * *." This change responds to the concerns expressed in hundreds of
145 comments. Many claims may seek relatively low amounts of money damages, or seek only specific
146 relief without any damages at all. Focus on the importance of the issues at stake was included in the
147 1983 rule as an explicit recognition that many actions that seek minimal or no damages involve
148 matters of personal or public importance beyond, and perhaps far beyond, money alone. Often an
149 individual plaintiff may be functioning in part as a private attorney general. Proportionality cannot
150 be measured by the money alone. Although this principle has been embodied by the rules from the
151 beginning, there is a fear that placing the amount in controversy first in the list may cause courts to
152 impose inappropriate limits on discovery. At the other end of the line, other comments expressed a
153 fear that focus on the money involved might lead some courts to allow absolutely unlimited
154 discovery in actions involving huge sums of money. The reordering in the rule text is further
155 supported by new language proposed for the Committee Note.

156 The second change recommended for the rule text adds a new factor to the list of
157 proportionality considerations: "the parties' relative access to relevant information." This language,
158 along with an explanation proposed for the Committee Note, is meant to address circumstances
159 commonly described as involving "asymmetric information." Some categories of litigation are
160 characterized by an uneven distribution of discoverable information. Civil rights actions in general,
161 and most particularly individual employment claims, are examples identified by many comments and
162 much testimony. An individual plaintiff claiming adverse employment action, for example, may have
163 very little information that the defendant employer needs to discover. The employer, on the other
164 hand, may have relatively large amounts of information that the employee can obtain only through
165 formal discovery, particularly when it is necessary to present evidence of the treatment of other
166 employees in similar circumstances. An asymmetric distribution of discoverable information often
167 means an asymmetric incidence of discovery burdens. This factor recognizes that proportionality
168 may allow one party to request more extensive discovery than its adversary requests.

169 Many of the comments and much of the testimony expressed a fear that moving
170 proportionality from Rule 26(b)(2) to (b)(1) would effect a change in the burdens imposed on the
171 parties in presenting discovery motions. The argument was that the present rule simply expresses a
172 limitation on discovery, so that a party resisting discovery has the "burden" of persuading the court
173 that proposed discovery is disproportional. Characterizing proportionality as part of the scope of
174 discovery, on the other hand, was feared to mean that the party requesting discovery will have the
175 full burden of justifying the request as proportional. Additions to the Committee Note are proposed
176 to address these fears, which arise from quite unintended interpretations of the proportionality

177 proposal that have no basis in either the proposed rule or the Committee Note. The Note now makes
178 it clear that the new rule text "does not change the existing responsibilities of the court and the
179 parties to consider proportionality, and the change does not place on the party seeking discovery the
180 burden of addressing all proportionality considerations." Boilerplate objections are not permitted.
181 Proposed Rule 34, indeed, requires that objections be specific. Nor can a party unilaterally decide
182 to limit its responses to what it considers proportional — "the parties and the court have a collective
183 responsibility to consider the proportionality of all discovery and consider it in resolving discovery
184 disputes."

185 Further additions to the Committee Note are recommended to respond to other concerns
186 expressed in the comments and testimony that the factors to be considered in implementing
187 proportionality are subjective and impossible to define. The basic point is that these factors began
188 with the somewhat shorter list in 1983, and have been expanded since then. They are familiar. When
189 concerns were expressed about the open-ended nature of a simple reference to "proportionality" at
190 the miniconference on early drafts, participants suggested that the concept should be given content
191 by incorporating the factors now listed in Rule 26(b)(2)(C)(iii). They agreed that when a court does
192 turn to consider proportionality, these factors are familiar and work well.

193 Turning to the new formulation of the proposition that discovery is not limited to matter that
194 would be admissible in evidence, Judge Koeltl emphasized that the history of the "reasonably
195 calculated" phrase shows that it was not intended to expand the scope of discovery. This phrase was
196 originally added in 1946, when it applied only to depositions, to overcome decisions ruling that a
197 deponent could not be required to testify to hearsay. The 2000 amendment made it clear that
198 discovery of inadmissible matter is subject to the Rule 26(b)(1) limits on the scope of discovery. But
199 many lawyers and courts continue to treat this provision as expanding, and indeed defining, the scope
200 of discovery. Andrea Kuperman's research provides many examples. This view is incorrect. An
201 attempt was made to correct it in 2000.

202 Most of the organized bar association groups that have commented on the changes to Rule
203 26(b)(1) support them. The Department of Justice also supports it.

204 Discussion began with a Committee member who thought the work extraordinary. "I'm a big
205 believer in proportionality." Proportionality was added to the English Practice Rules in 2009. It is
206 essential. The need for proportionality is demonstrated in long experience as a mediator in federal
207 courts.

208 Another member noted that as a new member he had been impressed by the serious attention
209 both Subcommittees and the Committee had devoted to the public testimony and comments. He had
210 had some concerns about the published proposals. These concerns have been resolved by the
211 proposed changes in rule text and Committee Notes.

212 A judge echoed these observations. He had been concerned by the testimony and comments
213 that worry about the burdens of arguing proportionality, and about what the factors bearing on
214 proportionality mean. All these concerns have been addressed in the Committee Note.

215 Another judge recalled that two witnesses at the Dallas hearing expressed fear that the
216 hearings and comment process were a charade. The changes that have been made show the
217 Committee in fact does listen and respond.

218 It was noted that the Department of Justice generally has supported proportionality. There
219 were some specific issues, but they have been addressed by the Subcommittee recommendations.
220 Support for the proposed rule was confirmed by circulating it within the Department.

221 Other members made similar observations. Moving "the importance of the issues at stake in
222 the action" up to become the first factor, and adding "the parties' relative access to relevant
223 information" to the factors, make for a better rule and reflect the Committee's responsiveness. The
224 recommendations are "a wonderful job in careful response to comments." The quantity and quality
225 of the comments and testimony show the importance of involvement by all segments of the bar in
226 public rulemaking.

227 Cost-Bearing: Rule 26(c)(1)(B): Judge Koeltl noted that the new reference to "the allocation of
228 expenses" by a protective order simply confirms authority that is already established by the rule
229 provisions for protecting against undue burden or expense. The authority is exercised now. But
230 adding it to rule text will forestall arguments to the contrary. The proposed Committee Note adds
231 new material that responds to public comments that feared the new rule text would encourage routine
232 cost-bearing orders. The Note now says that cost-shifting should not become a common practice, and
233 also says that courts and parties should continue to assume that a responding party ordinarily bears
234 the costs of responding. A comment responding to this new material has objected that it seems to
235 prejudge the continuing work of the Committee on "requester pays" proposals. That is not so. The
236 work will continue, and will be thorough. But "it will not be easy." The proposed rule and
237 Committee Note, in short, should not change current practice by making cost-shifting a common
238 event.

239 There was no further discussion of proposed Rule 26(c)(1)(B).

240 "Early" Rule 34 Requests: Rule 26(d)(2): The Subcommittee does not recommend any changes in
241 the published proposal that would allow early delivery of Rule 34 requests to produce. Present Rule
242 26(d)(1) establishes a moratorium on discovery, barring discovery before the parties have conferred
243 as required by Rule 26(f), except in cases exempted from initial disclosure. Proposed Rule 26(d)(2)
244 would allow delivery of Rule 34 requests before the parties' conference, but only after 21 days from
245 service of a summons and complaint on a party. Delivery of the requests does not start the time to
246 respond. Instead, the requests are considered to have been served at the parties' first Rule 26(f)
247 conference, starting the time to respond. The advantage of early delivery is that the parties will have
248 a concrete focus for discussion at the conference, making for a more productive conference, and a
249 better Rule 16(b) conference.

250 Public comments generally were favorable. Many plaintiff-side lawyers like the proposal.
251 Defense lawyers generally say they would not be likely to make early delivery, but some said they
252 would be glad to see plaintiffs' requests before the parties' conference.

253 Brief discussion focused on the time calculation. The time to respond begins at the first Rule
254 26(f) conference, and the Committee Note says that the opportunity for advance consideration of
255 early requests should not affect the determination whether to extend the time to respond. The time
256 provisions for early requests should be read carefully. The requests cannot be delivered with the
257 complaint. Initially, an early request may be delivered to a party 21 days after that party has been
258 served with the summons and complaint. That party then can deliver early requests to any plaintiff
259 and also to any other party that has been served.

260 In deference to a recommendation by the Style Consultant, Rule 26(d)(2)(B) will read: "The
261 request is considered to have been served at the first Rule 26(f) conference," rather than "considered
262 as served."

263 Rule 34: Judge Koeltl noted that Rule 34 would be revised to reflect the Rule 26(d)(1) provision for
264 early requests, and summarized the three other proposed changes in Rule 34. The proposals reflect
265 experience with responses that often "are absurd." General objections often incorporate boilerplate

266 protests that the requests are overbroad, unduly burdensome, and so on, without providing any
267 specific explanation. The responses then produce materials "subject to these objections" without
268 stating whether anything has been withheld on the basis of the objections. And the responses often
269 fail to state whether anything actually will be produced. All of this "is true abuse. The response is
270 only an invitation to meet and confer, not any real indication of what will be produced." The
271 proposals require that the response "state with specificity" the grounds for objecting; allow a
272 response that rather than permit inspection the requested materials will be produced; and provide that
273 production must be completed no later than the time stated in the request or a later reasonable time
274 stated in the response. In addition, an objection must state whether any responsive materials are
275 being withheld on the basis of the objection.

276 The proposed Committee Note responds to a concern expressed in testimony and comments.
277 A party may limit its search to a scope smaller than the request. A request for "all documents," for
278 example, may be met by a search for all documents back to 2005 and nothing earlier. The party does
279 not know whether relevant and responsive documents might be found if the search were extended
280 back beyond 2005, and does not know whether anything has been "withheld." The Note explains
281 that this potential dilemma ties to the direction to state objections with specificity. The response
282 should object that the request is overbroad and state that the search will be limited to documents
283 created in 2005 and later. This response counts as a statement that anything earlier has been
284 "withheld." The parties are then free to discuss the response and, if they cannot resolve the issue,
285 seek a court order.

286 The Note also anticipates an issue addressed by some of the testimony and comments. It says
287 that the producing party does not need to provide a detailed description or "log" of all documents
288 withheld.

289 In response to a suggestion by the Style Consultant, Rule 34(b)(2)(B) will provide: "state with
290 specificity the grounds for objecting," rather than "state the ground for objecting * * * with
291 specificity."

292 There was no further discussion of the Rule 34 proposals.

293 Numerical Limits: Rules 30, 31, 33, and 36: Judge Koeltl summarized several published proposals
294 that would reduce present presumptive limits on discovery events and add a new presumptive limit.
295 The presumptive limit on the number of depositions under Rules 30 and 31 would be reduced from
296 10 to 5 per side. The presumptive limit on the number of interrogatories under Rule 33 would be
297 reduced from 25 to 15. And, for the first time, Rule 36 would impose a presumptive limit of 25 on
298 requests to admit, excluding from the count requests to admit the genuineness of documents. In
299 addition, the presumptive time limit for oral depositions would be reduced from one day of 7 hours
300 to one day of 6 hours.

301 The Committee expected that these presumptive limits would be only that, simply
302 presumptive. The proposals relied on the parties to understand what numbers are proportional to the
303 needs of individual cases, and to agree on higher numbers whenever appropriate. Failing party
304 agreement, the expectation was that courts would respond flexibly in ordering higher numbers
305 suitable to the needs of each case. The purpose was to encourage realistic appraisal of the level of
306 discovery proportional to individual case needs. "To put it mildly, these proposals generated strong
307 opposition." Opposition came from the organized bar as well as from testimony and comments from
308 individual lawyers. The proposals were seen as counter-productive. Lawyers fear that some courts
309 would view the presumptive numbers as hard ceilings, and that attempts to achieve reasonable
310 accommodations through party discussions would often fail, leading to increased motion practice.

311 The Subcommittee recommends that these proposals be withdrawn. Such widespread and
312 forceful opposition deserves respect. The hope remains that most parties will continue, as they do
313 now, to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially
314 and, if need be, as the case unfolds. Failing party agreement, courts have power to shape discovery
315 to the reasonable needs of the case.

316 A Subcommittee member noted that the testimony and comments on the numbers of
317 depositions were impressive. Only a minority of cases now involve more than 5 depositions per side;
318 withdrawing the proposal will not affect most cases. For the cases that do involve more than 5
319 depositions per side, it is "better to leave well-enough alone." As to the number of interrogatories,
320 the change is not as important because they are not much used anyway.

321 One judge reported that colleagues were pleased with the recommendation to withdraw these
322 proposals.

323 CASE MANAGEMENT

324 Judge Koeltl began discussion of this segment of the package proposal by noting that early
325 and active judicial case management has encountered little opposition and widespread support from
326 the organized bar. There is concern that the early steps in an action take too long.

327 Rule 4(m): Time to Serve: The published proposal reduced the time to serve the summons and
328 complaint from 120 days to 60 days. The comments and testimony persuaded the Subcommittee to
329 recommend that the time be set at 90 days.

330 Several practical observations support the change to 90 days. Many comments suggest the
331 need for time to serve multiple defendants, or defendants who seek to evade service. When service
332 is to be made by a marshal, 60 days may strain the Marshals Service. A 60-day period may deter
333 requests to waive service, since not much time will remain when the plaintiff learns that service will
334 not be waived.

335 In addition to recommending a 90-day period, the Subcommittee proposes adding new
336 language to the Committee Note to reflect some of the circumstances that will justify an extension
337 of the time.

338 The published proposal also amends Rule 4(m) to exclude service of a notice under Rule
339 71.1(d)(3)(A). There was almost no comment on this proposal. The Subcommittee recommends it
340 for adoption. The Committee Note should carry forward as published, striking an extraneous clause
341 that was inadvertently carried into the agenda book materials from an earlier sketch.

342 Many of the comments on Rule 4(m) reflected an assumption that the limit applies to service
343 on a corporation in a foreign country. There are powerful reasons to exclude these cases from Rule
344 4(m), which does not apply to service abroad on individuals and a foreign state or its subdivision.
345 The Subcommittee's recommendation for publication of a clarifying amendment of Rule 4(m) was
346 discussed later in the meeting.

347 Rule 16 Scheduling Conferences and Orders: Judge Koeltl described the proposed changes in Rule
348 16(b).

349 The proposal continues to allow entry of a scheduling order on the basis of the parties' Rule
350 26(f) report without a conference. But it emphasizes the value of direct simultaneous communication
351 by deleting the reference to a conference "by telephone, mail, or other means." Telephone

352 conferences remain available. But mail, or other means that do not involve direct simultaneous
353 communication, are excluded.

354 The time to issue a scheduling order is reduced to the earlier of 90, not 120, days after any
355 defendant has been served, or 60, not 90, days after any defendant has appeared. This acceleration
356 is offset by adding a new provision that allows the judge to set a later time on finding good cause for
357 delay. The Department of Justice has continued to be concerned that the reduced time periods may
358 not be enough to support a meaningful conference, a concern that has been echoed by other
359 comments about the needs of complex cases. The Subcommittee proposes new language for the
360 Committee Note to reflect the circumstances that may show good cause to extend the time, including
361 cases that involve "complex issues, multiple parties, and large organizations, public or private."

362 New subjects are added to the list of permitted contents of a scheduling order, as well as the
363 Rule 26(f) discovery plan, including preservation of electronically stored information and agreements
364 reached under Federal Rule of Evidence 502. These topics are added to emphasize the importance
365 of paying early attention to them.

366 Finally, a new provision would recognize that a scheduling order may direct that before
367 moving for an order relating to discovery, the movant must request a conference with the court. This
368 provision reflects practices adopted by local rule or individual judges in many courts. About one-
369 third of judges now do this. But many do not, and the Subcommittee recognizes that some courts
370 may not be able to do it. So this provision simply provides another option, not a mandate.

371 Discussion began with the question why it is useful to foreclose a scheduling conference by
372 mail or other means that do not involve simultaneous communication among the parties and court.
373 The rule continues to allow entry of the order without any conference at all, relying on the parties'
374 Rule 26(f) report. The initial response focused on the value of allowing entry of the order on the
375 basis of the Rule 26(f) report alone. This can be an effective practice, particularly in "routine" cases
376 in which the judge trusts the lawyers. Some judges would not willingly give up this option to a
377 requirement of an actual conference in all cases. But this response did not satisfy the question: "sure,
378 it can make sense to allow entry of the order without any conference. But why limit the means
379 available for having a conference if the judge chooses to have one? The rule text, moreover, does
380 not directly say that there must be simultaneous communication." A further response stated that a
381 "conference" implies simultaneous communication, not, for example, an exchange of
382 correspondence. And it is desirable to emphasize the value of simultaneous communication by
383 deleting the reference to mail or other means.

384 COOPERATION

385 Rule 1: Judge Koeltl introduced the proposed amendment of Rule 1 that directs that the rules be
386 "employed by the court and the parties" to secure the just, speedy, and inexpensive determination
387 of every action. This amendment applies Rule 1 aspirations directly to the parties. The published
388 Committee Note observes that effective advocacy is consistent with, and indeed depends upon,
389 cooperative and proportional use of procedure.

390 The Subcommittee recommends that the Rule 1 proposal go forward without change. The
391 testimony and comments went in different directions. Some urged that "cooperation" be introduced
392 directly into rule text. Others urged that the proposal be abandoned, fearing that although it seems
393 desirable in the abstract it will become the occasion for prompting exactly the sort of behavior it is
394 meant to discourage. "Rule 1 motions" will be made as a strategic means of increasing cost and
395 delay. And still others — including the Sedona Conference — think the proposal gets it just right.

DUKE PACKAGE CONCLUSION

397 Judge Koeltl concluded the presentation of the Duke Rules Package with thanks to all who
398 have been instrumental in developing it. Judges Kravitz, Rosenthal, Sutton, and Campbell provided
399 great help. Judge Wood provided extraordinary help as liaison from the Standing Committee,
400 working as if a member of both the Advisory Committee and the Subcommittee. All members of
401 the Subcommittee worked with tireless skill and diligence. Professor Gensler has helped throughout.
402 The Subcommittee, further, operated by seeking consensus on a package that is unanimously
403 endorsed by every member. And every member "has fingerprints all over the product." Judge Koeltl
404 thanked Professor Cooper and Professor Marcus for their tireless and invaluable contributions to the
405 work of the Subcommittee.

406 A Subcommittee member recalled that Chief Justice Roberts approved the concept of the
407 Duke Conference only with the expectation that it would lead to specific proposals. "All these years
408 later, dealing with these sprawling and diffuse questions, we have done it." The patience, care, and
409 creativity that Judge Koeltl showed "were inspirational."

410 Another Subcommittee member observed that great care was taken in keeping track of each
411 change, large and small. "The result is reliable."

412 Another Subcommittee member said that "Judge Koeltl made the almost impossible look
413 easy."

414 Judge Campbell said that Judge Koeltl was the one whose hard work pulled the Duke
415 Conference together. He enlisted the participants and saw to it that all papers were produced on time.
416 The Conference itself was great. Combing through the record and pulling it all together has been a
417 remarkable accomplishment.

418 Judge Rosenthal added that this work owes a debt to Judge Scirica and Judge Levi who
419 embraced the concept of the Conference and helped to push forward the importance of relying on
420 empirical data to support Committee action, as well as the importance of listening carefully to the
421 many constituencies the Rules serve. And, of course, Dean Levi must be thanked for helping with
422 arrangements for the Conference itself. And Judge Koeltl was closely engaged with all of this and
423 more, never impatient, always cooperative and proportional.

424 Judge Campbell noted that several comments on the revised proposals in the agenda book
425 have been received and carefully considered. One comment comes from four United States Senators
426 who remain concerned about adding proportionality to Rule 26(b)(1). Committee members have read
427 their letter with care, as the other letters also, and have carefully considered their views. The letters
428 are thoughtful. "With some, we do not fully agree." Those who continue to oppose proportionality
429 are not satisfied with the revised version in the agenda book. They do not think it is needed. The
430 Committee thinks it is needed. Four different advisory committees, going back 30 years, have
431 believed it is needed: it was originally added in 1983, encouraged in 1993, and emphasized in 2000.
432 The present Committee, as the Committees that recommended the 1993 and 2000 amendments,
433 continues to believe that the 1983 rule has never really been applied. It is time to renew the effort.

434 The Committee voted unanimously to recommend adoption of the entire Duke Rules Package
435 as proposed by the Subcommittee.

436 Judge Campbell expressed the Committee's thanks to Judges Sutton and Gorsuch and
437 Professor Coquillette for attending this meeting to represent the Standing Committee. Thanks as well
438 were expressed to Judge Fogel for representing the Federal Judicial Center. "We hope the rules will

439 prompt more judicial education."

440 *B. Rule 37(e): Failure to Preserve ESI*

441 Judge Campbell introduced the Report of the Discovery Subcommittee by observing that the
442 Subcommittee had met repeatedly since preparation of the revised Rule 37(e) draft presented in the
443 agenda materials. The result of these further deliberations, which included consideration of several
444 outside comments on the agenda-book version, is a still further revision of the proposed rule text.
445 There was not time to revise the Committee Note to reflect the rule text changes. A revised
446 Committee Note will be prepared by the Subcommittee and circulated to the full Committee with
447 the goal of approving final Note language in time for inclusion in the agenda materials for the
448 Standing Committee meeting at the end of May. The task for today is to work on the rule text,
449 allowing for comments on the ways in which the Note might be revised to respond to whatever rule
450 text is approved for adoption.

451 Judge Grimm presented the Discovery Subcommittee Report. The Report is supplemented
452 by the revised Rule 37(e) text handed out to the Committee.

453 The first step of the Report is a recommendation that the new Rule 37(e) should replace
454 current 37(e), without carrying forward the current language.

455 Revising the proposed rule text began at a Subcommittee meeting held the morning after the
456 February 7 public hearing in Dallas. Several meetings were held by conference call after that,
457 culminating in a two and one-half hour call on Tuesday, April 8. A final meeting was held in the
458 evening of the first day of the present Committee meeting. Subcommittee members have given great
459 amounts of time to the project, as have Judges Campbell and Sutton, and also Andrea Kuperman.

460 Present Rule 37(e) was adopted in 2006 as part of a package of amendments that for the first
461 time expressly brought electronically stored information into Civil Rules texts. It was an attempt to
462 provide a limited safe harbor that some came to see as a limited not-so-safe harbor. It applied only
463 to sanctions "under these rules," leaving inherent power intact. The Note showed that once a duty
464 to preserve arises, there may be a duty to intervene to stop the destruction of ESI by auto-delete
465 functions or by other events.

466 A panel at the Duke Conference, chaired by Gregory Joseph, made a unanimous
467 recommendation for a comprehensive review of ESI preservation. The concern was that large
468 enterprises have felt forced to over-preserve huge amounts of ESI for fear of spoliation sanctions
469 imposed under the most demanding standards adopted by the most demanding court in the country.
470 The common law of spoliation provided the background — all things are presumed against one who
471 spoliates evidence. But ESI is not like traditional evidentiary materials, whether paper documents
472 or tangible things. Different circuits have developed different approaches to the duty to preserve
473 ESI, although all agree that the duty can arise before an action is actually filed. There are differences
474 in looking to the relevance of the information and the prejudice that may arise from its loss, and
475 different standards of culpability have been adopted. The Second Circuit approved sanctions for
476 negligence or gross negligence, based on a remedial focus: who should bear the loss, how do we
477 level the playing field? The Fifth and Tenth Circuits, on the other hand, allow adverse-inference
478 instructions only if there is enough culpability to support an inference that the lost information was
479 unfavorable to the party who lost it. Organizations that are subject to nationwide jurisdiction have
480 to observe the most demanding preservation regimes that may be imposed.

481 The Duke Conference panel asked that a rule be adopted. The Subcommittee was charged
482 with developing a proposal. The Dallas miniconference discussed initial sketches addressing these

483 issues.

484 Repeated attempts to draft a rule defining the duty to preserve failed to find a satisfactory
485 definition. The panel recommendation wanted to establish definitions of when the duty to preserve
486 arises; of the scope of the duty, both backward in time and continuing through the litigation and
487 perhaps beyond; how many custodians should be subject to a "litigation hold"; and still other matters.
488 The further these drafts progressed, the greater the obstacles that were identified. Even articulating
489 the events that might trigger a duty to preserve in anticipation of litigation proved difficult, despite
490 the widespread agreement that the duty can arise before an action is actually filed. The Subcommittee
491 simply could not draft a rule that provided meaningful guidance and at the same time applied fairly
492 to the wide variety of civil cases filed in federal court.

493 The first conclusion, then, was to rely on the common law to establish the duty to preserve.
494 A new Rule 37(e) should address only the procedural consequences when the duty is breached.

495 Subcommittee work, after many drafts and repeated discussion in the full Advisory
496 Committee, led to the proposal that was published for comment last summer. Comments and
497 testimony were expected. The message transmitting Rule 37(e) for publication specifically invited
498 comment on five stated questions. These questions asked whether the new rule should be limited to
499 the loss of ESI; whether to retain a provision that allowed "sanctions" without a showing of bad faith
500 when loss of the information irreparably deprived a party of any meaningful opportunity to present
501 or defend against the claims in the litigation; whether the provisions of present Rule 37(e) should
502 be retained; and whether the rule text should attempt to provide definitions of "substantial prejudice,"
503 "willful," and "bad faith."

504 The volume of comments up to the time of the February hearing led to an expectation that
505 as many as 1,000 comments might be addressed to the full set of proposals published in August. In
506 the end, more than twice that number were received.

507 The comments and testimony persuaded the Subcommittee that the published proposal "is
508 not the best we can do." Several concerns guide the need to adopt a reshaped rule.

509 There is a great need for a rule to address the consequences of losing ESI. Over-preservation
510 and the lack of uniformity in dealing with loss are real problems. It would be good to deal with the
511 circuit disagreements, even if nothing else can be accomplished.

512 It remains important to define responses to failures to preserve ESI that should have been
513 preserved. Over-reactions should be cabined, while preserving needed flexibility. John Barkett
514 generated an encyclopedic review of the case law. This review demonstrates the need to establish
515 a flexible range of responses, a need that is underscored by the prospect that the ESI universe will
516 change greatly in only a few years.

517 The published rule sought to establish a distinction between curative measures and sanctions.
518 The comments and testimony persuaded the Subcommittee that this distinction would not work well.
519 "ESI is so voluminous that you cannot preserve it all." But the volume of it also makes the inevitable
520 losses likely to be less serious than might seem. Often there are exact duplicates of a source that has
521 been lost. Often a lost source can be retrieved. And often measures aimed to cure the loss will
522 involve steps that also might be viewed as "sanctions." Invoking the list of sanctions in Rule
523 37(b)(2)(A) also does not work well. These measures properly are "sanctions" in the context of Rule
524 37(b) because they address violation of a court order. In the context of ESI lost without violating any
525 court order, they seem to serve a remedial purpose. And some of the choices available under
526 (b)(2)(A) do not fit failure to preserve ESI — contempt is not available when there is no court order,

527 and it makes no sense to "stay[] further proceedings until the order is obeyed." The "sanctions" label
528 came to seem inappropriate.

529 Further problems appeared with the concepts of substantial prejudice and willfulness or bad
530 faith, and with some of the factors listed in proposed 37(e)(2). The provisions designed to address
531 loss of unique tangibles — for example the automobile claimed to have been improperly designed
532 — also caused difficulty. And the attempt to deal with losses caused by forces outside a party's
533 control was not easily understood.

534 The Subcommittee set out to improve the rule, maintaining as much of the published version
535 as possible. The goal was to refine the expression in response to the comments and testimony.

536 The starting point remains the same. The revised proposal, as the published proposal,
537 addresses loss of information that should have been preserved in the anticipation or conduct of
538 litigation. And the revised proposal is intended to make it clear that losses of information caused by
539 forces outside a party's control are outside Rule 37(e). The published Note addressed that clearly,
540 and the revised Note will continue to be clear.

541 Further revisions pursue the distinction between curative measures and sanctions by refining
542 the approach to curative measures and abandoning any reference to "sanctions." Curative or remedial
543 measures are addressed in two steps. The introduction focuses on restoring or replacing lost
544 information by additional discovery. If that does not work, the court can order measures no greater
545 than necessary to cure prejudice caused by the loss. But it is not required that the court do everything
546 possible to restore or replace the lost information, nor that it do everything possible to cure prejudice
547 caused by the loss. Great flexibility is maintained. Finally, an intent to deprive another party of the
548 lost information's use in the litigation is required for any of four measures: the court's presumption
549 that the lost information was unfavorable to the party who lost it, an instruction that the jury may or
550 must presume the lost information was unfavorable to party who lost it; or dismissal or a default
551 judgment.

552 This version in part responds to concerns expressed about the dimensions of "curative
553 measures" under (e)(1)(A) of the published proposal. There was a fear that curative measures could
554 come to overlap many of the orders alternatively authorized as sanctions, but without the restrictions
555 that limited sanctions under the published rule.

556 Greater concerns were expressed in comments dealing with "sanctions" under the published
557 (e)(1)(B). The central provision, (i), allowed sanctions only on finding substantial prejudice and
558 willful or bad-faith loss. Many comments, responding to one of the questions inviting comment,
559 urged that there should be a definition of what is "substantial" prejudice. Still greater concerns
560 addressed the concept of willfulness. Many comments pointed to the great range of definitions that
561 appear in judicial opinions. "Wilful" is interpreted differently in different contexts. In many contexts
562 it means only an intent to do the questioned act, without any need to show an intent to produce the
563 act's consequences. An intent to discard an old smart phone, for example, could be willful even
564 though no thought was given to the loss of information stored in the phone. "Bad faith" also drew
565 criticism. Many comments suggested the two concepts should be combined as "willful and in bad
566 faith," or that at least "willful" should be discarded entirely.

567 The comments on the alternative in proposed (e)(1)(B)(ii) were equally strong. Although it
568 was intended to dispense with the requirement of willful or bad-faith conduct only on finding an
569 irreparable defeat of any meaningful opportunity to present or defend against a claim, a consequence
570 far worse than "substantial prejudice," many comments suggested that a court unhappy with the bad-
571 faith requirement would seize on this provision to make an end-run around both the substantial

572 prejudice and willfulness or bad-faith requirements.

573 The version in the agenda book responded to these comments in several ways.

574 The revised version carried forward the starting point: the rule applies only to a failure to
575 preserve information that should have been preserved in the anticipation or conduct of litigation.

576 The next step preserved a separate paragraph (1) for curative measures, but specified that the
577 measures must be no greater than necessary to cure the loss of information. It continued to include
578 examples of curative measures. It did not require a finding of prejudice.

579 The next step, paragraph (2), addressed situations in which the court finds prejudice, and
580 authorized measures no greater than necessary to cure the prejudice. No element of culpability was
581 required.

582 The final step, paragraph (3), addressed four specific measures: a court's presumption that
583 the lost information was unfavorable to the party who lost it; an instruction that a jury may or must
584 presume that the information was unfavorable to the party who lost it; dismissal; or default. Any of
585 these measures could be taken only on finding an intent to deprive another party of the information's
586 use in the action.

587 Comments on the agenda-book version suggested that it did not fully address the challenges
588 made to the published version. They asked what it means to "cure" a loss of information? They
589 questioned the absence of any culpability requirement for curative measures — with no definition
590 of curative measures, this provision could be used to justify powerful measures, such as excluding
591 evidence, defeating the limits of the next two paragraphs. So too, it was noted that no culpability was
592 required to support measures designed to cure prejudice, and that again there were no limiting
593 standards apart from the exclusion of the measures identified in the paragraph that requires an intent
594 to deprive another party of the lost information's use in the action. And the intent paragraph also
595 caused concerns that it could authorize sanctions based on culpable intent without any showing of
596 prejudice.

597 The new draft proposed by the Subcommittee addresses these concerns. It limits the rule to
598 settings in which a party "failed to take reasonable steps to preserve" information that should have
599 been preserved. This standard is meant to encourage reasonable preservation behavior.
600 Proportionality is part of the calculus of reasonableness.

601 The new draft eliminates the separate paragraph covering curative measures for lost
602 information, and instead makes clear in the introduction that the succeeding paragraphs apply only
603 when the lost information "cannot be restored or replaced through additional discovery." The
604 illustrations of additional discovery provided in the abandoned paragraph (1) on curative measures
605 will be explored in the Committee Note, which will be further revised to explore what it means to
606 restore or replace lost information and what is meant by "additional discovery." Additional discovery
607 is authorized by Rules 16 and 26, and includes discovery aimed at determining whether in fact any
608 information was lost. If a source of information was lost, additional discovery may show that the
609 very same information resides in a different source. An e-mail message deleted from the system of
610 one person, for example, may survive intact in another system. Or the court may order discovery
611 under Rule 26(b)(2)(B) from sources that otherwise would be thought not reasonably accessible
612 because of undue burden or cost. The goal is to put other parties effectively back in the position that
613 would have existed if the information had not been lost.

614 If the lost information cannot be restored or replaced, the next step in the revised proposal

615 is paragraph (1). This paragraph remains exactly the same as paragraph (2) in the agenda book: on
616 finding prejudice, the court may order measures no greater than necessary to cure the prejudice.

617 Finally, the revised proposal carries forward unchanged as paragraph (2) the agenda-book
618 paragraph (3) provision for information lost because a party acted with the intent to deprive another
619 party of the information's use in the litigation.

620 The Subcommittee, both in the agenda book proposal and in its revised proposal, has
621 responded to its own question by limiting Rule 37(e) to the loss of ESI. There is much to be said for
622 adopting a rule that establishes a uniform procedure for loss of any form of discoverable information.
623 But the loss of a unique tangible object is difficult to capture in a rule. There may be circumstances
624 that justify the ultimate sanctions of dismissal or default even though there was no intent to deprive
625 another party of the use of the object in the litigation. The *Silvestri* case cited in the published
626 Committee Note is an example of the problem. As comments on the published proposal show, there
627 is a risk that any attempt to draft a rule for this problem may open the door to evade the restrictions
628 embodied in other provisions. Beyond that, there is a well-developed body of law for losses of things
629 other than ESI. Further, the abundance of ESI makes it likely that satisfactory ways can be found to
630 work around the loss.

631 In short, the revised proposal has these features: It is limited to circumstances in which a
632 party failed to take reasonable steps to preserve information that should have been preserved, thus
633 embracing a form of "culpability." The concept of attempting first to cure the loss is maintained by
634 focusing on additional discovery to restore or replace the lost information. If those steps fail, the
635 central focus is on prejudice and measures no greater than necessary to cure the prejudice. The circuit
636 split on serious sanctions is resolved; an intent to deprive another party of the information's use in
637 the litigation is required for adverse inferences, dismissal, and default. Flexibility is the central
638 theme. The court need not order all additional discovery that might restore or replace the lost
639 information. It may, but need not, order all measures that might cure prejudice from the loss. The
640 focus is on what is appropriate in the circumstances, neither too demanding nor too forgiving. Nor
641 must a court impose the most severe sanctions when an intent to deprive is found.

642 Comments and testimony raised the question whether the new rule will affect the burden of
643 proving prejudice. The answer is that the burden is allocated to the party that has the knowledge that
644 bears on the issue. The party who lost the information generally is in the better position to have some
645 idea of what was lost. The party who wants the information generally is in a better position to
646 explain why information in the category of the lost information may have been important to its case.

647 The concept of willfulness or bad faith is abandoned. All that remains is an intent to deprive
648 another party of the lost information's use in the action. This intent is required only for a limited
649 range of powerful measures. The court may presume that the lost information was unfavorable to the
650 party who lost it for such purposes as motion practice, summary judgment, or a bench trial; adverse-
651 inference jury instructions; or dismissal or default.

652 The requirement of an intent to deprive another party of the information's use in the litigation
653 is designed to supersede the *Residential Funding* decision. That decision allows adverse-inference
654 instructions on finding negligence or gross negligence. Superseding this approach may give comfort
655 that will reduce over-preservation, at least in some measure. And restricting the use of adverse-
656 inference jury instructions carries with it the same restriction on the even more definitively fatal
657 measures of dismissal or default.

658 Limiting the use of adverse-inference jury instructions invokes a spectrum of instructions.
659 The rule text refers only to an instruction that the jury may or must "presume" the information was

660 unfavorable to the party that lost it. "Presume" is the language of many opinions. But the mental task
661 involved is inference, not the rebuttable presumption of evidence law. This form of instruction stands
662 at one end of the line. The other end of the line involves instructions that address evidence actually
663 introduced at trial. Evidence may be introduced to show the failure to preserve. That evidence may
664 be met by other evidence that explains the failure. The parties may argue about what inferences the
665 jury should draw from all the evidence about the favorable or unfavorable character of the lost
666 evidence. The court might instruct the jury that it is proper to evaluate the loss as suggested by the
667 evidence and arguments. The distinction invoked by the rule text is explored in the Committee Note
668 provided to explain the agenda-book version, which is the same as the Subcommittee's new proposal
669 on this point. The Subcommittee will work further on the Committee Note. There is a proper
670 evidentiary aspect to lost information, something that is not a "sanction." One example is provided
671 by a case in which the defendant introduced a memorandum to show that an employment plaintiff
672 voluntarily quit his job; the plaintiff was allowed to show that metadata went missing from the ESI
673 file for the memorandum.

674 The "intent to deprive" provision raises another issue: should prejudice be an explicit
675 limitation? That might seem implicit in presuming that the lost evidence was unfavorable, and
676 supported by the inference that deliberate destruction shows awareness that the information is
677 unfavorable. But the Subcommittee concluded that these measures, including dismissal or default,
678 should be available as a deterrent without adding an explicit prejudice requirement. The Committee
679 Note will say that the court should not dismiss or default simply for deliberate loss of immaterial
680 information. But if there is prejudice — including what may be inferred from the deliberate intent
681 to deprive — dismissal or default is available. The choice invokes discretion, and the Note will
682 suggest limits on the sound exercise of discretion.

683 The Subcommittee recommends that the list of factors in the published version, and the
684 revised list of factors in the agenda-book version, be abandoned. In the published version, these
685 factors bore both on determining whether information should have been preserved and on
686 determining whether the failure to preserve was willful or in bad faith. In the agenda-book version,
687 the factors bore generally on "applying Rule 37(e)." In addition to the usual problems that attend an
688 incomplete "laundry list" of factors in rule text, these factors seem less important now that "failure
689 to take reasonable steps" has been added to rule text. Reasonableness includes proportionality. Two
690 of the factors are thus made redundant. And reasonableness also reflects another of the factors, the
691 extent of the party's notice about impending litigation.

692 The Committee Note will be shortened, simplified, and adjusted to reflect the revised
693 proposal. Among other elements, it will explain the "restore or replace" element, along with the
694 related focus on "additional discovery."

695 Judge Campbell observed that Judge Grimm's thorough report "gave a short version of what
696 happened." The revised proposal continues the progress made by the agenda-book version toward
697 a simpler, more modest rule. The failure to preserve ESI presents many problems. The drafting
698 challenge is great. The difficulties push toward doing less, rather than attempting to do more in the
699 rule. And even in attempting less, we can aim only to get a good rule, not to get a perfect rule. This
700 proposal is a good rule. It can be adopted, and then tested in application. We will learn more from
701 how it works.

702 A Subcommittee member agreed that the Subcommittee had decided to be satisfied with a
703 more modest approach. There are great limitations on what we can do by rule to alleviate the burdens
704 of ESI preservation. The rule does not define the duty to preserve. Nor could the rule define duties
705 to preserve imposed by state law. The comments and testimony did not say much about how these
706 rules will alleviate the burden of preservation. The Subcommittee followed many paths. Nothing in

707 the rule requires a court to do anything. All of its provisions are "may." It is an authorization of
708 discretion. And there are limits: there must be a loss of information that should have been preserved,
709 a breach of the duty to preserve; the breach must at least be a failure to take reasonable steps to
710 preserve; and further steps can be taken only if the lost information cannot be restored or replaced.
711 The inquiry passes to prejudice and curing prejudice only if restoration or replacement cannot be
712 accomplished.

713 Another Subcommittee member began by recalling his reaction on first reading the
714 *Residential Funding* decision: "Oh my, look out." The case itself had nothing to do with spoliation,
715 but it had the potential to wreak havoc. It has. Decisions in the Second Circuit and in its district
716 courts have been inconsistent. There is something woefully wrong with them. We need to establish
717 uniformity, and it is not uniformity in the (non-uniform) Second Circuit approach. And we should
718 observe the separation between evidence law and procedure. Several recent decisions in the district
719 courts show that judges are pausing in the approach to lost ESI because they realize the lost
720 information may be restorable or replaceable, or may be merely cumulative even though it is not
721 restored or replaced. They may wait for trial to decide what to do about the loss, based on the trial
722 evidence. Some courts, attempting to level the playing field, have in the past invoked remedies that
723 tilt the playing field in the opposite direction. We should cure that. The "should have been preserved"
724 element brings in relevance, "content" as well as "intent." The Committee Note should mark the line
725 between evidence and procedure, to avoid tilting the playing field one way or the other. This
726 proposal may not be a perfect rule, but it is far better than the undisciplined case law. "I'm not sure
727 what a perfect rule is." But we can establish a measure of uniformity in approaching the loss of ESI,
728 and "this is a HUGE improvement."

729 Another Subcommittee member agreed that "it was a hard rule to write, and it will not be
730 entirely comfortable to apply." We want to preserve authority to maintain the integrity of the ESI
731 discovery process, but without going overboard. The Committee Note should make it clear that the
732 rule does not intrude on jury freedom to find the facts. "To avoid open season," the Note should
733 emphasize "replace or restore," and can draw on court help in ordering additional discovery.
734 Measures in response to prejudice will be the exception.

735 A fourth Subcommittee member described "two realities." First, ESI will be lost. It will be
736 lost a lot in a lot of cases. More often the loss will result from failure to take reasonable steps than
737 from intentional loss. And reasonable steps are not perfect steps; information will be lost even when
738 reasonable steps are taken to preserve it. Second, all of these problems are case-specific.
739 Subcommittee discussions included specific hypothetical cases, eliciting different intuitions. And
740 even if all members shared common intuitions, "we could not draft them." We depend on the court's
741 discretion. But, while depending on discretion, we can guide it in ways that will achieve greater
742 uniformity. Beyond these realities, the rule can cabin discretion in invoking the most severe
743 sanctions. In this dimension, the Subcommittee talked a lot about remedy, as compared to deterrence
744 and punishment. There is agreement that the principal focus is on remedy, even if not complete
745 agreement on the role of deterrence. "Bad intent is the periphery of the rule. The core is in the
746 preface and in curing prejudice."

747 An active participant in the Subcommittee process said that the proposal is a fine rule. The
748 limits in the preface — failure to take reasonable steps, and efforts to restore or replace — are
749 impressive. "The Subcommittee work is brilliant."

750 A fifth Subcommittee member noted that he had come late to the Subcommittee. He was
751 impressed by the seriousness of the attention paid to the testimony and comments, and to the
752 comments on the version in the agenda book. The proposed simplification, focusing on the core
753 things that need to be done, is what we should do. "We cannot write a rule that will deal with all

754 cases."

755 General discussion began with a reminder that in 2009 Judge Kravitz suggested there might
756 be Enabling Act problems in framing a rule to address pre-litigation conduct. It is "brilliant
757 avoidance" to frame a rule that, rather than attempt to establish an independent duty to preserve,
758 takes as given the duty established by court decisions.

759 The Committee Note addressing the parties' burdens in arguing whether a failure to preserve
760 caused prejudice, however, was found confusing. "I would fear the burden may shift during the
761 hearing." Nor is it clear whether the preponderance standard applies. It would help to say that a party
762 seeking remedial measures normally has the burden.

763 The burden question was addressed by noting the difficulty of proving what was in the lost
764 source of information. Imposing a burden on the party seeking to cure the loss "may thwart justice."
765 So it was that every attempt to write a burden provision proved difficult. "Some courts say where
766 the burden lies. Others are silent." There is this much guidance in the rule: the court must find
767 prejudice to invoke paragraph (1), and it must find intent to invoke paragraph (2).

768 The response was the same question, reframed: "Do we require the party who lost
769 information to prove the other party was not prejudiced"? If the party who lost the information has
770 the burden it has no way to know what other information is available to the party who may have been
771 prejudiced. "I fear discretion will be a complete lack of discipline. Allocating the burden may
772 determine the outcome."

773 Another judge reframed the question: "How does a trial judge get through this flexible
774 process? It is very complex. When I start to hear all this, whom do I look to at the starting point,
775 recognizing the burden may change as the hearing moves along"?

776 The response was the same. "We have not attempted to say where the burden rests, nor when
777 it may shift." The aim is only to draft a modest but broad rule, and to establish uniformity. Another
778 Committee member said that the basic law imposes the burden of proving prejudice on the moving
779 party. But when bad faith is shown, there is either a very low threshold on prejudice, or the burden
780 is shifted.

781 A Committee member commended the "restore or replace" provision as "an important and
782 good change." The next steps follow — measures no greater than necessary to cure prejudice, and
783 then intent. But if you cannot cure the prejudice by other means, paragraph (2) allows the court to
784 draw adverse inferences, give an adverse-inference jury instruction, or dismiss or default only on
785 finding an intent to deprive another party of the lost information's use in the litigation. Not even
786 reckless loss will support those measures. So if the court does not find the required intent, it will not
787 ask the jury to find the intent. What does the court say to the jury?

788 One response was that in the (e)(2) situation, the jury has heard what happened — that
789 information was not preserved. An example is proof of the loss of metadata for a document that
790 survives and is introduced in evidence. Even if the loss occurred at a time when there was no duty
791 to preserve, the jury may consider whether the missing evidence would be helpful to a party opposing
792 the party who lost it.

793 It was noted that the Subcommittee will work to refine the part of the Committee Note that
794 deals with the forms of jury instructions that may be given when there is no finding of an intent to
795 deprive another party of the lost information's use. This work will consider the later observation that
796 there is such a broad range from negligent to intentional conduct that we should be clear in reflecting

797 on the cases in which a jury may hear evidence on what was lost. There is a range of remedies not
798 circumscribed by a requirement of finding intent under (e)(2).

799 A Committee member said it is "good not to commoditize, to avoid a one-size-fits-all
800 approach, to tailor reactions to each case." Modesty is a strong mark of intelligence. It is good to
801 encourage a tailor-made approach to each case. But should a greater range of options be made
802 available under (e)(2) when intent is found? It was pointed out that (2) does not require resort to any
803 of the remedies it lists. The Committee Note says explicitly that the court may adopt less severe
804 remedies designed to cure the prejudice, if any, or to otherwise address the party's conduct.

805 A Committee member asked whether prejudice is required to invoke the severe measures
806 provided by paragraph (2) for a failure to preserve for the purpose of depriving another party of the
807 lost information's use in the action. The response was that to a certain extent, a finding of this intent
808 permits the judge to infer from the intent that the information was unfavorable to the party who lost
809 it. It would be confusing to add an explicit prejudice requirement. The case of deliberate intent
810 without prejudice raises the question of deterrence: should we remove any consideration of
811 deterrence from the choice of remedies? The Subcommittee decided that a need for deterrence might
812 justify even dismissal or default, but not if the lost information is truly inconsequential.

813 It was pointed out that if the "incompetent spoliator" is an attorney, the court has another
814 remedy by reporting to the state disciplinary authority.

815 Another Committee member recognized that "the rule presents challenging issues." The
816 proposed draft is in many ways an elegant way of improving on the complexities of the version that
817 was published for comment. And it is good to limit remedies to those that are no greater than
818 necessary to cure prejudice. But what types of loss start you down this path? The draft is not limited
819 to loss of "discoverable" information, nor does it require materiality. Some clarification in the
820 Committee Note would be helpful. It was agreed that the Subcommittee would attempt to do this.

821 The same member asked whether restoring backup tapes fits under the preface as additional
822 discovery to restore or replace lost information, or only under paragraph (1) as a measure to cure
823 prejudice? The preface goes beyond determining whether anything was lost. "Replace or restore can
824 be very expensive": should such measures be available without finding prejudice? Should we build
825 proportionality, a "no greater than necessary" limit into the approach to restoring or replacing the lost
826 information? Again the response was that this would be addressed in the Committee Note. "Often
827 you don't know whether there is prejudice until you've had the added discovery." Facing a renewed
828 protest that restoring or replacing can be very expensive, the response was that this is a matter of
829 discretion. The more reasonable the conduct was, the less likely it is that the judge will order extreme
830 measures. Proportionality concerns may persuade the judge to order phased discovery, as many
831 judges do now. "If there is a cost to some steps, we can talk about who pays."

832 The question whether present Rule 37(e) should be preserved in the text of the new rule was
833 renewed. The value may lie not so much in guiding litigants and courts as in providing a tool for
834 lawyers to use in persuading IT staff to design information systems that facilitate preservation. "Does
835 'reasonable steps' build in this idea"? It was suggested that something can be built into the
836 Committee Note to reflect this concern — it could be something like the portions of the Note that
837 appear in the agenda book at lines 37-47 and 384-385.

838 The question whether to limit the rule to loss of electronically stored information also was
839 renewed. The Subcommittee Report lays out powerful reasons for adopting this limit. But "I'm not
840 as confident there are not ESI equivalents to the vanishing car and air bag: there can be unique ESI
841 in unique sources." Not all ESI is redundant. And is the case law on the loss of tangible things in fact

842 less disuniform than the law on loss of ESI, so less in need of a uniform rule? A further concern is
843 that a single case may involve loss both of ESI and of a tangible thing: do we want to leave it open
844 to take different approaches to the different losses?

845 This question was characterized as a reflection of the reasons that make it unwise to attempt
846 to write a rule for all situations. Examining the cases equivalent to the lost car failed to find any
847 where there was not bad faith and a really critical loss of ESI. At the same time, it must be
848 recognized that some cases may present serious questions whether a particular bit of lost information
849 qualifies as ESI — our running example has been a printout of a vanished e-mail message.

850 A participant confessed to have begun by wanting a rule to address all forms of information.
851 But the complications are great. If the proposed rule is adopted, "we will monitor it closely." If it
852 works, we can think seriously about extending it to other forms of information. If it does not work,
853 we will look at it for that reason.

854 Another participant asked when the proposed rule would permit "issue sanctions, or evidence
855 sanctions." Can the court exclude testimony as a remedy without finding the intent required for
856 paragraph (2) measures, or — shades of Rule 37(b)(2)(A)(i) — direct that designated facts be taken
857 as established? The Committee Note should address this. It was responded that the Note calls these
858 steps "measures." But are they available without a showing of intent? Can the court forbid a witness
859 from testifying to the contents of an e-mail message he wrote and lost when there is "no mens rea"?
860 The Committee Note says, and is expected to say still, that anything that is equivalent to dismissal
861 or default requires intent.

862 A similar question asked whether taking a matter as established can extend to taking
863 "liability" as established? It was agreed that such a measure is equivalent to default, and is available
864 only on finding the intent required by paragraph (e)(2).

865 The Subcommittee agreed with a separate suggestion that the Note should make clear that
866 (e)(2) measures should not be punitive.

867 Brief discussion led to agreement that the "factors" in the published rule and the modified
868 list of factors in the agenda-book proposal would be deleted from rule text. Some discussion of them
869 may be provided in the Committee Note.

870 The Committee voted unanimously to approve the substitute draft proposed by the
871 Subcommittee at this meeting. A revised Committee Note will be prepared and promptly circulated
872 to the Committee.

873 The final question was whether approval of the new rule text should be for adoption or for
874 republication. The sense of the Subcommittee is that republication is not necessary. "We have
875 accomplished the purpose of publication and have had the full benefit of public input. Every issue
876 has been fully explored." The published proposal, moreover, gave full notice of everything that
877 remains in the rule. The new version still applies only to a failure to preserve information that should
878 have been preserved. The first step still is to try to restore, the equivalent of permitting discovery in
879 the language of the published proposal. The next step continues to address prejudice. And the new
880 rule continues to limit the *Residential Funding* decision. Beyond that, "this has been a long process."
881 There is a real need for clarification and uniformity. It is better to avoid further delay.

882 Agreement with this view was expressed. "The rule text is within the four corners of the
883 published proposal." A revised Committee Note that reflects the new rule text does not have to be
884 republished. When other proposals have been republished it has been because the revised version

885 involves a new factor that was not at all involved in what was published.

886 The Committee unanimously agreed that the recommendation should be for adoption without
887 republication.

888 Judge Campbell concluded the discussion with praise for the Subcommittee. "It has been a
889 great Subcommittee." It included a balance of lawyers "on both sides of the v." The judges also did
890 great work. Thanks are due from all for their substantial work.

891 *C. Rule 84*

892 Judge Pratter presented the Report of the Rule 84 Subcommittee.

893 The Subcommittee recommends approval of the published proposal to abrogate Rule 84 and
894 all of the Rule 84 Forms. Form 5, the request to waive service, and Form 6, the waiver, would be
895 carried forward by amending Rule 4(d) to incorporate them.

896 "The Forms from 1938 should be thanked for their service and retired."

897 A number of comments, especially many from the academy, reflect a wish that the Forms
898 remain. The hope is that people will return to them and use them. But there is little evidence of actual
899 use. And there are many readily available sources of excellent forms.

900 Another concern is that the Forms are part of the debate about the consequences of the
901 Supreme Court decisions in the *Twombly* and *Iqbal* cases.

902 The Subcommittee continues to believe, for reasons reflected in its Report, that abrogation
903 will reflect current reality. The Committee cannot be in the business of keeping official Forms up
904 to date in shapes that will be useful in today's litigation world.

905 The recommendation to recommend for adoption the published Rule 84 proposal, and the
906 related Rule 4(d) proposal, was unanimously approved.

907 *D. Rule 6(d)*

908 A modest revision of Rule 6(d) was published for comment in August, 2013. The change
909 corrects an unintended ambiguity created by a style choice to allow 3 added days to respond "after
910 service" by specified means. This formulation could be read to allow the 3 added days for periods
911 set for action by the party who makes service. It was intended to carry forward the original meaning
912 that allows the 3 added days only for a party who is served. The correction is simple: "after service
913 being served * * *."

914 Three written comments supported the proposal.

915 The Committee unanimously approved the amendment for adoption. The timing for the next
916 steps should be determined by the Standing Committee in light of the prospect that further changes
917 may be made in Rule 6(d). Last January the Standing Committee approved for publication a revision
918 that would exclude service by electronic means from the categories of service that provide 3 added
919 days to respond. That proposal may be published for comment this summer if the advisory
920 committees for other rules that have similar 3-added-days provisions recommend publication of
921 parallel changes. It also is possible that these questions will be held back for a determination whether
922 to recommend withdrawal of the 3-added-days provision entirely, or for some other modes of

923 service. There is no urgency about the "being served" amendment. The ambiguity was identified in
924 a law review article, and there is no indication that it has caused any significant problems in actual
925 practice. The advantages of accomplishing all potential revisions of Rule 6(d) in a single package
926 are real.

927 *E. Rule 55(c)*

928 A modest revision of Rule 55(c) was published for comment in August, 2013. The
929 change corrects an ambiguity by adding one word: "The court may * * * set aside a final default
930 judgment under Rule 60(b)." Rule 60(b) authorizes relief from "a final judgment." Rule 54(b)
931 provides that any order or other decision that adjudicates fewer than all the claims among all the
932 parties "may be revised at any time before the entry of a judgment" adjudicating all claims among
933 all parties. Present Rule 55(c) is meant to govern only relief from a final default judgment, whether
934 finality is achieved by an order under Rule 54(b) to enter a partial final judgment or results from
935 complete disposition of all claims among all parties. Courts have reached this result, but often have
936 had to struggle through the three rules to understand that it is the proper result. The amendment
937 makes the point clear, sparing future parties and courts from the need to work through to the correct
938 answer.

939 Three public comments supported the proposal.

940 The Committee unanimously approved the proposal for adoption.

941 **II. PROPOSALS FOR PUBLICATION**

942 *A. Rule 4(m)*

943 As noted in discussing the Duke Rules Package, many comments on the proposal to reduce
944 the time set by Rule 4(m) for serving the summons and complaint suggested that even 120 days are
945 not enough to accomplish service abroad, whether under the Hague Convention or otherwise. Most
946 of these comments were puzzling. By its express terms, Rule 4(m) "does not apply to service in a
947 foreign country under Rule 4(f) or 4(j)(1)." The apparent source of the confusion is that Rule 4(f)
948 governs service on an individual at a place not within any judicial district of the United States, and
949 Rule 4(j)(1) governs service on a foreign state or its political subdivision, agency, or instrumentality
950 in accordance with 28 U.S.C. § 1608. Service on a corporation, partnership or other unincorporated
951 association outside any judicial district of the United States is governed by Rule 4(h)(2). Rule 4(h)(2)
952 in turn directs service "in any manner prescribed by Rule 4(f) for serving an individual, except
953 personal delivery under (f)(2)(C)(i)." This sequence of cross-references could be construed to mean
954 that service under Rule 4(h)(2), "in any manner prescribed by Rule 4(f)," is service under Rule 4(f).
955 Then the present 120-day limit, and the proposed 90-day limit, would not apply. That construction
956 makes sense; there is no reason to think that service abroad can be any more expeditious when
957 service is to be made on a corporation rather than an individual. But that conclusion is not manifestly
958 required, and the comments suggest that many lawyers have not thought of it. One thoughtful
959 comment pointed to the uncertainties in Rule 4, suggested that courts that have confronted the
960 problem of serving a corporation in another country have reached the right result, albeit without clear
961 analysis, and urged that Rule 4(m) be amended.

962 The Committee unanimously recommended publication of an amendment to Rule 4(m): "**
963 * * This subdivision does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1)
964 * * *."
965

967 The Standing Committee at the meeting last January approved publication of a proposal to
 968 amend Rule 82 to reflect amendments of the statutory venue provisions governing admiralty or
 969 maritime actions. New 28 U.S.C. § 1390(b) provides that apart from the transfer provisions, the
 970 venue provisions of Chapter 87 do not govern the venue of a civil action in which the district court
 971 exercises the jurisdiction conferred by § 1333 over admiralty or maritime claims. It was agreed that
 972 the message transmitting the amended rule for comment would ask whether the rule should continue
 973 to refer to 28 U.S.C. § 1391. Further reflection prompted the need for further consideration.

974 Rule 82 serves to make it clear that the Civil Rules do not "extend or limit the jurisdiction
 975 of the district courts or the venue of actions in those courts."

976 The second sentence of Rule 82 was added to reflect the well-established rule that the general
 977 venue statutes do not apply to admiralty or maritime actions, apart from the transfer provisions. This
 978 specific statement reflects potential ambiguities about the exercise of admiralty or maritime
 979 jurisdiction. Some admiralty and maritime claims are inescapably admiralty or maritime claims; as
 980 to them there is no ambiguity. But other claims, governed by the "saving to suitors" clause in 28
 981 U.S.C. § 1333, may be brought either as admiralty or maritime claims within § 1333 jurisdiction or
 982 as common-law claims that can be brought in federal court only by asserting a different basis for
 983 jurisdiction. Rule 9(h) allows a pleading that states such a claim to designate it as an admiralty or
 984 maritime claim. But the merger of the admiralty rules into the general Civil Rules in 1966 made an
 985 action asserting an admiralty or maritime claim a "civil action." The remedy was to add the second
 986 sentence, stating that an admiralty or maritime claim under Rule 9(h) is not a civil action for
 987 purposes of 28 U.S.C. §§ 1391-1393. Section 1393 was deleted from Rule 82 when § 1393 was
 988 repealed.

989 The venue amendments enacted in 2012 repeal § 1392. If nothing else, Rule 82 must be
 990 revised to strike the reference to § 1392.

991 That leaves the question whether to continue to refer to § 1391. The proposal approved for
 992 publication in January was conservative. It retained much of the present language of Rule 82,
 993 revising it only to provide that an admiralty or maritime claim under Rule 9(h) is not a civil action
 994 for purposes of §§ 1390-1391. The snag is that § 1390(b) twice refers to actions under § 1333 as civil
 995 actions. It seems at best incongruous to say in the rule that an admiralty or maritime claim is not a
 996 civil action for purposes of § 1391, and flatly inconsistent with § 1390(b) to say it is not a civil action
 997 for purposes of § 1390.

998 The revised version proposed in the agenda book was this: "An admiralty or maritime claim
 999 under Rule 9(h) is an exercise of the jurisdiction conferred by 28 U.S.C. § 1333, including for
 1000 purposes of 28 U.S.C. § 1390." The Committee voted to recommend this revised version for
 1001 publication.

1002 Subsequent consultation with Professor Kimble, the Style Consultant, suggested a clearer
 1003 version: "An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390." That
 1004 version will be included with the recommendation to the Standing Committee.

1005 III. INFORMATION

1006 Judge Dow delivered a report on the preliminary work of the Rule 23 Subcommittee. The
 1007 Subcommittee met in Phoenix after the public hearing on the published rules proposals. The sense
 1008 of the Subcommittee is that it is timely to start considering possible revisions of Rule 23. Many

1009 developments that affect class actions have occurred since Rule 23 was last revised. The Class
1010 Action Fairness Act and a number of Supreme Court interpretations of Rule 23 have affected
1011 ongoing practice in many ways.

1012 The Subcommittee has considered a number of possible topics, with the sense that a
1013 manageable project should not attempt to address every issue that might be identified. It has worked
1014 up a list that identifies three topics as potential "front burner" subjects, with another half dozen as
1015 potential further subjects.

1016 One subject is presented by settlement classes. Some work identifying issues within this
1017 category has already been done. the issues include criteria for certifying a settlement class; cy pres
1018 provisions; criteria for approving a settlement; and a matter currently on the agenda of the Appellate
1019 Rules Committee, the responses appropriate when an objector appeals approval of a class settlement
1020 and then seeks to dismiss the appeal, perhaps because of an agreement with proponents of the
1021 approved settlement. Most class actions settle. Consideration of settlements seems desirable,
1022 including work with the Appellate Rules Committee on settlements pending appeal.

1023 Issues classes present a second set of issues. Different circuits treat Rule 23(c)(4) differently.
1024 Serious questions arise from integration of Rule 23(c)(4) with the predominance criterion of Rule
1025 23(b)(3).

1026 Notice to class members also presents interesting questions. Contemporary technology
1027 presents many alternative possibilities for accomplishing notice. Different means may be consistent
1028 with due process as an abstract matter, and may in fact be more effective than some contemporary
1029 modes of accomplishing notice.

1030 After these issues come several that have not percolated as much in initial Subcommittee
1031 deliberations and that may not be appropriate for present action. Among those that have been
1032 identified, several seem to present both attractive opportunities to improve the rule and equally
1033 daunting risks of interfering with current practices that may be better than formal rule provisions
1034 could manage. These include: (1) the extent to which consideration of the claims on the merits
1035 should be explored at the certification stage; (2) implementation of the predominance and superiority
1036 requirements in Rule 23(b)(3); (3) the extent to which a mandatory (b)(2) class for injunctive or
1037 declaratory relief should extend to monetary awards; (4) the questions of commonality raised by the
1038 *WalMart* decision, including related questions of consolidation by other means; and (5) amending
1039 the language that prompted the *Shady Grove* ruling that allows certification of a class to enforce
1040 state-law claims that state law excludes from class recovery.

1041 It was noted that the Supreme Court continues to take cases involving class actions, but that
1042 this is not a reason to abandon work on Rule 23.

1043 The prospect that people often junk class-action notices without reading them was noted.

1044 The next step for the Subcommittee will be to generate a more concrete list of topics for
1045 consideration at the fall meeting. More detailed work can be launched after that; when the work has
1046 advanced to an appropriate stage, it is likely that a miniconference will prove helpful. No rule text
1047 drafts have been prepared, apart from an initial sketch of small changes that would supersede the
1048 textual foundation for the Shady Grove result.

1049 *A thank you*

1050 The Committee expressed gratitude and appreciation to Dean Klonoff and the staff of the

1051 Lewis and Clark Law School for their extensive and gracious efforts in hosting the Kravitz
1052 symposium and the Committee meeting.

1053 *Adjournment*

1054 The meeting adjourned. The next meeting will be on October 30 and 31 in Washington, D.C.

1055 Respectfully submitted,

1056 Edward H. Cooper
1057 Reporter

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TAB 3

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Inter-Committee CM/ECF Subcommittee

RE: Report to the Standing Committee

DATE: May 5, 2014

The CM/ECF Subcommittee met by conference call on May 2, 2014 to review a number of proposals for changes to the national rules to accommodate electronic case filing. In that conference call, the Subcommittee expressed its support for the proposed amendments to the Appellate, Bankruptcy, Civil, and Criminal Rules that would abrogate the three-day rule as applied to electronic service. It also resolved to continue to study other suggestions for change.

1. Abrogation of the Three-Day Rule as Applied to Electronic Service

The Subcommittee had previously determined that the rules adding three days to the time required to take action after receiving electronic service should be abrogated. The rules to be amended are Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6 and Criminal Rule 45. The Subcommittee had previously developed — with the assistance of the Reporters to the Advisory Committees — a template that would provide a uniform approach for these changes. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments were prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments and Committee Notes were then considered by each of the concerned Advisory Committees. The Civil Rules proposal was tentatively approved for publication by the Standing Committee at its January, 2014 meeting. The Appellate, Bankruptcy and Criminal Rules Committee are — at this meeting of the Standing Committee — seeking approval to publish proposed amendments that would abrogate the three-day rule as applied to electronic service.

The CM/ECF Subcommittee reviewed these proposals and unanimously supports their release for public comment.

The Subcommittee has also considered whether the proposed amendments should be expanded to abrogate the three-day rule as to other — or all — forms of service. After discussion, the Subcommittee determined that any such proposal would require significant study for its impact on litigants, especially pro se litigants — whereas it was clear that there was no continuing justification for adding three days to respond to something that has been served electronically. The Subcommittee concluded that if the Advisory Committees do wish to study the merits of a further limitation on the three-day rule, they could do so and the respective rules could be amended again at a later point — but that delaying the existing proposed amendments as applied to electronic service was not justified. Moreover, it was noted that any further limitation on the three-day rule would involve service other than by electronic means, and so would be a matter for the respective Advisory Committees, and not for the CM/ECF Subcommittee.

2. *Electronic Signatures: Proposed Amendment to Bankruptcy Rule 5005*

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. As discussed in the materials submitted for this meeting by the Bankruptcy Committee, the proposed amendment to Bankruptcy Rule 5005(a)(3) was not approved. That proposal provided that (A) the username and password of a filing user would serve as that individual's signature on any electronically filed document, and (B) a scanned signature of a non-filing user would be considered a valid signature without any requirement that the filing user retain the original signature. The explanation for the Bankruptcy Committee's rejection of the proposal is explained in the materials provided by that Committee in the agenda book for this meeting.

In light of the rejection of the proposed amendment, the Subcommittee considered whether there was any further work to be done on the subject matter of electronic signatures. The Subcommittee noted that local rules now govern the use of electronic signatures. Most of the district and bankruptcy courts have local rules that track the model rules on electronic filing that have been promulgated by CACM and the Judicial Conference; but there are some differences in the local rules with respect to such details as retention requirements of wet signatures and whether to use an s/slash as opposed to a scanned signature. The question is whether it would be useful to propose national rules to provide for uniformity regarding the use of electronic signatures. But the concern is that any national rulemaking could end up being overrun by advances in technology — for example a move from electronic signatures to more high tech means of “signing” documents. Moreover, a nationwide solution may not be ideal where technological capabilities and customs may vary among the districts.

The Subcommittee has obtained the assistance of the Administrative Office to survey the local rules on electronic filing. It will review the survey with the goal of determining whether any

national rules on the subject would be useful.

3. *Civil and Criminal Rules Requiring Electronic Filing*

The Subcommittee again discussed whether the Civil and Criminal Rules should be amended to provide that a court can require electronic filing subject to certain exceptions. This is a Civil and Criminal Rules matter as Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court “may, by local rule, allow” electronic filing. The Bankruptcy Rule already allows a court to require electronic filing. *See, e.g.*, Bankruptcy Rule 5005.

Last year the Administrative Office, at the request of the Subcommittee, surveyed the local rules and concluded that almost all of the local rules *mandate* electronic filing subject to certain (varying) exceptions. The Subcommittee has concluded that an amendment to the Civil and Criminal Rules should be considered by the Civil and Criminal Rules Committees, because of the tension between the “may allow” language and the local rules requiring electronic filing. Of course, The Subcommittee recognizes that careful consideration must be given to the necessary exceptions.

4. *Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.*

Professor Capra, the Reporter to the Subcommittee, has prepared for discussion purposes a template that perhaps could be used to provide a “universal fix” for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

- a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
- b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

After discussion, the Subcommittee determined that a universal fix for electronic *information* is probably more viable than a fix for electronic *action*. But both fixes require careful consideration of necessary exceptions. Moreover, it may well be that certain actions might be universally electronic or nearly so and could be subject to an amendment of a particular rule — as opposed to a universal fix. The Subcommittee will continue to consider and discuss whether any kind of universal fix is feasible, and will serve as a forum for exchange of ideas among the Advisory Committees and their Reporters.

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TAB 4

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TAB 4A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Reena Raggi, Chair
Advisory Committee on Criminal Rules

RE: Report of Advisory Committee on Criminal Rules

DATE: May 5, 2014

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Advisory Committee”) met on April 7-8, 2014, in New Orleans, Louisiana, and took action on a number of proposals. The Draft Minutes are attached. (Tab E).

This report presents three action items for Standing Committee consideration:

- (1) approval to publish a proposed amendment to Rule 4 (service of summons on organizational defendants); and
- (2) approval to publish a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches); and
- (3) approval to publish a proposed amendment to Rule 45 (additional time after certain kinds of service).

In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, including one proposal that has been referred to subcommittees for further study.

II. Action Items — Recommendations to Publish for Public Comment

1. ACTION ITEM — Rule 4 (service of summons on organizational defendants)

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the “new reality”: a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a “growing class of organizations, particularly foreign corporations” that have gained “‘an undue advantage’ over the government relating to the initiation of criminal proceedings.” The Department’s proposal was referred to a subcommittee which met multiple times by teleconference and proposed an amendment for consideration at the New Orleans meeting.

In New Orleans, the Committee unanimously approved a proposed amendment making the following changes in Rule 4:

- (1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule.
- (2) For service of a summons on an organization within the United States, it:
 - eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but
 - requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.
- (3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

Following the meeting, the Committee unanimously approved style changes and slight changes in the committee note that were circulated electronically. The text of the proposed amendment and accompanying committee note are provided at Tab B.

A. Authorizing sanctions if an organizational defendant fails to appear

As a preliminary matter, the Committee identified a gap in the current rule concerning organizational defendants who fail to appear. Rule 4(a) presently provides that both individual and organizational defendants may be served with a summons. Although the rule provides for the issuance of an arrest warrant if an individual defendant fails to appear in response to a summons, it is silent on the procedure to be followed if an organizational defendant fails to appear.

The Committee concluded that this omission should be addressed, and it proposes that the following sentence be added to the end of paragraph (a): “If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by law.”

There is little precedent defining the actions that a court may take if an organizational defendant fails to appear. The Department of Justice emphasized that such cases have rarely arisen, and it anticipates that would continue to be the case if the proposed amendment is adopted. Foreign as well as domestic corporations have many incentives to appear and resolve criminal charges once service is made. Given the paucity of available authority, the Committee concluded it would be premature to attempt any determination of the scope of the courts’ authority to employ the sanctions identified by the government. By stating that the court has the authority to “take any action authorized by law” the amendment provides a framework for the courts to evaluate the scope of that authority if and when cases arise in which organizational defendants fail to appear after being served.

B. Restricting the Mailing Requirement When Delivery Is Made in the United States

The current mailing requirement in Rule 4(c)(3)(C) is a major impediment to prosecution of foreign entities, and the Committee agreed that the requirement is unnecessarily overbroad. At present, in every case involving an organizational defendant, the rule requires not only service by delivery to an agent but also mailing to the entity, which must be made “to the organization’s last known address within the district or to its principal place of business elsewhere in the United States.” Accordingly, it is not possible to serve a foreign entity—even one that conducts both real and virtual business within the United States—that has neither a principal place of business in the U.S. nor a known address within the district of prosecution.

The Committee’s proposed amendment follows the approach of the Civil Rule 4(h): it restricts the mailing requirement to cases in which service has been made on a statutorily appointed agent when the statute itself requires a mailing as well as personal service. Moreover, the proposed amendment does not restrict the address to which the mailing may be made.

C. Providing for Service of Organizational Defendants Outside the United States

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served “within the jurisdiction of the United States.”¹ In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).²

Given the increasing number of criminal prosecutions involving foreign entities, the Subcommittee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization, and it proposes the following addition to Rule 4(c)(2), which governs the location of service: “A summons under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.” This general provision is implemented in the Subcommittee’s proposed amendment to Rule 4(c)(3), which governs the manner of service.

The Subcommittee’s proposal – like Fed. R. Civ. P. 4 – enumerates a variety of methods of proper service, but also provides a more general provision authorizing other methods. New subdivision (c)(3)(D) authorizes several forms of service “on an organization not within a judicial district of the United States,”³ and it enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant. Subdivision (i) notes that a foreign jurisdiction’s law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means of serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction’s law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that “gives notice.”

¹ Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made “anywhere else a federal statute authorizes an arrest.”

² Fed. R. Civ. P. 4(h)(2) provides, however, that service on an entity may not be made under Rule 4(f)(2)(c)(i) (delivery “to the individual personally”).

³ Fed. R. Civ. P. 4(h) provides for service on a corporation “at a place not within any judicial district of the United States,” but the Subcommittee deliberately omitted the reference to service *at a place* outside a judicial district of the United States. Thus the new provision authorizes additional means of service on *organizations* that are not within a judicial district of the United States. Although the authorized means for such service would generally occur outside any U.S. judicial district, in some cases service by stipulation or service under the general catch-all provision might occur within a U.S. judicial district.

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements, regional agreements, and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

The Committee viewed these methods as uncontroversial. Using these well-developed procedures should ordinarily provide notice to an organizational defendant. However, if notice has not been afforded in an individual case, the Committee Note recognizes that the defendant may later choose to raise a challenge on this basis. The Committee also concluded that the listed means of service posed neither concerns under the principles of international law nor institutional concerns. Service in a manner authorized by the foreign jurisdiction's law is respectful of that nation's sovereignty. The same is true of service that the foreign sovereign itself undertakes in response to the various types of requests identified in proposed subdivision (c)(3)(D)(ii)(b). Moreover, as described more fully in memoranda prepared for the Committee by the Department of Justice, the Criminal Division's Office of International Affairs will be involved in assisting individual prosecutors in determining which means of service will be most effective in individual cases, and will consult with the Department of State regarding any special concerns.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means.⁴ One of the principal issues considered by the Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement

⁴ The Rule 4 Subcommittee considered and rejected a requirement that would have limited service under (D)(ii)(c) to cases in which service in a manner authorized by the foreign jurisdiction's law, undertaken by the foreign authority, or by stipulation was unavailable. The Subcommittee concluded that requiring the government to demonstrate that it had tried and failed to effect service in these ways it would impose unnecessary burdens and delays.

of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.⁵

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, the court would not be deprived of jurisdiction. Under the Committee's proposal – which does not require prior judicial approval of the means of service – a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law.

The Committee noted that eliminating a requirement for prior judicial approval may also be preferable from the defense perspective. Prior judicial approval would place a defendant later challenging the effectiveness of the notice provided in a difficult position. In effect, the defendant would be asking the judge who approved the service to change her mind, rather than to consider a question of first impression.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be published for public comment.

2. ACTION ITEM — Rule 41 (venue for approval of warrant for certain remote electronic searches)

The proposed amendment (Tab C) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue

⁵ These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by “any other means not prohibited by international agreement, as the court orders.” Although Fed. R. Civ. P. 4(f)(2)(C) precludes service “prohibited by the foreign country’s law,” that restriction is absent from Fed. R. Civ. P. 4(f)(3).

a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district. The proposed amendment was unanimously approved by the Committee in New Orleans. Following the meeting, the reporters circulated style changes and new language for the Committee note, which were unanimously approved by an electronic vote.

The proposed amendment had its origins in a letter from Acting Assistant Attorney General Mythili Raman. The proposal was referred to a subcommittee, which held multiple telephone conference calls before approving a proposal to amend Rule 41(b)(6).

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,⁶ but permits out-of-district searches in specified circumstances.⁷ The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

A. Reasons for the proposal

Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated

⁶ Rule 41(b)(1) (“a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district”).

⁷ Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee should consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a botnet, which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts—or perhaps all 94 districts—requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

B. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

The Committee agreed that the use of anonymizing software to mask the location of a computer should not prevent the issuance of a warrant if the investigators can satisfy the Fourth Amendment's threshold requirements for obtaining a warrant, describing the computer to be searched with particularity and demonstrating probable cause to believe that evidence to be sought via the remote search will aid in apprehension or conviction of a particular offense. It is appropriate in such cases to make a narrow exception to the general territorial limitations governing the issuance of search warrants. The proposed amendment addresses this problem by relaxing the venue requirements when "the district where the media or information is located has been concealed through technological means." Because the target of the search has deliberately disguised the location of the media or information to be searched, the amendment allows a magistrate judge in a district in which activities related to a crime may have occurred "to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information *located within or outside that district.*" (Emphasis added).

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),⁸ where the media to be searched are "protected computers" that have been "damaged without authorization." The

⁸ 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

definition of a protected computer includes any computer “which is used in or affecting interstate or foreign commerce or communication.” 18 U.S.C. § 1030(e)(2). The statute defines “damage” as “any impairment to the integrity or availability of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided “to the person from whom, or from whose premises, the property was taken” or left “at the place where the officer took the property.” The Committee recognized that when a electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

3. ACTION ITEM — Rule 45 (additional time after certain kinds of service)

The proposed amendment (Tab D) is part of the work of the Standing Committee’s CM/ECF Subcommittee, and it parallels amendments to the civil, criminal, bankruptcy and appellate rules. The proposed amendment of Rule 45 would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee’s conclusion that advances in the reliability of technology have undermined the principal justifications for the current rule. Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, concerns about the reliability of electronic service were cited as justifications for allowing three additional days to act after electronic service. At that time, there were concerns that (1) the electronic transmission might be delayed, (2) incompatible systems might make it difficult or impossible to open attachments, or (3) parties might withhold their consent to receiving electronic service unless they had three

additional days to act. The CM/ECF Subcommittee concluded that those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

The CM/ECF Subcommittee also noted that elimination of the three day rule for electronic service would also simplify time computation. To ease the task of computing time, many rules were amended in 2009 to adopt 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the proposed amendment (and the parallel amendment to the other rules) includes new parenthetical descriptions of the forms of service for which three days will still be added.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45 be published for public comment.

III. Information items

The Committee also discussed suggestions for amendments to Rules 29, 52, 53, and Rules 11 and 32. It referred the proposal to amend Rule 52 for in-depth study by a subcommittee, and it declined to proceed further with the others.

1. Rule 52

Judge Jon O. Newman wrote to suggest consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. In contrast to the correction of trial errors by retrials, which impose very significant burdens on the judicial system, he noted that the correction of sentencing errors is much less burdensome. Moreover, the cost of sentencing errors can be very high. An uncorrected guideline miscalculation may lead to months or years of unwarranted imprisonment. Accordingly, he proposed an amendment that would permit appellate courts to consider sentencing errors not first raised in the district court—even if they would not meet the standard of plain error—when the error was prejudicial to the defendant and its correction would not require a new trial. The Advisory Committee concluded that this proposal was worthy of further study by a subcommittee (which should coordinate with the Appellate Rules Committee). Judge Raymond Kethledge will chair the subcommittee

2. Rule 29

Jared Kneitel wrote to the Committee suggesting that it consider amending Rule 29 to provide a procedure for making a motion for acquittal in a bench trial. He argued that the current

rule provides a procedure for such motions in a jury trial, but not in a bench trial. The Committee was not persuaded that the current rule has posed a problem for litigants and judges, and it declined to move forward with the proposal.

3. Rule 53

Writing on behalf of the Criminal Law Committee, Judge Irene Keeley forwarded the suggestion of Magistrate Judge Clay Land for an amendment to Rule 53 permitting reporters to Tweet from the courtroom. Prior to the New Orleans meeting the proposal was referred to a subcommittee, and the reporters prepared a research memorandum that discussed (1) the history of Rule 53, (2) Twitter use in the federal courts, (3) developments in the state courts, and (4) issues raised by the limited law review and practice commentary. At the New Orleans meeting, the subcommittee reported its conclusion that it would be premature at this time to undertake a full review of Rule 53. Rather, it would be preferable to defer action, allowing district judges to develop more experience with Twitter (and other forms of technology) before undertaking any revision of Rule 53. The Advisory Committee agreed, and declined to move forward with the proposal.

4. Rules 11 and 32

Professor Gabriel Chin wrote to suggest that the Committee consider amending Rules 11 and 32 to make Pre-Sentence Reports (PSR) available in advance of a guilty plea so that all parties would be aware of the potential sentence. He drew the Committee's attention to the opinion in a 1993 decision of the D.C. Circuit as well as his own article to support this proposal. The Committee decided not to pursue Professor Chin's proposal at this time. The advance preparation of the PSR would be a major change in many districts requiring a duplication of effort and imposing very significant burden on Probation Officers. Advance preparation and disclosure to the defense would also raise concerns about the protection of victims and government witnesses, as well as the need for a mechanism to resolve disputes about the contents of PSRs. In light of these concerns, the Committee was not persuaded that there had been a sufficient showing that change is needed, and it declined to move forward with the proposal.

At the New Orleans meeting Judge Donald Molloy raised a question about Rule 32(i)(2), which states that at sentencing "[t]he court may permit the parties to introduce evidence on the objections." He noted that the district judge has a great deal of discretion in determining how a sentencing will proceed, but wondered whether it is necessary to allow proof in support of a request for a "variance" as opposed to a contest about the guidelines themselves. In light of the many other items on the agenda, the Committee decided not to undertake a study of this aspect of Rule 32 at the present time.

TAB 4B

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Rule 4. Arrest Warrant or Summons on a Complaint
Revised Draft – April 21, 2014

1 **(a) Issuance.** If the complaint or one or more affidavits
2 filed with the complaint establish probable cause to believe
3 that an offense has been committed and that the defendant
4 committed it, the judge must issue an arrest warrant to an
5 officer authorized to execute it. At the request of an attorney
6 for the government, the judge must issue a summons, instead
7 of a warrant, to a person authorized to serve it. A judge may
8 issue more than one warrant or summons on the same
9 complaint. If an individual defendant fails to appear in
10 response to a summons, a judge may, and upon request of an
11 attorney for the government must, issue a warrant. If an
12 organizational defendant fails to appear in response to a
13 summons, a judge may take any action authorized by law.

* * *

14
15 **(c) Execution or Service, and Return.**

16 **(1) By Whom.** Only a marshal or other authorized
17 officer may execute a warrant. Any person authorized
18 to serve a summons in a federal civil action may serve
19 a summons.

20 **(2) Location.** A warrant may be executed, or a
21 summons served, within the jurisdiction of the United
22 States or anywhere else a federal statute authorizes an
23 arrest. A summons under Rule 41(c)(3)(D) may also
24 be served at a place not within a judicial district of the
25 United States.

26 **(3) Manner.**

27 (A) A warrant is executed by arresting the
28 defendant. Upon arrest, an officer possessing the

29 original or a duplicate original warrant must show it
30 to the defendant. If the officer does not possess the
31 warrant, the officer must inform the defendant of
32 the warrant's existence and of the offense charged
33 and, at the defendant's request, must show the
34 original or a duplicate original warrant to the
35 defendant as soon as possible.

36 (B) A summons is served on an individual
37 defendant:

38 (i) by delivering a copy to the defendant
39 personally; or

40 (ii) by leaving a copy at the defendant's residence
41 or usual place of abode with a person of suitable
42 age and discretion residing at that location and by
43 mailing a copy to the defendant's last known
44 address.

45 (C) A summons is served on an organization in a
46 judicial district of the United States by delivering a
47 copy to an officer, to a managing or general agent, or to
48 another agent appointed or legally authorized to
49 receive service of process. ~~A copy~~ If the agent is one
50 authorized by statute and the statute so requires, a copy
51 must also be mailed to the organization organization's
52 last known address within the district or to its principal
53 place of business elsewhere in the United States.

54 (D) A summons is served on an organization not
55 within a judicial district of the United States:

56 (i) by delivering a copy, in a manner authorized by
57 the foreign jurisdiction's law, to an officer, to a
58 managing or general agent, or to another agent

59 appointed or legally authorized to receive service of
60 process; or
61 (ii) by any other means that gives notice, including
62 one that is:
63 (a) stipulated by the parties;
64 (b) undertaken by a foreign authority in response
65 to a letter rogatory, a letter of request, or a request
66 submitted under an applicable international
67 agreement; or
68 (c) permitted by an applicable international
69 agreement.

COMMITTEE NOTE

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons [on an organization] outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer, managing, or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business and mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective — notice of pending criminal proceedings — is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, to a managing or general agent. This is a permissible means of serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "give[s] notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase “applicable international agreement” refers to an agreement that has been ratified by the U.S. and the foreign jurisdiction and is in force.

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TAB 4C

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Proposed Amendment to Rule 41
revised draft – April 21, 2014

* * * * *

1 **(b) Authority to Issue a Warrant.** At the request of a
2 federal law enforcement officer or an attorney for the
3 government:

* * * * *

4
5 (6) a magistrate judge with authority in any district
6 where activities related to a crime may have occurred has
7 authority to issue a warrant to use remote access to
8 search electronic storage media and to seize or copy
9 electronically stored information located within or
10 outside that district if:

11 (A) the district where the media or information
12 is located has been concealed through technological
13 means; or

14 (B) in an investigation of a violation of 18
15 U.S.C. § 1030(a)(5), the media are protected
16 computers that have been damaged without
17 authorization and are located in five or more districts.

* * * * *

18
19 **(f) Executing and Returning the Warrant:**

20 **(1) Warrant to Search for and Seize a Person or**

21 **Property**

22 * * * *

23 **(C) Receipt.** The officer executing the warrant
24 must give a copy of the warrant and a receipt for the
25 property taken to the person from whom, or from
26 whose premises, the property was taken or leave a
27 copy of the warrant and receipt at the place where the
28 officer took the property. For a warrant to use remote
29 access to search electronic storage media and seize or
30 copy electronically stored information, the officer
31 must make reasonable efforts to serve a copy of the
32 warrant on the person whose property was searched
33 or whose information was seized or copied. Service
34 may be accomplished by any means, including
35 electronic means, reasonably calculated to reach that
36 person.

COMMITTEE NOTE

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the

use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of “botnets”) may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms “protected computer” and “damage” have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment to Rule is intended to ensure that reasonable efforts are made to provide notice of the search, seizure or copying to the person whose information was seized or copied or whose property was searched.

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TAB 4D

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electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

TAB 4E

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 7-8, 2014, New Orleans, Louisiana

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met in New Orleans, Louisiana, on April 7-8, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Professor Orin S. Kerr
Judge David M. Lawson
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
David A. O’Neil, Assistant Attorney General for the Criminal Division
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Judge Jeffrey S. Sutton, Standing Committee Chair
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.(by phone)
Julie Wilson, Esq.

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Raggi introduced new member Professor Orin S. Kerr, and new Standing Committee Liaison Judge Amy St. Eve.

B. Review and Approval of Minutes of April 2013 Meeting

A motion to approve the minutes of the April 2013 Committee meeting in Durham, North Carolina, having been seconded:

The Committee unanimously approved the April 2013 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Sutton reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

- Rule 5. Initial Appearance
- Rule 6. Grand Jury.
- Rule 12. Pleadings and Pretrial Motions
- Rule 34. Arresting Judgment
- Rule 58. Initial Appearance

Judge Sutton thanked the Committee in particular for its cooperative work on Rule 12, as did Judge Raggi.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rule 4

Judge Raggi asked Judge Lawson, Chair of the Rule 4 Subcommittee, to report on the Subcommittee's proposal to amend Rule 4. The proposal responds to a request by the Department of Justice to address the difficulty posed by the requirement in the current rule that service be mailed to an address within the United States, in cases where a corporate defendant has no such address. The Subcommittee's proposed amendment, Judge Lawson reported, eliminates the requirement of a separate mailing except when specified by statute, notes that required mailings need not be to an address in the judicial district, and provides for service outside the United States by means roughly analogous to the methods authorized under the Civil Rules. The amendment also notes that the court may impose those sanctions authorized by law should a corporate defendant fail to appear.

As to means of service outside the district, the amendment permits service (1) by delivery

to an officer, managing or general agent, or other agent legally authorized; (2) by stipulation; (3) undertaken by a foreign authority, using letters rogatory, or under request authorized by international agreement and (4) by any means not prohibited by an international agreement. Judge Lawson noted the Subcommittee rejected alternative language that would have allowed service possibly in violation of the foreign jurisdiction's law if authorized by court order.

Professor Beale added that there was agreement on the Subcommittee that an amendment was needed, noting there was no good policy reason to allow certain foreign corporations to evade service because they chose not to have a mailing address in the United States. The discussion in the Subcommittee had focused on the "other means" of service. The proposed amendment does not involve a court order authorizing such service. It does allow a defendant to raise challenges to adequate notice later.

Judge Raggi added that in rejecting the civil rule's language authorizing other means of service when ordered by the court, the Subcommittee recognized that when a person appears in court, the court generally does not question how the party got there, and considers instead whether there was adequate notice. The Subcommittee decided that it would be best to retain this approach to avoid involving courts in ordering action that might violate another nation's laws.

Judge Raggi solicited comments from members of the Subcommittee.

A Subcommittee member noted that one factor supporting the Subcommittee's decision was that the Department has procedures for approving international service, and he asked if the Department planned to include in its procedures review by a Deputy Attorney General or equivalent, rather than just the Office of International Affairs.

Assistant Attorney General O'Neil responded the Department is committed to providing an appropriate level of approval, given the potential impact on foreign relations, and that the Office of International Affairs would give this much thought and consult with appropriate Departments.

Another Subcommittee member reiterated that the Subcommittee's discussion centered on the catch-all means of service at the end of the proposed amendment.

Assistant Attorney General O'Neil expressed gratitude for the Committee's attention to the issue and stated that it was not a theoretical but a very pressing issue for the Department.

Judge Raggi mentioned that the Subcommittee had also addressed what steps might be taken if a corporation did not appear after being served. She mentioned that the Department had

related that corporations do often appear now to contest service because it is in their interest to do so, as they may be involved in other proceedings. She noted that the Department submitted a memorandum included in the materials in the Agenda Book listing the type of actions that might be taken against a corporation that does not appear, including forfeiture. The proposed amendment includes general language on this point, without specifying any particular remedy.

The Subcommittee's recommendation to approve and forward to the Standing Committee an amendment to Rule 4(a) that would add the word "individual" (specifying that the existing language applies to an individual defendant), and a provision referencing actions in response to an organization's failure to appear was moved and seconded. Discussing the motion, a member expressed support for the proposal, noting that she had experience with one of these cases in which the charges had to be dropped as a result of the corporation's objection to service.

The motion to approve the proposed amendment to Rule 4(a) and transmit it to the Standing Committee passed unanimously.

The Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(2) to add a sentence "A summons may also be served at a place not within a judicial district of the United States under subdivision (c)(3)(D)" was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(2) and transmit it to the Standing Committee passed unanimously.

Turning to the manner of service, the Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(3)(C), limiting this subsection to service on organizations in the United States, limiting the mailing requirement to mailings required by statute, and eliminating the mailing requirement to the organization's last known address or place of business within the United States, was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(3)(C) and transmit it to the Standing Committee passed unanimously.

Discussion proceeded on the Subcommittee's recommendation to approve and forward the proposed amendments to Rule 4(c)(3)(D). Judge Sutton questioned why the introductory language to (D)(ii) does not read ". . . that gives notice, and that is not prohibited by an applicable international agreement." Professor King and Subcommittee members responded that the means of service could be prohibited by an applicable international agreement but the parties could still agree to it. Another member expressed the view that service should never be in

violation of a treaty. Judge Raggi noted that a court would have jurisdiction over an individual defendant even if he were kidnapped and brought to court, and here the issue is the appropriate rule for a foreign corporate entity. She asked the Department of Justice to clarify whether there are situations in which the United States has an international agreement with another country, but the other country is not honoring that agreement, or perhaps giving “super protection” to their own corporations beyond what is recognized by international law. She expressed her concern about providing more protection in the rules for corporations than for human beings.

Mr. Wroblewski noted, for example, that sometimes a corporation or organization is state-owned, and the state may not enforce an international agreement that is in place. The proposal recognizes such circumstances may arise, and leaves it to the State Department to determine how to proceed. It is appropriate to put in the rule something that references an applicable international agreement. The proposal also notes that service by other means occurs without prior judicial approval, so that a defendant can later come in and raise concerns or constitutional objections. The proposal also parallels the civil rules, he noted, which have a similar provision, though it requires prior court approval.

Professor Beale stated that the Subcommittee also considered a concern about the Rules Enabling Act: could a rule authorize service contrary to a treaty? The Subcommittee decided that the proposed language struck the appropriate balance, by listing any other means consistent with an applicable agreement, recognizing the Department’s position that a treaty might have been abrogated, and not precluding later arguments by defendants. It recognizes that a court would not have to bless such service in advance when it would not have heard arguments by both sides.

A member stated that the Subcommittee did not want the rule to effectively authorize the Department to ignore applicable treaties. Another member noted that the word “applicable” allowed the Executive Branch to determine whether the treaty was applicable in the circumstances, or whether it had been abrogated by conduct. Judge Raggi added that the Subcommittee wanted to avoid providing a basis for a defendant to come to court and invoke a treaty and say you haven’t served me correctly, noting that the Supreme Court has already expressed concern about Rules of Criminal Procedure giving rights to defendants under foreign treaties.

Judge Sutton pointed out that the list of possible means of service started with “including” so it was already a non-exclusive list.

When Professor Coquillette asked the Department if this proposal had been vetted with the State Department, Mr. Wroblewski indicated that they had many discussions with colleagues in the Executive Branch. The Department also provided written assurance relating this

consultation to the Subcommittee. Those consulted are comfortable with the process. He explained that the United States Attorneys' Manual already provides that whenever prosecutorial steps may implicate foreign policy, such as a foreign deposition, attorneys must consult with the Office of International Affairs.

Discussion turned to the proposed language in (D)(ii)(a) regarding stipulated means of service. Judge Lawson suggested that the word "stipulation" is generally interpreted to be a more formal agreement in writing, and that the style change to the verb "stipulate" may not carry that meaning. Professor Beale noted that the reporters' research found that the noun "stipulation" and the verb "to stipulate," along with the term "agreement," were used throughout the Federal Rules, and do not always signify that writing is required. If the Committee wished to limit the stipulation to a written record, perhaps the words "in writing" should be added. A member suggested that counsel will agree, and that this will not be an issue. Discussion continued on whether either a corporation or the court would benefit if a written stipulation were required. Judge Raggi noted that this could come up if the corporation is not there as well as when the corporation appears.

Without resolving the concern raised about the language referring to stipulated means of service, the discussion returned to the structure of proposed (D)(ii). A member suggested that in response to Judge Sutton's remarks, the proposal be rewritten to require both notice and compliance with international agreement, but also permit the stipulation to trump the international agreement. Another member suggested making notice and applicable international agreement into a catch all. A third member asked for and received clarification that the parties referenced in the stipulation language are the Department of Justice and the indicted defendant.

Judge Raggi postponed further consideration of the proposal until the Subcommittee had a chance to work on new language.

B. Proposed Amendments to Rule 41

Judge Raggi asked Judge Keenan, Chair of the Rule 41 Subcommittee, to introduce the proposal to amend Rule 41. She noted that the Committee had received a detailed memo from the ACLU, which had been distributed by email prior to the meeting.

Judge Keenan explained that this proposal was also initiated by the Justice Department, and involved two aspects of Rule 41: the territorial requirement and the notice requirement. The Subcommittee considered several versions. The revised version it was recommending to the Committee, after styling, was dated April 3. It was circulated before the meeting and was not in the agenda book. The proposal would amend the Rule 41 to add new subdivision (b)(6):

A magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district.

This amendment would authorize a magistrate to issue a warrant to search allowing officers to remotely search and seize information on a computer, even if that computer is located outside the magistrate's district, so long as criminal activity has occurred within that district. Rule 41 generally limits warrants to searches and seizures within the district, but it already provides authority for a judge to issue a warrant for a search or seizure outside the district in four other situations, including the use of tracking devices. The amendment seeks only to refine the territorial limits; it does not alter the constitutional constraints, such as the particularity requirement. Any constitutional restriction should be addressed by each magistrate with each warrant request.

As to the notice requirement, Judge Keenan continued, the proposed amendment reads:

For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of it on the person whose property was searched or whose information was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

This amendment would clarify that officers must make reasonable efforts to provide notification of the search or seizure.

Judge Keenan reported that the Subcommittee held four telephone conferences and considered several memoranda, which are included in the agenda book. The materials also include sample warrants. In the fourth conference call, the Subcommittee approved the version of the proposed amendment that was identical to the version before the Committee, except for a few style changes. Judge Keenan noted that Judge Kethledge, who could not be at this meeting, served as a member of the Subcommittee, had indicated approval of the proposal, and that one member dissented from the Subcommittee's proposed amendment. Finally, he recognized that some Committee members may not have had time to read and analyze the memorandum from the American Civil Liberties Union.

Judge Raggi asked the Department of Justice to speak to the proposal.

Assistant Attorney General O'Neil said the proposal is meant to address three scenarios. The first is to provide authority for a magistrate to issue a warrant to search with remote access

for the location of a computer whose location is unknown, possibly in another district. The second is to provide authority for a judge to issue a warrant to search multiple computers in known locations outside the district. The third is to provide authority for a judge to issue a warrant to conduct a remote access search in a district outside the district where the warrant is being sought, as an ancillary request to a physical search request.

Assistant Attorney General O'Neil emphasized that the proposal does not provide authority for the government to conduct any new kind of search or to use any new tools. It does not change anything about the substantive standards that the government must satisfy in order to obtain a warrant or address the substantive requirements of particularity or probable cause. All it does, he explained, is address the venue question—the question of which judge can issue a warrant that, as the law develops, the Fourth Amendment allows.

Assistant Attorney General O'Neil spoke to two concerns raised by the proposal. As to forum or judge shopping, he said that the same concern was raised by the Electronic Communications Privacy Act (ECPA), which already allows a judge in one district to issue a warrant in another district. Congress nevertheless approved this scheme, and the Department was not aware of any complaints about this problem under the ECPA. The second concern he noted was that the proposal could be used to circumvent ECPA or as an alternative means that is less protective than ECPA. The Department did not think that was a problem. The same standards of particularity and probable cause apply to both ECPA and warrants under the proposed Rule 41 remote access searches. Also, prosecutors can already obtain warrants for remote access searches under the present rule. The only question is whether the judge who is most familiar with the facts of an investigation can issue a warrant for information stored outside that judge's district.

Mr. Wroblewski stated that when investigators don't know where the computer is, it is very important to be able to learn that information. He recognized that the ACLU has argued that there ought to be oversight of the code that the government uses to do this, that there ought to be more transparency, and that the code has potential to do harm. The Department recognizes those concerns, he explained, but this Committee is not the place to address them. Some of the issues are Constitutional and will be addressed by magistrate judges one warrant at a time. Some of them will ultimately be addressed by Congress in determining what is and is not permissible. What this proposal tries to address are the three practical realities summarized earlier and in the memos included in the materials.

On the first of those scenarios, Mr. Wroblewski continued, there was agreement in the Subcommittee there should be a rule change. The ACLU also suggested that the second scenario involving the botnets should be addressed and that the government should take steps to respond to this important practical reality. Their concern was the proposal would change practice beyond these two particular circumstances, he said, and the Department disagrees.

Mr. Wroblewski stated that there have been concerns that the Department might use a search warrant issued pursuant to the proposed amendment to secretly search for information, rather than proceeding pursuant to ECPA. That won't happen, he argued, because the Department needs to cooperate constantly with the internet service providers. It will be the rare circumstance, he argued, where agents would get a search warrant rather than an ECPA warrant, possibly in a case involving a business, when a stored communications site is open and available, or when the government already has the credentials to obtain access. The proposal seeks the authority the government already has under ECPA to go to the magistrate judge in the district where the crime is being investigated and ask for a warrant. It only identifies the magistrate who can consider the warrant application. There is a practical enforcement problem on the ground that needs to be addressed, he concluded, and the proposed amendment will address it.

Judge Keenan added that the proposal will also allow a magistrate to issue a warrant that would authorize investigators to search computers in several districts simultaneously.

Judge Raggi observed that the Subcommittee at times used the word "hacking" to discuss remote access searches. To the extent it suggests illegality, it is unfortunate, because the proposal is talking about what judges would authorize. She also noted that the Subcommittee's discussion considered concerns about the government's satisfaction of its Fourth Amendment requirements wherever these warrants were sought, whether under the present rule or under an expanded venue rule. That's why the Committee Note says the proposal is not intended to in any way affect the government's obligations under the Fourth Amendment.

Experts joined some of the Subcommittee's phone conferences to try to explain these remote access searches, she said, and judges would have to be educated about what to ask when the government seeks these warrants. She said she spoke to the Federal Judicial Center about possibly providing judges with more relevant information. For example, to the extent that these searches would involve transmittals, should the judge be asking about Title III? She reiterated that these concerns are with us now already under the present rule, and the question before the Committee is whether to expand the venue and change the notice requirement.

One member raised various concerns with the proposal, noting that he opposed the current version because it is far broader than the reasons that have been proposed to justify it. The first scenario, when the location of a computer is not known, is the strongest case the government has for a change in the rule because the alternative is that the government may not be allowed to obtain any warrant. Warrants to obtain information from computers of unknown location have been obtained, he stated, so it may be premature to conclude from a single magistrate judge's opinion rejecting this authority that the government cannot obtain such a warrant under the existing rule. But accepting that one opinion as correct, he thought there is a very good case for changing the rule to address this problem.

The second scenario, the member continued, involves sending many communications to computers around the world that are infected as part of a botnet, remotely taken over by hackers. There could be thousands of these affected computers. The warrant applications provided to the Subcommittee authorize obtaining limited information from those computers affected by that botnet and then sending it back to the government. But as far as he is aware there has never been a judicial opinion stating that a warrant is required in that situation. There may be no reasonable expectation of privacy in this information or the government may argue that reason for the search is to protect the victim-owner of the infected device. Accordingly there are various exceptions that might authorize obtaining this information without a warrant. It is premature to act on the assumption that a warrant is required, he argued.

The third scenario is when the government executes a warrant at one place, and then finds there are servers elsewhere with information relevant to the investigation. The member said it would be helpful to have precedent on how Rule 41 applies to this situation before amending the rule. This same concern arises with physical searches, he said, so it is not clear why an amendment is needed for on-line searches and not physical searches. For example, if the government searches a business and discovers there is a warehouse in another district where more records are stored off site, the government would ordinarily go to the other district and obtain a second warrant to search the warehouse. Why shouldn't the venue requirements for Rule 41 should be eliminated for all such searches, so that the first warrant would support the second search as well? The arguments for and against the venue requirements are the same off-line as online, so it is not clear why Rule 41 should authorize the second search under one warrant in the online setting but not in the physical setting.

Finally, he said he feared that the language as drafted has much broader implications than these three scenarios. On its face the draft allows remote access for all searches. Even if the government does not plan on using these more broadly, he warned, it could. The government might get a warrant, he suggested, to search a person's physical places and virtual places all at once. The drafted language would seem to allow that dramatic shift in practice. He noted that the Department said it has no intent to engage in that practice, but he stated his preference for a version of the rule that on its face does not appear to authorize that possibility. He recognized that the Justice Department has a good relationship with major providers now, but that ten years from now it is difficult to know how the rule might be used.

The member explained that there are narrower options to respond to this problem. One would be allowing case law to develop to see if the current rule will be interpreted to allow the practices the government is seeking, or if the Fourth Amendment requires warrants in all of these situations. Another option would be to propose language that would address the unknown location problem. A slightly broader version of that would be to say if data is in multiple districts, a warrant could be issued to reach that.

The member concluded by raising a concern about the proposed language defining the district in which the warrant could be sought: “where activity related to a crime may occur.” This phrase is used earlier in Rule 41, but if it is an effort to identify where there would be venue, the venue in computer crimes cases is tremendously uncertain. He mentioned a case in which the government is asserting that there is effectively universal venue for computer-related crime. He was concerned about using a phrase with an unknown meaning.

Judge Keenan noted that the key aspects of the proposal are contained in the memo from the Department on p. 261 of the agenda book, dated March 5, stating the three scenarios. He asked that if there is agreement on scenario number one, perhaps the Committee could move to scenario number two. He asked the Department to explain why an amendment was needed to address scenario number two.

Mr. Wroblewski responded, stating that he agreed that it is possible courts will decide no warrant is required for scenarios one or two, but the Department thinks the better practice is to get the warrants.

Responding to concern about changing the venue rule for online searches but not physical searches, Mr. Wroblewski noted that Congress has already recognized this in several different aspects, including ECPA. Congress already authorized one judge to issue a warrant in one district for searches for electronic information in another district. There are valid concerns about particularity and universal venue, and how many locations can be identified in a particular warrant, but they aren’t something this amendment will impact. All this amendment will determine is which judge can be asked to issue the warrant.

Assistant Attorney General O’Neil added that a botnet (which he defined as a collection of computers infected by the same malware, remotely controlled and commanded by a criminal) will usually affect computers in all 94 districts. The question is whether one prosecutor investigating the case can get a warrant from one judge rather than many going to judges in 94 different districts. On scenario three, he said, the fundamental difference between physical searches and searches for electronic evidence is that electronic information can be destroyed instantaneously. If investigators are conducting a search in one district and want to obtain electronic evidence, they need to do that without going all the way to a district on the other side of the country, educating the judge, and obtaining the warrant, he explained. By the time they could do that the digital evidence may be destroyed.

Another member expressed gratitude for all of the work that has been done and sympathy for the Justice Department’s need to disable botnets, which are used to commit crimes and attack businesses by disrupting service. He took the Department’s representations about their intent to use this authority sparingly at good faith, but remained troubled by some of the concerns raised

by the ACLU. He suggested that Congress will be interested in the resolution of these issues, which reminded him of the controversy about the Justice Department's practice in the attorney client privilege area. He noted some of the ACLU's concerns (such as judge shopping) were not troubling or were far afield from the Committee's work. But there is the possibility that the authority in Rule 41 will be transformed over time to do things that are not intended. He supported the proposal because it is important to get public comment to confirm whether a limited fix is possible, and the Committee can't wait several years.

Another member expressed his agreement that the proposal is modest. He stated that he was surprised at the suggestion that the rule should not be amended because scenarios two and three may not even require a warrant. In his view, anytime judicial review of searches and seizures can be encouraged that is a good thing. He was concerned about the risk of doing nothing given the reality that computers are how people do business and communicate on the most basic levels. He said this amendment addresses a venue question and a notice issue, it has been unfairly demonized, and a lot of red herrings have been thrown into the debate.

Judge Keenan moved to approve the Subcommittee's recommendation to forward the proposed amendment to Rule 41 to the Standing Committee, the motion was seconded, and discussion on the motion continued.

A member expressed appreciation for the importance of the issue and the work that has been done, but she argued that the proposal was premature and she expressed strong opposition to adopting any amendment. Noting that the Committee has identified only one relevant judicial opinion, she suggested waiting a year or two. Also, she argued, the proposal is too broad, with ramifications that can't be anticipated. She observed that the Committee has been asked to wait on the Rule 53 tweeting proposal to allow more information to develop, but stated that she found the need for more information and law to develop is even more acute in the Rule 41 context. Finally, the member believed the proposal will make what is now the exception—ECPA— into the rule. If Congress wants that to be the rule, it should make it the rule. Congress is the appropriate forum for resolving these conflicting concerns.

Judge Raggi asked the member to specify where the proposal is too broad. The member explained that whatever is intended when something is passed, it almost inevitably gets bigger and bigger and bigger over time. The government may choose a judge far away making it difficult to defend, and they'll be allowed to pick in a way they can't now, because the "may have occurred language" is very broad.

Another member said he was in favor of seeking public comments now. He explained there is not likely to be more case law developing, because notices of searches aren't given right way when there is ongoing criminal activity, and once it is unsealed the issue is seldom whether there was probable cause. He noted that the government already gets to choose where to bring

the case even if it is inconvenient for the defendant. He explained that concerns about privacy are understandable, but that shouldn't matter when the government can show that there is probable cause to believe there is evidence of a crime at a particular place. He also didn't see how the right of a second person on a shared site could cause the government to lose its rights to search a computer when it had probable cause for the search. A valid warrant to search a home is not defeated if one of the owners objects. Although he has confidence in the current administration's good will, we would be giving them a tool that we don't entirely understand, with a standard that is not explained. Judges may not know what questions to ask. If there was a way to publish a rule to seek comment but not a rule we approve, that would be good.

Another member asked the Department if it was really having problems with this. He noted a case in which the destruction of electronic evidence occurred but investigators were able to find a copy of the information from a foreign source. The member also expressed concern that the proposed changes to the territorial authority of magistrates were substance not merely procedure.

Mr. Wroblewski responded that use of anonymizing sites, which transmit information disguising the real addresses, is increasing. The government cannot trace the source without the authority to send something back through the anonymizing site. This is a real problem. He explained that it might be possible to litigate and hope the courts will create an exception to a rule that on its face does not work with these realities. But the better approach is to come to the Committee and change the rule that is creating the issue.

Another member explained that he was opposed to the proposal because it introduced a concept not before mentioned in the rules, that is, using remote access to search electronic media. He said the proposal untethers the venue provision, the former limiting principle governing searches, without replacing it with another principle. This idea is similar conceptually to the problem that arose after the Supreme Court's *Katz* decision, which eventually spawned Title III. Congress should address this problem. Maybe Article III judges should have the authority to approve remote access searches, and there are other issues that the Committee cannot address. Releasing an amendment for comment does not solve the problem. The process authorized by the amendment is complex, raises genuine issues of privacy, and is largely *ex parte*, without the advantage of adversarial argument. Limits have to be firmly in place before authority is granted, and even a focused rule poses the risk of unintended consequences.

Judge Raggi remarked that the limiting principle under both the old and proposed rule is the probable cause requirement, and a venue change won't leave Rule 41 with no limiting principle. If the overlap with Title III became a sticking point, we could add language to the Committee Note that the Committee is not expressing any view as to Title III as well as the Constitution.

Judge Raggi asked if the reporters would comment.

Professor Beale spoke to the comparison of the Rule 41 and Rule 53 proposals earlier in the discussion. She argued that the proposals are very different and can be distinguished. She stated Rule 41 appears to be a much more serious problem than Rule 53, and is a problem that is caused by the language of the rule. The government is reporting that they are being hampered or at least there is uncertainty about investigations in an important and growing class of cases because of language in Rule 41, while the Rule 53 proposal is based on reporters who want to tweet from the courtroom. The need for us to figure out whether reporters can tweet from the courtroom is on a different scale than whether the government can get access when anonymizing software is used, and where botnets are used in attacks. The present Rule 41 creates the problem, at least scenario one.

Second, she responded to the concern that changing the territorial restriction on magistrate warrant authority might violate the Rules Enabling Act. She noted that Rule 41(b) already contains other narrow exceptions to the territorial authority to issue warrants, and concluded this aspect of the proposal is not a substantive change that would violate the Act.

Third, she noted that there seemed to be agreement that scenario one is a problem, caused by the text of the rule. For scenario two, the Committee has always preferred that a warrant be sought. On scenario three, it does not seem premature to start the three-year rules amendment process now, she concluded.

Professor King agreed with Professor Beale and added that in her view the Committee should not forward a proposed rule to the Standing Committee for publication simply to generate public comment, there needs to be some consensus behind an amendment in order to send it on.

Judge Raggi asked Judge Sutton to comment generally on the rule-making process. Judge Sutton explained that if the Committee cannot agree on all aspects of a proposal, but can agree on some of it, one option would be to limit the proposed amendment to the part the Committee endorses, and ask questions for comment about other aspects on which there is no agreement. When the Civil Rules Committee sent out Rule 37, they were unanimous about some aspects, but they weren't sure about others. So they put five questions at the end of the proposal to try to focus public comments on these issues.

Judge Raggi reminded members that if the Committee were to approve a proposed amendment at the meeting, even if everything goes smoothly, it will be a three-year process. She suggested taking the package apart to attempt to identify where there was agreement and where there wasn't.

Turning to the situation in which the government doesn't know where the computer is, she said that declining to modify the rule leaves the government without a way to get a warrant. One issue is whether the rules should require the government to make a showing that they don't know where the computer is. One member suggested that the proposal require such a showing, while the government sees this as an undue burden.

Judge Raggi asked the Department to comment its opposition to a preliminary showing. Mr. Wroblewski indicated that the Department is concerned that depending upon how it is crafted this requirement could lead to litigation over how much the government knew or could learn, but he noted that it might be possible to draft language that referred to the type of technology.

Judge Raggi asked for an explanation of the rationale for requiring a preliminary showing. A member said that adding language that "the location cannot reasonably be ascertained" would respond to Magistrate Smith's opinion, and would operate like other judicial assessments that a judge makes in the warrant process, none of which form the basis for later litigation. It is not a constitutional argument so there could be no basis for suppression, nor is suppression a remedy for violation of the rule.

Another member pointed out that there are limited resources the government can use to track down the location of a computer that had been disguised by anonymizing software. If there is a showing required, it should be clear that the NSA and CIA need not get involved. The entire federal government shouldn't have to gear up to prove this for each warrant.

Mr. Wroblewski commented that language that does not turn on the government's knowledge but rather on the type of technology used would avoid these concerns. Assistant Attorney General O'Neil suggested that something like "an investigation involving the use of technological means to conceal identity" might work.

A member asked those supporting a preliminary showing why this would be unlike Title III, where the failure to comply with procedural requirements forms the basis for defense litigation. A member favoring a preliminary showing responded that this assessment would be the same as other judicial assessments under the current rule concerning the property's location, which are not currently litigated because suppression is not a remedy for violations of the rule.

A member expressed continuing concern that a rule is not the correct means of authorizing remote access to electronic storage media. Does it authorize eavesdropping on digital communications? The seizure of intellectual property that is already in existence?

Judge Raggi asked the Department to explain why remote access searches do not fall under Title III. Mr. Wroblewski responded that remote access searches are happening under the

rule now, and the amendment concerns only the venue for judicial approval. Rule 41(e)(2)(b), the provision governing warrants seeking electronically stored information, authorizes the seizure of electronic storage media *or* the seizure or copying of electronically stored information. He emphasized that warrants under Rule 41(e)(2) do not authorize the interception of communications, but rather the search and then seizure or copying of previously stored information. Assistant Attorney General O'Neil agreed that the Department is already using remote access searches to seize or copy electronically stored information.

There was further general discussion of remote electronic searches and Title III. A member commented that the means authorizing remote access ought to be prescribed by legislation like Title III, rather than the Rules process. Judge Keenan suggested that something could be added to the Committee Note indicating that there is no intent to affect the limitations imposed by Title III. The first member agreed, offering that the Note could say that the amendment authorizes no more than what is already authorized by Rule 41(e)(2)(b).

Judge Raggi asked for discussion of any concerns about the language defining the district in which a warrant could be sought: "where activities related to a crime that may have occurred." A member expressed concern about the breadth of the language, though she agreed the Committee should not wait to address scenario one. She asked how the government would know where activities related to the crime may have occurred.

Mr. Wroblewski responded with an example that was included in the agenda book. In that case, someone made a threat against a building in Philadelphia. No one knew where the perpetrator was, only the victim's location was known, because the perpetrator was using anonymizing software.

The reporters pointed out that the language in question is already in Rule 41 in the other exceptions to the venue limitation, i.e., Rule 41(b)(3) and (5). Professor Beale noted that departing from that language would generate questions about why this exception is different than the others.

Mr. Wroblewski observed that there are other possible ways to express this idea. ECPA § 2703 refers to "a court with jurisdiction over the offense under investigation," and the concept is the same. A member offered that he had looked for judicial precedent explaining or interpreting the language in question and couldn't find any.

Judge Raggi adjourned the meeting for lunch.

After lunch, Judge Raggi noted that discussion among the members suggested that agreement might be reached on language tailored to meet the problem of anonymizing software,

though the Department of Justice needed time to consult its experts about appropriate language. Accordingly, further discussion on that issue would be deferred until Friday.

Discussion then focused on the second scenario, the botnet investigation, in which the Department seeks authority to get a single warrant rather than separate warrants in many districts. Judge Raggi asked members what concerns this part of the proposal raised.

A member stated that if courts have ruled that a warrant is required in this scenario and also that such warrants are permitted, then it makes sense as a matter of policy to allow a single warrant to be issued in one district. He asked if the Department knew of any instances in which the application for such a warrant in one district had been denied. Mr. Wroblewski responded that he was not aware of such a denial. The member who raised the issue commented that perhaps an amendment is not yet needed.

Judge Raggi noted that the Committee was aware of concerns about the need to require probable cause and particularity to protect privacy interests, and she emphasized that the rule does not address these constitutional considerations. She asked the Committee to focus on the question whether in principle the venue requirements for warrant applications should be amended in the specific situations where technology has been used to disguise the district and there are multiple computers in many districts, as in the case of a botnet investigation.

A member asked whether the government is seeking to disable malware in a botnet investigation, and, if so, what is it “searching” for. Mr. Wroblewski responded that the government may seek to disable malware inserted on many victim computers, but it may also search for and copy information, such as the IP address, from the victim computers. In response to the question whether a warrant is needed to remediate by removing malware, Mr. Wroblewski stated that this is an open question. The Department would like to be able to obtain warrants in these cases and to act under the supervision of the courts. He noted that the ACLU says that such remediation does raise Fourth Amendment concerns, though these interests are not as heightened as they would be if the government were seeking evidence of a crime.

Professor Beale noted that the current draft refers to the authority to issue a warrant to search, seize, and copy; it does not mention remediation. Mr. Wroblewski agreed.

Mr. Wroblewski then described the third scenario, where the government conducts a physical search of a business, the computers are on, and it finds that some files are stored in the cloud on a server in a different district. Because the machines are on and access is available at the moment, the government wants to be able to get the files by remote access from the cloud. Under ECPA, in contrast, the government must go back to the district court, and then obtain and serve an ECPA warrant on the provider. The proposal here is in limited circumstances to continue the search on site and access the data remotely and directly.

Discussion then turned to the relationship between the proposal and ECPA. Concerns have been expressed that allowing a remote search in the government's third scenario would permit evasion of ECPA and also effectively reduce the probable cause requirement.

Mr. Wroblewski argued that in some circumstances it is important not to delay the search of material stored remotely on the cloud, because it can be destroyed or encrypted if there is a delay. He also noted that within the Department there is a debate about whether ECPA already permits the procedure the government recommends. As the ACLU has argued, ECPA itself allows law enforcement to send a preservation request immediately. Mr. Wroblewski stated that this procedure is not always practical. The ECPA process is not instantaneous, and there can be delay in getting a provider to preserve. Accordingly, the government is seeking the authority to immediately access and copy the electronically stored information to prevent its destruction.

A member observed that if there were reasonable grounds to believe a third party would delete the information from a cloud there are exigent circumstances and no warrant would be required. Thus the proposed amendment seems to be addressed to cases in which such a showing could not be made in advance, but the government fears that destruction might occur during the process of seeking an ECPA warrant.

Another member noted that as a practical matter there has to be probable cause to search the second server on which the material in the cloud is actually being stored. Members discussed the question whether that means a second warrant is constitutionally required. Mr. Wroblewski stated that of course probable cause is required for any search or seizure, and this does not change when there are computers in more than one district. The main point for the government, he emphasized, is to be able to get the initial warrant and any subsequent related warrant from a single judge.

Judge Raggi noted that if the government is authorized to extend its search from the physical computer to information stored on a server based in another district it will still have to satisfy the probable cause and particularity requirements. Many warrants now allow a search of more than one location. Similarly, a court might conclude that probable cause had been shown to search one computer and others linked to it as to which probable cause had also been shown. But all seem to agree that the government must show probable cause and meet the particularity requirement for any search of a new device. A member responded that the case law is fluid on the application of the particularity requirement, in some cases allowing a search of all laptops or desktop computers in person X's home.

Another member observed that the third scenario was the most difficult part of the current proposal. Because of the increasing use of cloud computing, we no longer have separate devices that are analogous to individual locked chests.

Mr. Wroblewski noted that from the government's perspective the problem is that when its investigators remove the storage media (computers) they leave the people behind, and those people can go to a different computer and quickly access and destroy or encrypt any information stored elsewhere. Information stored on the cloud is simply stored in another computer, which is often located in a different judicial district. What the government seeks is the authority to go back to the same magistrate judge, who is familiar with the facts, if it needs a second warrant.

Judge Raggi noted that the Committee Note could even more strongly emphasize that the proposed amendment is addressed only to venue, and not to probable cause or particularity. Professor Coquillette agreed that committee notes can properly be used to emphasize the limited nature of an amendment in order to prevent courts from reading in something that is not there.

These issues were referred back to the Subcommittee with the request that it report back to the Committee later in the meeting.

C. Further Discussion of Proposed Amendments to Rule 4

Judge Raggi asked the Committee to return to the issues raised by Rule 4.

The Rule 4 Subcommittee presented two alternative approaches to proposed Rule 4(c)(3)(D)(ii). The first would shorten the text of the rule by moving the illustrative list of means of service to the Committee Note. The text would refer only to "any other means that gives notice." The second alternative would retain the illustrative list of means of service but rephrase the last, about which Judge Sutton had raised questions. Rather than using a double negative, it would recognize service by a means "permitted by an applicable international agreement."

Subcommittee members spoke in favor of each version. One member stated that he preferred the second option because the rule itself (not merely the note) should give guidance, and inclusion in the text implicitly states the listed means of service are good (if not the only) ways to proceed. This would encourage prosecutors to employ the listed means, and their inclusion would also signal our adherence to the rule of law. He later referred to this as a matter of "optics," urging we are best served by rules that clearly emphasize compliance with international processes and laws. Speaking for the Department of Justice, Mr. Wroblewski disagreed. Illustrations belong in a note, not the rule, and putting them into the text suggests that the list is not merely illustrative. If any means that give notice are permitted, then the text of the rule should not hint otherwise.

Judge Raggi observed that in the case of corporate prosecutions there are special concerns about collateral consequences if the corporation fails to appear. No one suggests that any defendant (human or corporate) can be prosecuted without appearing before the court. The

cases involving individual defendants hold that the courts' jurisdiction is not affected by the means used to bring an individual before the court, and she is reluctant to think that a corporate defendant should have more due process rights than an individual. On the other hand, the government might someday seek to forfeit the assets of a foreign corporation that it says received sufficient notice but did not appear. This raises the question whether we should be satisfied if the government can act in such a case without complying with U.S. treaty obligations.

Discussion turned to what other means of service the government might use. Mr. Wroblewski suggested, for example, that the government might use electronic service, or it might be able to serve a person with a strong relationship to the entity when that person was present in a third country.

Professor Beale noted that as a matter of logic there is no difference between the two versions. But professors often see students read in more than is there in language, and courts and litigants may do the same. Here, the intuition is that enumeration may slightly constrain how the rule would be applied and interpreted. A member noted that the Subcommittee had discussed whether there was any priority or need to exhaust the listed means, and he wondered if the option enumerating certain means of service might suggest that.

Professor King took up the question how the proposal compares to the Civil Rule. On the one hand, the proposed amendment expressly requires that any means of service must give notice. This feature is absent from the residual clause of the Civil Rule. On the other hand, the residual clause in the Civil Rule requires that the court approve service by other means in advance, a requirement that the Subcommittee had considered and rejected.

After brief expressions of support for the second alternative, Judge Raggi asked for a motion. Judge Rice moved that the Committee approve the second alternative for amending Rule 4(c)(3)(D)(ii), containing the non-exhaustive list of means by which service can be made.

The motion to was seconded and it passed unanimously.

Judge Lawson then moved that the Subcommittee's proposal, as amended, be transmitted to the Standing Committee with the recommendation that it be published for public comment.'

The motion to transmit the revised proposal to amend Rule 4 to the Standing Committee with the recommendation that it be published passed unanimously.

Judge Sutton complimented the Committee on its work on the proposed amendment.

D. Proposal to Study an Amendment to Rule 53

Judge Raggi then asked Judge England to present the recommendation of the Rule 53 Subcommittee, which he chaired. Judge England explained that as originally adopted Rule 53 banned “radio broadcasting” of judicial proceedings from the courtroom, but in the restyling of the Criminal Rules this was shortened to “broadcasting.” In one case brought to the Subcommittee’s attention a magistrate judge concluded that the term broadcasting includes Twitter, and accordingly he denied a reporter’s request to Tweet from the courtroom. Tweets are limited to 140 characters, and they are a live method of providing information. The reporter sought to use this method to provide quick reports from inside the courtroom. Judge England noted that except for limited pilot programs the federal courts prohibit radio or television broadcasts from the courtroom. In contrast, in the California state court on which he previously served each judge had discretion to decide what to allow, including multiple cameras, a pool camera, and limitations on what could be recorded (excluding for example any views of witnesses or jurors). His view and that of the Subcommittee is that we do not have enough information at this point to consider revising Rule 53 to take account of new technologies, and we should wait for more experience to develop.

Judge Raggi stated that unless there is a need for a one-size-fits-all rule, she did not favor an amendment that would tell judges how to run their courtrooms. She asked if any members felt that there was such a need.

A member noted one aspect of Twitter that might be relevant: since one can subscribe to a Twitter account, a juror might have subscribed to a reporter’s Twitter account and receive messages posted from the courtroom. This poses a slightly different problem than jurors seeking out news accounts.

Professor Beale noted that there is also a significant overlap with traditional forms of reporting, since reporters generally Tweet to their broadcaster’s or paper’s news site. Judge England noted that in high profile cases we already have the problem of making sure jurors do not read about the case.

Discussion turned to the current practice in various courts. A member reported that in the Northern District of Illinois individuals can bring their phones into the courtroom and there is an executive order permitting individual judges to determine whether Twitter is permitted from their courtroom. In other courts, phones are not permitted without the court’s permission. A member noted that in South Dakota’s Supreme Court all reporters may Tweet. At the trial level, it is up to the individual judge. If they allow Tweeting, the judges give specific instructions that cover subscribers. There have been no problems with these policies in South Dakota.

Other members stated that they favored taking no action at this time. One commented that although there has been one ruling from a magistrate judge that Rule 53 bars Tweeting, other judges have read the rule differently. Thus the matter is not settled. Another member

noted that if the Committee were to take up the matter, it should coordinate with Committee on Court Administration and Case Management (CACM).

Judge Lawson moved that the Committee not further pursue an amendment to Rule 53, and the motion passed unanimously.

E. Proposed Amendment to Rule 45

Discussion then turned to the proposal to amend Rule 45, which is the first action item coming from the work of a special subcommittee established by the Standing Committee to consider changes in the rules related to the CM/ECF system. The CM/ECF Subcommittee is chaired by Judge Michael Chagares, and is composed of all reporters as well as liaison members from all of the Advisory Committees. Judge Molloy is our liaison.

Professor Beale explained that when the rules initially authorized electronic service there were concerns that it might be problematic for a variety of reasons, such as difficulty in opening attachments. Accordingly, all of the rules (including Criminal Rule 45) provided for an additional three days to act whenever service was made electronically. The CM/ECF Subcommittee concluded that the concerns that justified the additional three days were no longer applicable. Moreover, the simplified rules for time computation—which converted all times for action to 7, 14, 21, and 28 days without excluding weekends and holidays—also counsel against adding three days when service is made electronically. Accordingly, the CM/ECF Subcommittee requested that all of the Advisory Committees consider elimination of the three-days-added rules at their spring meetings. Parallel amendments and committee notes are being considered by each Advisory Committee. The Civil Rules Committee approved the proposed change at its fall meeting, and its proposed amendment was approved for publication by the Standing Committee in January. The proposed amendment to Rule 45 tracks the change in the Civil Rule.

The Committee voted unanimously to transmit the proposed amendment to Rule 45 to the Standing Committee with the recommendation that it be published for public comment.

F. Other Suggestions for Possible Amendments

The Committee next turned to suggestions received from members of the public and the judiciary for amendments.

Professor Gabriel Chin proposed a change in the timing of the disclosure of presentence reports to make them available in advance of a guilty plea. As the reporters' memorandum in the agenda book explains, this might be accomplished by amendments to Rule 32 (and perhaps Rule 11). After a brief discussion of the procedures now followed in various districts, the burden

on parole officers, and other potential problems, Judge Raggi asked if any member wished to move to place this issue on the Committee's agenda for more study. Since no member made such a motion, the matter will not be pursued at this time.

Judge Jon Newman wrote to urge consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. After a brief discussion in which members expressed interest in further consideration, Judge Raggi stated that she would appoint a subcommittee to study the proposal in depth, in coordination with the Appellate Rules Committee. Judge Raymond Kethledge will chair the subcommittee.

Jared Kneitel wrote to propose an amendment to Rule 29 to provide a procedure for making a motion for a judgment of acquittal in a bench trial. After a brief discussion, there was a consensus that there was no pressing need for an amendment at this time.

Judge Raggi then adjourned the meeting for the day.

G. Further Discussion of Proposed Amendments to Rule 41

On Friday morning, Judge Keenan presented the Rule 41 Subcommittee's revised recommendations. He thanked the Department of Justice representatives, the other subcommittee members, and the reporters for what he called yeoman work to develop a revised proposal.

The Subcommittee unanimously agreed that an amendment is warranted in two kinds of cases: those where anonymizing technologies have been used to mask the district in which a computer is located, and botnet investigations in which victim computers are located in a very large number of districts. The revised proposal is tailored to respond to these two problems: subdivision (a) of the proposal deals with the first problem, and subdivision (b) the second. The redrafted amendment is intended to clearly identify for the Standing Committee and general public the limited purpose and effect of the proposed change.

Mr. Wroblewski explained that in botnet investigations a large number of computers have been infected with malware. The language in proposed amendment focuses on these cases in several ways. The proposal is limited to investigations of violations of 18 U.S.C. § 1030(a)(5) where the media to be searched is a protected victim computer. Professor Beale briefly summarized Section 1030(a)(5), which criminalizes various forms of conduct—unauthorized transmission of programs, information, codes or commands as well as intentional access without authorization—that causes damage to protected computers. The proposal is limited to investigations under § 1030(a)(5) in which warrants are sought in five or more districts, where the burden of seeking separate warrants would be very substantial.

A member spoke in favor of the proposal's targeted approach. He termed it sensible in proposed subsection (6)(a) to allow cross-district remote searches when the district has been deliberately concealed. He thought that proposed subsection (b) was a good effort to draft narrow language. The media to be searched must be "protected computers that have been damaged without authorization" by a violation of § 1030(a)(5). This would cover what is popularly called hacking, when a computer has been harmed by the insertion of code or taken off line. He noted the possibility that (6)(b) it might apply to some investigations that did not involve a botnet, and stated that the particularity requirement is likely to be the real limitation. In his view, if a warrant is constitutionally required, there will be a question whether it can be obtained.

Professor King noted that the terms "damage" and "protected computer" are defined in §§ 1030(e)(2) and (8). An addition to the Committee Note could make clear that the rule is adopting the statutory definitions.

A member expressed strong support for the proposal, which he saw as a very sound approach to real problems. He found the Department of Justice's flexibility very helpful, noting the strong public interest and importance of being clear about what the government is doing and why.

Judge Keenan moved to approve the Subcommittee's revised proposal to the Standing Committee with the recommendation that it be published for public comment. Discussion followed.

A member questioned whether it would be better to use the term "electronic search" rather than "remote access." Judge Raggi and the reporters responded that focus of the proposal was not on all electronic searches, but only those authorizing remote access searches outside the district in which the warrant would be issued. This is proposed as a narrow exception to the general rule that a magistrate judge has authority to issue warrants only within the district.

The member also expressed concern about limiting proposed (6)(a) to cases in which "the district ... has been concealed," because that suggests that the entire district has somehow been hidden. Judge Raggi and others noted that because the focus of the provision is on the authority to issue warrants to search outside the district, the rule needed to refer to the concealment of the district, not merely the location.

The member questioned whether the proposal could be modified to limit the use of remote searches only to the situations specified in (6)(a) and (b). The reporters and other members emphasized that remote searches are now authorized by Rule 41(e)(2)(B), provided that they occur within the district in which the warrant has been issued. Remote electronic searches are not new, and are not being authorized by this proposal. Rather, the proposed

language in (6)(a) and (b) seeks *only* to authorize magistrate judges to issue warrants for remote electronic searches *outside the issuing district* in two narrowly defined situations. Another member commented that warrants for remote electronic searches within the issuing district are routinely issued now.

Other members raised various questions about the language of the proposal and suggested alternative phrasing. Judge Raggi requested that the Committee focus first on the substance of the proposal. She noted that if the proposal were adopted it would be subject to review for style, and there would be a further opportunity for members to comment on the language. Professor Beale noted that the committee note would also require revision to refer to the newly tailored language, and Judge Raggi stated that the proposed note language would be circulated.

A member noted that he had not initially thought it would be possible for the Committee to reach agreement on this proposal. He praised the Committee's collaborative effort and expressed support for the approach of narrowing the language to focus on the enforcement of an important statute.

With the proviso that the proposal was subject to review for style and the note would require revision, the Committee unanimously approved the Subcommittee's revised proposal to amend Rule 41(b) for transmission to the Standing Committee.

Discussion then turned to the proposed amendment to Rule 41(f)(1)(C), which requires service of a copy of the warrant and a receipt for property that has been seized.

Noting that the Subcommittee's proposal required service "on the person whose property was searched *or* whose information was seized," a member proposed that the service should be required on both (changing "or" to "and"). Judge Raggi responded that in the case of a physical search of a home, investigators now leave only one notice, even if they seize property belonging to multiple individuals. The member suggested that remote searches are different because they are generally surreptitious, and in the case of cloud computing they take place away from the owner. Thus the owner would not naturally be aware of the search. If only one party is to receive notice, he thought it should be the person whose information was seized or copied. The reporters noted some parallel situations under present law. Professor King noted that the notice of a warrant for a tracking device under Rule 41(f)(2)(C) uses "or." Professor Beale noted that if a warrant were served on Duke University today for a search of information on its servers, Duke would receive notice, not all of the faculty, staff, and students whose digital files and information on university servers was searched, seized, or copied. Similarly, Judge Raggi noted that in the case of a physical search of a storage unit facility investigators would normally leave a single copy of the warrant and receipt. Mr. Wroblewski noted that under ECPA service is made only on the provider, such as Google, not the subscriber. As a matter of policy, however,

many providers provide notice to their subscribers. Professor Beale agreed that in her hypothetical Duke would probably provide notice to its faculty and students.

Judge Raggi observed that whether to expand the existing requirements for providing notice of a search is a policy question. This could be taken up separately, but is not a part of the current proposal.

Discussion turned to the question whether the language of concern to the member (which specified who would receive notice of a remote electronic search) was a necessary part of the proposal. Professor King noted that as drafted the new language in (f)(1)(C) encompassed all remote electronic searches. Mr. Wroblewski explained that although the proposal did not seek to alter *who* should receive notice; in that respect it parallels the current provisions in (f)(1)(C) as well as the notice provisions of ECPA. However, it does seek to change *how* notice would be provided. The current language—which refers to the “premises” where the search is conducted—is not adapted to remote electronic searches. Because there are no premises where a notice may be left, the proposal allows service by “any means, including electronic means, reasonably calculated to reach” the person who must receive notice.

In response to another member’s view that the proposal should require service on both the person whose property has been searched “and” the person whose information has been seized or copied, Judge Raggi noted that when the government is investigating the hacking of a provider, this might require the government to notify thousands of account holders. From a practical perspective, this may be too great a burden to impose on the government.

A member expressed support for requiring notice to the target whose information has been seized. More fundamentally, he argued, a remote electronic search is a different animal than a physical search. In his view, a separate rule or statute should deal comprehensively with remote electronic searches, which raise distinctive concerns about technology and privacy that should inform the approach to a range of issues concerning seizure, notice, and copying. The public is sensitized to these issues, and it needs to be reassured that the government is acting to protect privacy while pursuing criminal activity.

Judge Raggi observed that the constitutional requirement of probable cause for the issuance of a warrant is the primary protection for privacy interests.

A member stated that he supported the language proposed by the Subcommittee. It is helpful to be specific about how notice should be given for remote electronic searches. Especially in cases under proposed Rule 41(b)(6), the government may have very little information about whose property it is. It’s very hard to be specific here about how notice must be given, but still helpful to have language that does not refer to leaving notice on the “premises.” Another member agreed that a new provision on notice is needed. In an

investigation of the intrusion at Target that affected thousands of customer accounts, there is nowhere to go to give notice.

Judge Raggi adjourned the meeting to permit the Rule 41 Subcommittee to consider the issues raised in the discussion. Following this recess, Judge Keenan reported the Subcommittee's recommendations concerning the proposed amendment to Rule 41(e)(1)(C). First, the Subcommittee agreed to delete the bracketed language Professor Kimble viewed as redundant. However, the Subcommittee disagreed with another style suggestion. It recommended that the proposed amendment require "reasonable efforts to serve *a copy of the warrant*" (not of "it"). The amendment itself refers to copying in a different sense (seizure or copying of electronically stored information). To avoid confusion, it is necessary to refer to service of a copy of the warrant. This is substance, not a matter of style. Finally, he asked a member of the Subcommittee to summarize the reasons for requiring service on the person whose property was searched "or" the person whose information was seized or copied.

The member explained there were three reasons for the Subcommittee's recommendation for "or" (rather than "and"):

First, the Subcommittee thought it appropriate to follow the precedent for physical searches. In the non-electronic search world the approach recommended by the Subcommittee has long been the rule. If the government had searched the New York Stock Exchange in the 1950s and seized the records of individual accounts, it would have given notice only to the Exchange, and not to individuals whose records might have been seized. The second reason was practicality. It would impose too great a burden to require notifications of all putative victims in a botnet case, which could be 1,000, or 100,000, or more. Finally, it would be possible in some cases only to search and not to seize or copy information, and accordingly the requirement for providing notice should be disjunctive.

Judge Keenan moved the approval of the Subcommittee's proposal to amend Rule 41(f)(1)(C).

A member who had argued in favor of "and" rather than "or" stated that he intended to vote in favor of the proposal. He explained that in the case of a remote electronic search what is really being searched is intellectual property. Once it has been viewed, it has been seized. By this reasoning, the person whose property has been searched is the same as the person whose property has been seized or copied.

The motion to transmit the Subcommittee's revised proposal to amend Rule 41(f)(1)(C) to the Standing Committee for publication passed unanimously.

Before the meeting concluded, Judge Raggi acknowledged the many contributions of Judge Keenan and Judge Molloy, noting this was their last meeting as members of the Committee.

TAB 5

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TAB 5A

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

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CHAIR

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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: May 8, 2014

I. Introduction

The Advisory Committee on Appellate Rules met on April 28 and 29 in Newark, New Jersey. The Committee approved for publication five sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; and (5) Rule 26(c)'s "three-day rule." The Committee discussed a number of other items and removed seven items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers other matters.

The Committee has scheduled its next meeting for October 20, 2014, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of five sets of proposed amendments as set forth in the following subsections.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks approval to publish proposed amendments that are designed to clarify and improve the inmate-filing rules. The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, are set out in the enclosure to this report.

The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

B. Tolling motions: Rule 4(a)(4)

The Committee seeks approval to publish the proposed amendment to Appellate Rule 4(a)(4) set out in the enclosure to this report. The amendment addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4) if a court has mistakenly ordered an “extension” of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called “tolling motions” filed in the district court that have the effect of extending the appeal deadline, but “§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear.” 16A Wright et al., *Federal Practice & Procedure* § 3950.4. At the time of enactment, “caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal.” *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that “[i]f a party timely files in the district court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” A number of circuits have ruled that the Civil Rules’ deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly “extends” the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a “timely” one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int’l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of “timely” in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The Committee proposes to publish for comment an amendment to the Rule that would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not “timely” under Rule 4(a)(4). The proposed amendment would work the least change in current law. And, as Judge Diane Wood noted for the court in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court’s decision in *Bowles*, which held that the Court has “no authority to create equitable exceptions to jurisdictional requirements.” 551 U.S. at 214.

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The Committee seeks approval to publish for comment amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as set out in the enclosure to this report.

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than type-volume limits invites gamesmanship by attorneys. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

A change from page limits to type-volume limits requires a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. (See attached letter of D.C. Circuit Advisory Committee on Procedures, July 14, 1993.) The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. Although there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs, the proposed amendments approved by the committee shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits could choose, of course, to accept longer briefs.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The proposed amendments would add a new Rule 32(f) setting forth such a list.

D. Amicus filings in connection with rehearing: Rule 29

The Committee seeks approval to publish for comment proposed amendments to Rule 29, as set out in the enclosure to this report. The amendments would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no

federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. In addition, they would incorporate (for the rehearing stage) most of the features of current Rule 29, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

E. Amending the “three-day rule”: Rule 26(c)

The Committee seeks approval to publish for comment the proposed amendment to Rule 26(c) that is set out in the enclosure to this report. The amendment would implement a recommendation by the Standing Committee’s CM/ECF Subcommittee that the “three-day rule” in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)’s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change would thus be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

III. Information Items

The Committee is studying proposals to amend the Rules to address appeals by class-action objectors. The Committee has heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. The Committee has benefited from informative research by Marie Leary of the FJC, who has studied class-action-objector appeals in three circuits. The Committee intends to consider the matter further, in consultation with the Civil Rules Committee’s Rule 23 Subcommittee.

The Committee is considering whether to clarify the operation of Appellate Rule 41,

concerning issuance of the mandate. Two recent cases – *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise several issues concerning Rule 41. One issue is whether Rule 41 requires (or should require) a court of appeals to issue the mandate immediately after the filing of the Supreme Court’s order denying the petition for writ of certiorari in a case. Another is whether a court of appeals may extend the time for the mandate to issue through mere inaction or must act by order. A third is whether Rule 41(d) should be amended to clarify whether a stay of the mandate continues through denial of a petition for rehearing by the Supreme Court.

The Committee is also considering whether the disclosure provisions in Appellate Rules 26.1 and 29 elicit all the information that a judge would wish to know in considering recusal or disqualification issues. Exploration of this topic likely would benefit from consultation with the Judicial Conference Committee on Codes of Conduct.

The Committee has received a suggestion to consider the appealability of orders concerning attorney-client privilege. This agenda item arises from the Court’s observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. Recognizing that a project aimed at a global overhaul of interlocutory appeal jurisdiction would be unmanageable, the Committee intends to focus more narrowly on specific categories of appeals where a proponent urges an amendment to the rules.

The Committee removed seven items from its agenda. One of those items related to a proposal that Appellate Rules 3 and 6 be amended in light of the shift to electronic filing; although that proposal may eventually merit consideration as part of a broader package of e-filing-related amendments, the Committee decided to focus for the moment on matters prioritized by the CM/ECF Subcommittee, such as the three-day rule amendment noted in Part II.E of this memo. Two items related to the Appellate Rules’ disclosure requirements, but raised particular issues that did not warrant continued study in connection with the Committee’s ongoing consideration (noted above) of possible changes to those requirements. A fourth item concerned a suggestion by Justices Ginsburg, Scalia, and Breyer that the Rules Committees consider ways to expedite proceedings under the International Child Abduction Remedies Act. The Committee’s consensus is that this issue is best addressed, in the first instance, by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee also removed from its agenda an item concerning audiorecordings of appellate arguments. Although Committee members point out the desirability of prompt online posting of such audiorecordings, this matter appears to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management. The Committee considered, and removed from its agenda, a proposal to peg the due date for amicus briefs to the due date, rather than the filing date, of the brief of the party supported by the amicus. The Committee

reasoned that putative amici have ready access to electronic dockets in cases of interest, and that the proposed change would pose a significant risk of interfering with the parties' briefing schedule, given the default rule that the appellee's deadline runs from the date of service (not the due date) of the appellant's brief. The Committee also rejected a proposal to permit party consent to extend the amicus's filing deadline, out of concern that such a change was not needed and could meet with opposition by judges who wish to avoid delay in case processing. Finally, the Committee removed from its agenda an item relating to a proposal by Judge Jon O. Newman to amend Criminal Rule 52 concerning the standard of appellate review for sentencing errors. The Committee noted that the Criminal Rules Committee has appointed a subcommittee to study this proposal, and felt that the proposal to amend a Criminal Rule is within the jurisdiction of that Committee.

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TAB 5B

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U.S. Department of Justice

DNLetter:lcb

Telephone:
(202) 514-3602

Washington, D.C. 20530

JUL 14 1993

Honorable Abner J. Mikva
Chief Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Honorable Ruth Bader Ginsburg
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Dear Chief Judge Mikva and Judge Ginsburg:

When I sent you the final version of the Advisory Committee's recommended local rule changes, I indicated that we would be conducting a survey to determine the proper number of words to allow in briefs under the new proposed Rule 28. (As you recall, the Committee recommended that the length requirement for briefs be shifted from a page maximum to a word maximum.) Jack Goodman of the Advisory Committee, and I have now conducted that survey, although we have had difficulty gathering data from law firms.

For the reasons described below, we recommend that the Court adopt a maximum word rule based on an average of 250 words per page, which would translate to a limit of 12,500 words for a party's main brief, 6,250 for a reply brief, and 8,750 for an intervenor or amicus curiae brief. (For shorter documents, such as petitions for rehearing and motions, the Committee had recommended that the Court retain the current page limits rather than switching to a word count, although these documents could now be prepared in proportional fonts of acceptable size.)

Mr. Goodman and I analyzed data first from the Department of Justice Civil Division archive of appellate briefs. We took ten briefs that were approximately 50 pages in length, and which did not contain what could reasonably be considered an excessive

number of single spaced footnotes or block quotes. We then also obtained from that archive ten reply briefs of approximately 25 pages in length, also avoiding briefs with too many footnotes or block quotes. By computer, we determined the total number of words in these briefs. In doing so, we began counting with the first page of the brief, and excluded the cover, the tables, and any addenda. Thus, we determined the number of words that would be contained in an acceptable 50 or 25 page brief that begins on the first page with a case caption and ends with a signature block. This computer counting included names and numbers in citations.

We found that the briefs of approximately 50 pages had an average total word count of 12,275 words, but some of the briefs were only 49 pages long. The average per page word count for this group was 247. For the reply briefs of approximately 25 pages, the average total word count was 6,244, with an average per page word count of 251.

We then obtained data from eight appellate briefs filed by the Federal Communications Commission and the law firm of Wilmer, Cutler & Pickering. The combined total average words per page from these briefs was 250 (although the briefs from the FCC averaged higher than that amount and the briefs from Wilmer, Cutler averaged lower than that amount).

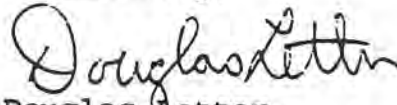
Based on these data, a brief with a maximum average of 250 words per page appears to be close to what the Court would expect to be the limit for "normal" briefs under the current rules. Consequently, Mr. Goodman and I think that if the Court adopted the word limits proposed above, those limits will on average be close to what the Court would currently find as the maximum allowed (although reply briefs would be longer than currently allowed since the Court has accepted our recommendation that, if a page length limit were used, reply briefs could be 25 pages -- as FRAP allows -- rather than the current 20).

We note that this proposal means that there will be some variations in brief page numbers, and briefs within the maximum word limit will sometimes exceed 50 pages. As described in our earlier recommendation, however, we expect that adoption of this proposed rule will lead to extensive use of proportional fonts, and many briefs will actually be shorter in pages than currently received briefs, but more easily legible.

Mr. Goodman and I will continue to attempt to obtain data from several law firms to make sure that the data we have

developed are not unusual in some unknown way. I have attached to this letter a copy of the gross data that we developed. Please contact me if any further explanation is needed.

Sincerely,



Douglas Letter
Chairman

Advisory Committee on Procedures

cc: Ron Garvin
Clerk, U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W., Room 5423
Washington, D.C. 20001-2866

Mark Langer
Chief Staff Counsel
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

OVERALL WORDS PER PAGE: 249 WORDS PER 54 LINES W/DOUBLE SPACE

LIST OF BRIEFS WITH 49 TO 50 PAGES

	WORD COUNT
ANESTHESIOLOGISTS AFFILIATED (49 PAGES)	b11,371/pp232
ARMSTRONG (50 PAGES)	b11,793/pp236
TREASURY V. FLRA (50 PAGES)	b12,070/pp241
PARKER V. RYAN (50 PAGES)	b12,777/pp256
WABASH VALLEY POWER ASSOCIATION, INC. (49 PAGES) .	b12,438/pp254
KHADER MUSA HAMIDE (50 PAGES)	b11,402/pp228
MT. DIABLO HOSPITAL MEDICAL CENTER (50 PAGES) . .	b13,292/pp266
PENTHOUSE INTERNATIONAL, LTD. (49 PAGES)	b13,246/pp270
PETER ROSETTI (50 PAGES)	b12,345/pp247
AMALGAMATED TRANSIT UNION (50 PAGES)	b12,019/pp240
TOTAL AVERAGE WORDS PER BRIEF/PAGE	<u>b12,275/pp247</u>

LIST OF REPLY BRIEFS WITH 24 TO 25 PAGES

CARTERET REPLY (25 PAGES)	r5,977/pp239
DAVIDSON V. SULLIVAN (24 PAGES)	r5,864/pp244
HAITIAN REFUGEE CENTER, INC. (25 PAGES)	r6,787/pp271
JONES V. SULLIVAN (25 PAGES)	r6,141/pp246
MARTINEZ V. LANNOM (25 PAGES)	r6,856/pp274
TASHIMA (25 PAGES)	r6,297/pp252
ANNI WATERFLOW (25 PAGES)	r6,417/pp257
WINSTAR (25 PAGES)	r5,667/pp227
JOHNSON V. HHS (25 PAGES)	r6,382/pp255
FARMER (25 PAGES)	r6,053/pp242
TOTAL AVERAGE WORDS PER 25 REPLY/PAGE	<u>r6,244/pp251</u>

BRIEFS

SOURCE	NO. OF PAGES	NO. OF WORDS	WORDS PER PAGE
FCC	49	11660	237.9591837
FCC	48	13836	288.25
FCC	50	13585	271.7
FCC	47	12408	264
FCC	47	12563	267.2978723
WC&P	14	3037	216.9285714
WC&P	21	4806	228.8571429
WC&P	19	4230	222.6315789
AVGE.	34	7945	230.2953813

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TAB 5C

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PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 **Rule 4. Appeal as of Right—When Taken**

2 * * *

3 **(c) Appeal by an Inmate Confined in an Institution.**

4 (1) If an inmate confined in an institution files a
5 notice of appeal in either a civil or a criminal case, the
6 notice is timely if it is deposited in the institution's internal
7 mail system on or before the last day for filing. ~~If an~~
8 ~~institution has a system designed for legal mail, the inmate~~
9 ~~must use that system to receive the benefit of this rule.~~
10 ~~Timely filing may be shown by a declaration in compliance~~
11 ~~with 28 U.S.C. § 1746 or by a notarized statement, either of~~
12 ~~which must set forth the date of deposit and state that~~
13 ~~first-class postage has been prepaid; and:~~

14 (A) it is accompanied by:

15 (i) a declaration in compliance with
16 28 U.S.C. § 1746 – or a notarized statement
17 – setting out the date of deposit and stating
18 that first-class postage is being prepaid; or

19 (ii) evidence (such as a postmark
20 and date stamp) showing that it was so
21 deposited and that postage was prepaid; or

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 (B) the court of appeals exercises its
2 discretion to permit the later filing of a declaration
3 or notarized statement that meets the requirements
4 of Rule 4(c)(1)(A)(i).

5 * * *

6
7 **Committee Note**

8
9 Rule 4(c)(1) is revised to streamline and clarify the
10 operation of the inmate-filing rule. The second sentence of the
11 former Rule – which had required the use of a “system designed
12 for legal mail” when one existed – is deleted. This change is
13 designed to clarify that an inmate receives the benefit of the rule
14 whether the inmate uses a prison’s legal mail system or a prison’s
15 general mail system, and that an inmate is required to show timely
16 deposit and prepayment of postage whether or not the inmate uses
17 a prison’s legal mail system.

18
19 The Rule is amended to specify that a notice is timely if it
20 is accompanied by a declaration or notarized statement stating the
21 date the notice was deposited in the institution’s mail system and
22 attesting to the prepayment of first-class postage. The declaration
23 must state that first-class postage “is being prepaid,” not (as
24 directed by the former Rule) that first-class postage “has been
25 prepaid.” This change reflects the fact that inmates may need to
26 rely upon the institution to affix postage subsequent to the deposit
27 of the document in the institution’s mail system. New Form 7 in
28 the Appendix of Forms sets out a suggested form of the
29 declaration.

30
31 The amended rule also provides that a notice is timely
32 without a declaration or notarized statement if other evidence
33 accompanying the notice shows that the notice was deposited on or
34 before the due date and that postage was prepaid. If the notice is
35 not accompanied by evidence that establishes timely deposit and
36 prepayment of postage, then the court of appeals has discretion to
37 accept a declaration or notarized statement at a later date.

38
39

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 first-class postage is being prepaid;
2 or
3 (b) evidence (such as a
4 postmark and date stamp) showing
5 that it was so deposited and that
6 postage was prepaid; or
7 (ii) the court of appeals exercises its
8 discretion to permit the later filing of a
9 declaration or notarized statement that meets
10 the requirements of Rule 25(a)(2)(C)(i)(a).

11 * * *

12 **Committee Note**

13
14 Rule 25(a)(2)(C) is revised to streamline and clarify the
15 operation of the inmate-filing rule. The second sentence of the
16 former Rule – which had required the use of a “system designed
17 for legal mail” when one existed – is deleted. The purposes of the
18 Rule are served whether the inmate uses a system designed for
19 legal mail or a system designed for nonlegal mail.

20
21 The Rule is amended to specify that a paper is timely if it is
22 accompanied by a declaration or notarized statement stating the
23 date the paper was deposited in the institution’s mail system and
24 attesting to the prepayment of first-class postage. The declaration
25 must state that first-class postage “is being prepaid,” not (as
26 directed by the former Rule) that first-class postage “has been
27 prepaid.” This change reflects the fact that inmates may need to
28 rely upon the institution to affix postage subsequent to the deposit
29 of the document in the institution’s mail system. New Form 7 in
30 the Appendix of Forms sets out a suggested form of the
31 declaration.

32

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 The amended rule also provides that a paper is timely
2 without a declaration or notarized statement if other evidence
3 accompanying the paper shows that the paper was deposited on or
4 before the due date and that postage was prepaid. If the paper is
5 not accompanied by evidence that establishes timely deposit and
6 prepayment of postage, then the court of appeals has discretion to
7 accept a declaration or notarized statement at a later date.
8

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 **Form 1. Notice of Appeal to a Court of Appeals From a**
2 **Judgment or Order of a District Court**
3

4 United States District Court for the _____
5 District of _____
6 File Number _____
7

8 A.B., Plaintiff

9
10 v.

Notice of Appeal

11
12 C.D., Defendant
13
14

15 Notice is hereby given that ___(here name all parties taking
16 the appeal)__, (plaintiffs) (defendants) in the above named case,¹
17 hereby appeal to the United States Court of Appeals for the
18 _____ Circuit (from the final judgment) (from an order
19 (describing it)) entered in this action on the _____ day of
20 _____, 20____.
21

22
23 (s) _____
24 Attorney for _____
25 Address: _____
26
27
28

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

¹ See Rule 3(c) for permissible ways of identifying appellants.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

**Form 5. Notice of Appeal to a Court of Appeals from a
Judgment or Order of a District Court or a Bankruptcy
Appellate Panel**

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant

File No. _____

Notice of Appeal to United States Court of Appeals for the
_____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

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

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 **Form 7. Declaration of Inmate Filing**

2
3 _____
4 *[insert name of court, for example,*
5 *United States District Court for the District of Minnesota]*

6
7
8 A.B., Plaintiff

9
10 v. Case No. _____

11
12 C.D., Defendant

13
14 I am an inmate confined in an institution. I deposited the
15 _____ *[insert title of document, for example, “notice of*
16 *appeal”]* in this case in the institution’s internal mail system on
17 _____ *[insert date]*, and first-class postage is being prepaid
18 either by me or by the institution on my behalf.

19
20 I declare under penalty of perjury that the foregoing is true
21 and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

22
23 Sign your name here _____

24
25 Executed on _____ *[insert date]*

26

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 **Rule 4. Appeal as of Right—When Taken**

2 **(a) Appeal in a Civil Case.**

3 * * *

4 **(4) Effect of a Motion on a Notice of Appeal.**

5 (A) If a party ~~timely~~ files in the district
6 court any of the following motions under the
7 Federal Rules of Civil Procedure; – and does so
8 within the time allowed by those rules – the time to
9 file an appeal runs for all parties from the entry of
10 the order disposing of the last such remaining
11 motion:

12 * * *

13 **Committee Note**

14
15 A clarifying amendment is made to subdivision (a)(4).
16 Former Rule 4(a)(4) provided that “[i]f a party timely files in the
17 district court” certain post-judgment motions, “the time to file an
18 appeal runs for all parties from the entry of the order disposing of
19 the last such remaining motion.” Responding to a circuit split
20 concerning the meaning of “timely” in this provision, the
21 amendment adopts the majority approach and rejects the approach
22 taken in *National Ecological Foundation v. Alexander*, 496 F.3d
23 466 (6th Cir. 2007). A motion made after the time allowed by the
24 Civil Rules will not qualify as a motion that, under Rule
25 4(a)(4)(A), re-starts the appeal time – and that fact is not altered
26 by, for example, a court order that sets a due date that is later than
27 permitted by the Civil Rules, another party’s consent or failure to
28 object to the motion’s lateness, or the court’s disposition of the
29 motion without explicit reliance on untimeliness.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed:

(A) 5,000 words; or

(B) 520 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 derived from the current page limits using the assumption that one
2 page is equivalent to 250 words or to 26 lines of text. Papers
3 produced using a computer must include the certificate of
4 compliance required by Rule 32(g); Form 6 in the Appendix of
5 Forms suffices to meet that requirement. Page limits are retained
6 for papers prepared without the aid of a computer (i.e., handwritten
7 or typewritten papers). For both the type-volume limits and the
8 page limit, the calculation excludes the accompanying documents
9 required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

10
11
12 **Rule 21. Writs of Mandamus and Prohibition, and Other**
13 **Extraordinary Writs**

14 * * *

15
16
17 (d) **Form of Papers; Number of Copies.** All papers must
18 conform to Rule 32(c)(2). ~~Except by the court's permission, a~~
19 ~~paper must not exceed 30 pages, exclusive of the disclosure~~
20 ~~statement, the proof of service, and the accompanying documents~~
21 ~~required by Rule 21(a)(2)(C).~~ An original and 3 copies must be
22 filed unless the court requires the filing of a different number by
23 local rule or by order in a particular case. Except by the court's
24 permission, and excluding the accompanying documents required
25 by Rule 21(a)(2)(C):

26 (1) a handwritten or typewritten paper must not
27 exceed 30 pages; and

28 (2) a paper produced using a computer must
29 comply with Rule 32(g) and not exceed:

30 (A) 7,500 words; or

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 excluding the accompanying documents authorized by Rule

2 27(a)(2)(B):

3 (A) a handwritten or typewritten motion or
4 response to a motion must not exceed 20 pages;

5 (B) a motion or response to a motion
6 produced using a computer must comply with Rule
7 32(g) and not exceed:

8 (i) 5,000 words; or

9 (ii) 520 lines of text printed in a
10 monospaced face;

11 (C) a handwritten or typewritten reply to a
12 response must not exceed 10 pages; and

13 (D) a reply produced using a computer must
14 comply with Rule 32(g) and not exceed:

15 (i) 2,500 words; or

16 (ii) 260 lines of text printed in a
17 monospaced face.

18 * * *

19 **Committee Note**

20 The page limits previously employed in Rules 5, 21, 27, 35,
21 and 40 have been largely overtaken by changes in technology. For
22 papers produced using a computer, those page limits are now
23 replaced by type-volume limits. The type-volume limits were
24 derived from the current page limits using the assumption that one
25
26

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 page is equivalent to 250 words or to 26 lines of text. Papers
2 produced using a computer must include the certificate of
3 compliance required by Rule 32(g); Form 6 in the Appendix of
4 Forms suffices to meet that requirement. Page limits are retained
5 for papers prepared without the aid of a computer (i.e., handwritten
6 or typewritten papers). For both the type-volume limits and the
7 page limit, the calculation excludes the accompanying documents
8 required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).
9

10
11 **Rule 28.1. Cross-Appeals**

12 * * *

13 **(e) Length.**

14 (1) **Page Limitation.** Unless it complies with Rule
15 28.1(e)(2) ~~and (3)~~, the appellant's principal brief must not
16 exceed 30 pages; the appellee's principal and response
17 brief, 35 pages; the appellant's response and reply brief, 30
18 pages; and the appellee's reply brief, 15 pages.

19 **(2) Type-Volume Limitation.**

20 (A) The appellant's principal brief or the
21 appellant's response and reply brief is acceptable if
22 it complies with Rule 32(g) and:

23 (i) ~~it contains no more than 14,000~~

24 12,500 words; or

25 (ii) ~~it uses a monospaced face and~~

26 contains no more than 1,300 lines of text.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

1 (B) The appellee's principal and response
2 brief is acceptable if it complies with Rule 32(g)
3 and:

4 (i) ~~it contains no more than 16,500~~
5 14,700 words; or

6 (ii) ~~it uses a monospaced face and~~
7 contains no more than 1,500 lines of text.

8 (C) The appellee's reply brief is acceptable
9 if it complies with Rule 32(g) and contains no more
10 than half of the type volume specified in Rule
11 28.1(e)(2)(A).

12 ~~(3) Certificate of Compliance. A brief submitted~~
13 ~~under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

14 * * *

15 **Committee Note**

16
17 When Rule 28.1 was adopted in 2005, it modeled its
18 type-volume limits on those set forth in Rule 32(a)(7) for briefs in
19 cases that did not involve a cross-appeal. At that time, Rule
20 32(a)(7)(B) set word limits based on an estimate of 280 words per
21 page. The basis for the estimate of 280 words per page is
22 unknown, and the 1998 adoption of Rule 32(a)(7)(B) superseded at
23 least one local circuit rule that used an estimate of 250 words per
24 page based on a study of appellate briefs. The committee believes
25 that the use of the estimate of 280 words per page inadvertently
26 increased the length limits for briefs. Rules 28.1 and 32(a)(7)(B)
27 are amended to reduce the word limits accordingly.
28

PROPOSED AMENDMENTS TO THE FEDERAL
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1 Rule 28.1(e) is amended to refer to new Rule 32(g) (which
2 now contains the certificate-of-compliance provision formerly in
3 Rule 32(a)(7)(C)).
4
5

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

7 **(a) Form of a Brief.**

8 * * *

9 **(7) Length.**

10 **(A) Page Limitation.** A principal brief may
11 not exceed 30 pages, or a reply brief 15 pages,
12 unless it complies with Rule 32(a)(7)(B) and (C).

13 **(B) Type-Volume Limitation.**

14 (i) A principal brief is acceptable if it
15 complies with Rule 32(g) and:

- 16 ● ~~it~~ contains no more than
17 ~~14,000~~ 12,500 words; or
18 ● ~~it~~ uses a monospaced face
19 and contains no more than
20 1,300 lines of text.

21 (ii) A reply brief is acceptable if it
22 complies with Rule 32(g) and contains no
23 more than half of the type volume specified
24 in Rule 32(a)(7)(B)(I).

PROPOSED AMENDMENTS TO THE FEDERAL
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1 (iii) ~~Headings, footnotes, and~~
2 ~~quotations count toward the word and line~~
3 ~~limitations. The corporate disclosure~~
4 ~~statement, table of contents, table of~~
5 ~~citations, statement with respect to oral~~
6 ~~argument, any addendum containing~~
7 ~~statutes, rules or regulations, and any~~
8 ~~certificates of counsel do not count toward~~
9 ~~the limitation.~~

10 * * *

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

- 14 ● the cover page
- 15 ● a corporate disclosure statement
- 16 ● a table of contents
- 17 ● a table of citations
- 18 ● a statement regarding oral argument
- 19 ● an addendum containing statutes, rules, or
20 regulations
- 21 ● certificates of counsel
- 22 ● the signature block

PROPOSED AMENDMENTS TO THE FEDERAL
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1 briefs. Rule 32(a)(7)(B) is amended to reduce the word limits
2 accordingly.
3

4 A new subdivision (f) is added to set out a global list of
5 items excluded from length computations, and the list of
6 exclusions in former subdivision (a)(7)(B)(iii) is deleted. The
7 certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is
8 relocated to a new Rule 32(g) and now applies to filings under all
9 type-volume limits, including the new type-volume limits in Rules
10 5, 21, 27, 35, and 40. Conforming amendments are made to Form
11 6.
12

13 **Rule 35. En Banc Determination**

14 * * *

15 (b) **Petition for Hearing or Rehearing En Banc.** A party
16 may petition for a hearing or rehearing en banc.

17 * * *

18 (2) Except by the court's permission, ~~a petition for~~
19 ~~an en banc hearing or rehearing must not exceed 15 pages,~~
20 ~~excluding material not counted under Rule 32.;~~

21 (A) a handwritten or typewritten petition for
22 an en banc hearing or rehearing must not exceed 15
23 pages; and

24 (B) a petition for an en banc hearing or
25 rehearing produced using a computer must comply
26 with Rule 32(g) and not exceed:

27 (i) 3,750 words; or

PROPOSED AMENDMENTS TO THE FEDERAL
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1 (ii) 390 lines of text printed in a
2 monospaced face.

3 (3) For purposes of the ~~page~~ limits in Rule
4 35(b)(2), if a party files both a petition for panel rehearing
5 and a petition for rehearing en banc, they are considered a
6 single document even if they are filed separately, unless
7 separate filing is required by local rule.

8 * * *

9 **Committee Note**

10 The page limits previously employed in Rules 5, 21, 27, 35,
11 and 40 have been largely overtaken by changes in technology. For
12 papers produced using a computer, those page limits are now
13 replaced by type-volume limits. The type-volume limits were
14 derived from the current page limits using the assumption that one
15 page is equivalent to 250 words or to 26 lines of text. Papers
16 produced using a computer must include the certificate of
17 compliance required by Rule 32(g); Form 6 in the Appendix of
18 Forms suffices to meet that requirement. Page limits are retained
19 for papers prepared without the aid of a computer (i.e., handwritten
20 or typewritten papers). For both the type-volume limits and the
21 page limit, the calculation excludes any items listed in Rule 32(f).
22
23
24

25 **Rule 40. Petition for Panel Rehearing**

26 * * *

27 (b) **Form of Petition; Length.** The petition must comply in
28 form with Rule 32. Copies must be served and filed as Rule 31
29 prescribes. ~~Unless the court permits or a local rule provides~~

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1 ~~otherwise, a petition for panel rehearing must not exceed 15 pages.~~

2 Except by the court's permission:

3 (1) a handwritten or typewritten petition for panel
4 rehearing must not exceed 15 pages; and

5 (2) a petition for panel rehearing produced using a
6 computer must comply with Rule 32(g) and not exceed:

7 (A) 3,750 words; or

8 (B) 390 lines of text printed in a

9 monospaced face.

10 **Committee Note**

11
12 The page limits previously employed in Rules 5, 21, 27, 35,
13 and 40 have been largely overtaken by changes in technology. For
14 papers produced using a computer, those page limits are now
15 replaced by type-volume limits. The type-volume limits were
16 derived from the current page limits using the assumption that one
17 page is equivalent to 250 words or to 26 lines of text. Papers
18 produced using a computer must include the certificate of
19 compliance required by Rule 32(g); Form 6 in the Appendix of
20 Forms suffices to meet that requirement. Page limits are retained
21 for papers prepared without the aid of a computer (i.e., handwritten
22 or typewritten papers). For both the type-volume limits and the
23 page limit, the calculation excludes any items listed in Rule 32(f).

PROPOSED AMENDMENTS TO THE FEDERAL
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Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This ~~brief document~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [insert Rule citation, e.g., 32(a)(7)(B)] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [insert applicable Rule citation if any]]:

this ~~brief document~~ document contains *[state the number of]* words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or~~

this ~~brief document~~ document uses a monospaced typeface and contains *[state the number of]* lines of text; ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).~~

2. This ~~brief document~~ document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this ~~brief document~~ document has been prepared in a proportionally spaced typeface using *[state name and version of word processing program]* in *[state font size and name of type style]*, or

this ~~brief document~~ document has been prepared in a monospaced typeface using *[state name and version of word processing program]* with *[state number of characters per inch and name of type style]*.

(s) _____

Attorney for _____

Dated: _____

PROPOSED AMENDMENTS TO THE FEDERAL
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1 **Rule 29. Brief of an Amicus Curiae**

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

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

7 **(2) When Permitted.** The United States or its
8 officer or agency or a state may file an amicus-curiae brief
9 without the consent of the parties or leave of court. Any
10 other amicus curiae may file a brief only by leave of court
11 or if the brief states that all parties have consented to its
12 filing.

13 ~~(b)~~ **(3) Motion for Leave to File.** The motion must
14 be accompanied by the proposed brief and state:

15 ~~(1)~~ **(A)** the movant's interest; and

16 ~~(2)~~ **(B)** the reason why an amicus brief is
17 desirable and why the matters asserted are relevant
18 to the disposition of the case.

19 ~~(c)~~ **(4) Contents and Form.** An amicus brief must
20 comply with Rule 32. In addition to the requirements of
21 Rule 32, the cover must identify the party or parties
22 supported and indicate whether the brief supports

PROPOSED AMENDMENTS TO THE FEDERAL
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1 affirmance or reversal. An amicus brief need not comply
2 with Rule 28, but must include the following:

3 ~~(1)~~ (A) if the amicus curiae is a corporation,
4 a disclosure statement like that required of parties
5 by Rule 26.1;

6 ~~(2)~~ (B) a table of contents, with page
7 references;

8 ~~(3)~~ (C) a table of authorities—cases
9 (alphabetically arranged), statutes, and other
10 authorities—with references to the pages of the brief
11 where they are cited;

12 ~~(4)~~ (D) a concise statement of the identity of
13 the amicus curiae, its interest in the case, and the
14 source of its authority to file;

15 ~~(5)~~ (E) unless the amicus curiae is one listed
16 in the first sentence of Rule 29(a)(2), a statement
17 that indicates whether:

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

20 ~~(B)~~ (ii) a party or a party's counsel
21 contributed money that was intended to fund
22 preparing or submitting the brief; and

PROPOSED AMENDMENTS TO THE FEDERAL
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1 ~~(E)~~ (iii) a person—other than the
2 amicus curiae, its members, or its
3 counsel—contributed money that was
4 intended to fund preparing or submitting the
5 brief and, if so, identifies each such person;

6 ~~(F)~~ (F) an argument, which may be preceded
7 by a summary and which need not include a
8 statement of the applicable standard of review; and

9 ~~(7)~~ (G) a certificate of compliance, if
10 required by Rule 32(a)(7).

11 ~~(d)~~ **(5) Length.** Except by the court's permission, an
12 amicus brief may be no more than one-half the maximum
13 length authorized by these rules for a party's principal
14 brief. If the court grants a party permission to file a longer
15 brief, that extension does not affect the length of an amicus
16 brief.

17 ~~(e)~~ **(6) Time for Filing.** An amicus curiae must file
18 its brief, accompanied by a motion for filing when
19 necessary, no later than 7 days after the principal brief of
20 the party being supported is filed. An amicus curiae that
21 does not support either party must file its brief no later than
22 7 days after the appellant's or petitioner's principal brief is

PROPOSED AMENDMENTS TO THE FEDERAL
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1 filed. A court may grant leave for later filing, specifying
2 the time within which an opposing party may answer.

3 ~~(f)~~ (7) Reply Brief. Except by the court's
4 permission, an amicus curiae may not file a reply brief.

5 ~~(g)~~ (8) Oral Argument. An amicus curiae may
6 participate in oral argument only with the court's
7 permission.

8 (b) During Consideration of Whether to Grant
9 Rehearing.

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

14 (2) When Permitted. Rule 29(a)(2) applies.

15 (3) Motion for Leave to File. Rule 29(a)(3)
16 applies to the motion for leave.

17 (4) Contents, Form, and Length. Rule 29(a)(4)
18 applies to the amicus brief. The brief must comply with
19 Rule 32(g) and not exceed:

20 (i) 2,000 words; or

21 (ii) 208 lines of text printed in a
22 monospaced face.

PROPOSED AMENDMENTS TO THE FEDERAL
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1 **(5) Time for Filing.** An amicus curiae supporting
2 the petition for rehearing or supporting neither party must
3 file its brief, accompanied by a motion for filing when
4 necessary, no later than 3 days after the petition is filed.
5 An amicus curiae opposing the petition must file its brief,
6 accompanied by a motion for filing when necessary, no
7 later than the date set by the court for the response.

8 **Committee Note**
9

10 Rule 29 is amended to address amicus filings in connection
11 with requests for panel rehearing and rehearing en banc. Existing
12 Rule 29 is renumbered Rule 29(a), and language is added to that
13 subdivision (a) to state that its provisions apply to amicus filings
14 during the court’s initial consideration of a case on the merits.
15 New subdivision (b) is added to address amicus filings in
16 connection with a petition for panel rehearing or rehearing en
17 banc. Subdivision (b) sets default rules that apply when a court
18 does not provide otherwise by local rule or by order in a case. A
19 court remains free to adopt different rules governing whether
20 amicus filings are permitted in connection with petitions for
21 rehearing, and governing the procedures when such filings are
22 permitted.

PROPOSED AMENDMENTS TO THE FEDERAL
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1 **Rule 26. Computing and Extending Time**

2 * * *

3 **(c) Additional Time after Certain Kinds of Service.**

4 When a party may or must act within a specified time after ~~service~~
5 being served, 3 days are added after the period would otherwise
6 expire under Rule 26(a), unless the paper is delivered on the date
7 of service stated in the proof of service. For purposes of this Rule
8 26(c), a paper that is served electronically is ~~not~~ treated as
9 delivered on the date of service stated in the proof of service.

10 **Committee Note**

11
12 Rule 26(c) is amended to remove service by electronic
13 means under Rule 25(c)(1)(D) from the modes of service that
14 allow 3 added days to act after being served.

15
16 Rule 25(c) was amended in 2002 to provide for service by
17 electronic means. Although electronic transmission seemed
18 virtually instantaneous even then, electronic service was included
19 in the modes of service that allow 3 added days to act after being
20 served. There were concerns that the transmission might be
21 delayed for some time, and particular concerns that incompatible
22 systems might make it difficult or impossible to open attachments.
23 Those concerns have been substantially alleviated by advances in
24 technology and in widespread skill in using electronic
25 transmission.

26
27 A parallel reason for allowing the 3 added days was that
28 electronic service was authorized only with the consent of the
29 person to be served. Concerns about the reliability of electronic
30 transmission might have led to refusals of consent; the 3 added

PROPOSED AMENDMENTS TO THE FEDERAL
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1 days were calculated to alleviate these concerns. [If we eliminate
2 consent from Rule 25(c)(1)(D), we can add that here.]¹
3

4 Diminution of the concerns that prompted the decision to
5 allow the 3 added days for electronic transmission is not the only
6 reason for discarding this indulgence. Many rules have been
7 changed to ease the task of computing time by adopting 7-, 14-,
8 21-, and 28- day periods that allow “day-of-the-week” counting.
9 Adding 3 days at the end complicated the counting, and increased
10 the occasions for further complication by invoking the provisions
11 that apply when the last day is a Saturday, Sunday, or legal
12 holiday.
13

14 Rule 26(c) has also been amended to refer to instances
15 when a party “may or must act ... after being served” rather than
16 to instances when a party “may or must act ... after service.” If, in
17 future, an Appellate Rule sets a deadline for a party to act after *that*
18 *party itself effects service* on another person, this change in
19 language will clarify that Rule 26(c)’s three added days are not
20 accorded to the party who effected service.

¹ Rule 25(c)(1)(D) authorizes service “by electronic means, if the party being served consents in writing.” Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

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TAB 5D

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Advisory Committee on Appellate Rules Table of Agenda Items — May 2014

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
08-AP-H	Consider issues of “manufactured finality” and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14

TAB 5E

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Minutes of Spring 2014 Meeting of Advisory Committee on Appellate Rules April 28 and 29, 2014 Newark, New Jersey

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 28, 2014, at 10:00 a.m. at the Seton Hall University School of Law. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid,¹ Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Judge Jeffrey S. Sutton, Chair of the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee’s Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office (“AO”); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”) were also present. Judge Adalberto Jordan, liaison from the Advisory Committee on Bankruptcy Rules, and Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated in portions of the meeting by telephone.

Judge Colloton began by expressing thanks to Patrick E. Hobbs, the Dean of Seton Hall University School of Law, for hosting the Committee’s meeting. Dean Hobbs in turn thanked Judge Chagares for suggesting that the meeting be held at Seton Hall, and noted that the Law School would welcome future visits from any of the Rules Committees.

Judge Colloton welcomed the Committee’s newest member. Mr. Katsas, a partner at Jones Day, has a distinguished record of appellate arguments in every circuit as well as in the United States Supreme Court. Mr. Letter observed that during Mr. Katsas’s service in senior positions in the DOJ, Mr. Katsas gained high regard among the career civil servants there.

II. Approval of Minutes of April 2013 Meeting

A motion was made and seconded to approve the minutes of the Committee’s April 2013 meeting. The motion passed by voice vote without dissent.

¹ Justice Eid attended the meeting on April 28 but not on April 29.

III. Report on January 2014 Meeting of Standing Committee

Judge Colloton noted that he had given a report on the activities of the Appellate Rules Committee at the Standing Committee's January 2014 meeting. Due to the cancellation of the Appellate Rules Committee's fall 2013 meeting, he observed, there were no Appellate Rules action items for the January 2014 Standing Committee meeting.

The Reporter reminded the Committee that amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, had taken effect on December 1, 2013. The proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases, have been adopted by the Supreme Court and submitted to Congress; absent any contrary action by Congress, those amendments will take effect on December 1, 2014.

Judge Sutton observed that some lawyers are slow to adjust to the requirements of amended Rule 28(a) concerning the "statement of the case." Mr. Gans reported that his office has been educating lawyers about the new rule.

IV. Action Items – For Publication

Judge Colloton recalled that the Committee's fall 2013 meeting had been cancelled due to the lapse in appropriations. During the year that passed between the spring 2013 and spring 2014 meetings, he asked members of the Committee to work with him and the Reporter on proposals to address a number of items on the Committee's agenda.

A. Item No. 07-AP-I (FRAP 4(c) / inmate filing)

Judge Colloton reminded the Committee that Item No. 07-AP-I arises from a suggestion by Judge Diane Wood that courts have experienced difficulty in interpreting Rule 4(c)(1)'s inmate-filing provision. Some courts treat the question of prepayment of postage differently depending on whether the inmate uses an institution's legal mail system (in which event these courts do not require prepayment of postage) or an institution's general mail system (in which event prepayment of postage is a precondition for applying Rule 4(c)(1)'s inmate-filing provision). Questions also have arisen concerning the declaration mentioned by Rule 4(c)(1); is such a declaration necessary in cases where other evidence shows the timely deposit of the notice of appeal in the institution's mail system? And, when a declaration is required, must it be included with the notice of appeal or can the inmate supply the declaration later?

The working group that addressed these questions included Justice Eid, Professor Barrett, and Mr. Letter. The group took as a starting point Supreme Court Rule 29.2, which provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

The group set out to answer three policy questions: First, should Rule 4(c)(1) require prepayment of postage as a condition for the application of the provision's inmate-filing rule? The working group suggested that the rule should require prepayment of postage. Second, should the availability of Rule 4(c)(1)'s inmate-filing rule depend on the inmate's use of an institution's legal mail system? The working group suggested that the provision should not require the inmate to use a legal mail system. The input received from the federal Bureau of Prisons (BOP) indicates that the distinction between legal mail systems and general mail systems often serves other goals, such as assuring the privacy of legal mail. There does not appear to be any institutional interest that would be served by requiring the inmate to use the legal (as opposed to general) mail system. Third, how should Rule 4(c)(1) treat the role of the declaration? The proposal set forth in the agenda materials would provide that a filing is timely if it is timely deposited in the institution's mail system with postage prepaid and is accompanied by the declaration. If the inmate does not include the declaration with the initial filing and other evidence accompanying the filing does not show its timeliness, then the court would have discretion whether or not to permit the inmate to establish timeliness by belatedly filing the declaration.

Judge Colloton invited the Reporter to introduce, for comment by the Committee members, the proposed text of the amendment and the proposed Committee Note. The Reporter pointed out that two restyled options for the text of Rule 4(c) were set out in her April 25 memorandum to the Committee and that the proposed Committee Note was set out in her April 22 memorandum; although the April 25 memo did not include a draft of Rule 25(a)(2)(C), the Rule 25(a)(2)(C) proposal could be revised to track the approach selected for Rule 4(c)(1).

With respect to the second restyled draft of Rule 4(c)(1) in the April 25 memo, a member suggested reordering subparts (c)(1)(A)(i) and (ii) so that the Rule would refer to the contemporaneously-provided declaration before going on to discuss other evidence of timeliness or a later-filed declaration. This ordering is preferable, she explained, because it highlights the preferred course of action – namely, including the declaration along with the filing. An appellate judge member expressed agreement with this reordering. Another appellate judge member also agreed with this proposed reordering, and stated that, more generally, she supports the proposed amendments to Rule 4(c). The current Rule's reference to a "system designed for legal mail" is undesirable, she suggested, because the Rule does not make clear what qualifies as such a system. Mr. Letter agreed that the reference to a "system designed for legal mail" should be deleted. Informal consultations with Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, and with Kenneth Hyle, the Deputy General Counsel of the BOP, disclosed no reason for retaining the legal-mail-system provision. And, Mr. Letter suggested, it seems preferable for the Appellate Rules' inmate-filing provisions to track the U.S. Supreme Court's inmate-filing provision as closely as possible.

Judge Colloton observed that Supreme Court Rule 29.2, unlike current Appellate Rule 4(c)(1), appears to require that the declaration "accompan[y]" the document that is being filed. In practice, though, if an inmate files a document without the declaration or notarized statement, the Supreme Court will return the document to the inmate but then will accept it as timely filed if

the inmate refiles the document with a declaration stating that the original mailing was deposited in the prison mailbox before the last date for filing with postage prepaid. The proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) take a similar approach: They provide that the document is timely if “accompanied by” a satisfactory declaration, but also give the courts of appeals discretion to permit the later filing of a declaration.

An attorney member expressed agreement with the substantive choices reflected in the proposed amendments. He raised a question about the second restyled version of Rule 4(c)(1); as set out in the April 25 memo, the restyled rule would offer two alternatives – subdivision (A) and subdivision (B) – for establishing timeliness under the inmate-filing provision. Subdivision (B) includes the term “such a declaration or notarized statement.” To know which declaration or statement this refers to, the reader must turn to subdivision (A) – but it does not make sense to rely on a referent located in subdivision (A), because (A) and (B) are alternatives. The Reporter suggested that this difficulty could be addressed by revising subdivision (B) to refer to subdivision 4(c)(1)(A)(i).

An appellate judge member noted that the text of the proposed rule addresses three possible ways to show timeliness: by means of a declaration included with the filing; by means of other evidence that accompanies the filing; or by means of a later-filed declaration. He asked whether this rule text would accommodate an instance where evidence other than a declaration is proffered after the fact. It was suggested that, in such an instance, the inmate could append copies of the relevant evidence to a declaration. Turning to the proposed Form 7 – which shows the suggested contents of the declaration – the judge member noted that the Form states that “first-class postage is being prepaid either by me or by the institution on my behalf.” The member asked whether “is being prepaid” should be placed in brackets and paired with another bracketed alternative, “was prepaid.” The latter, he suggested, would be the appropriate choice if the inmate were to file the declaration belatedly. The Reporter responded that “is being prepaid” was designed to reflect the overall preference that the inmate include the declaration along with the initial filing.

The appellate judge member also asked whether the Form, when referring to payment of postage by the institution, should say something like “based on my understanding, postage is being paid by the institution on my behalf.” Such a formulation, he suggested, might be preferable because an inmate might not know with certainty whether the institution will pay the postage. Other participants, though, suggested that an inmate would be justified in saying “is being prepaid” if he or she has a reasonable expectation (grounded in the institution’s policy) that the institution will pay the postage.

Another appellate judge member noted that a few institutions have begun to allow inmates to file court papers electronically. Would an inmate in such an institution, he asked, have to comply with Rule 4(c)(1)’s requirements? Judge Colloton responded that Rule 4(c)(1) provides the inmate with an option for showing timely filing of the notice of appeal, but recourse to Rule 4(c)(1) is not mandatory.

An appellate judge asked whether proposed subdivision (c)(1)(B) – concerning later-filed declarations – would tempt inmates to omit the declaration from their initial filing. In response, the Reporter undertook to propose revised language for subdivision (c)(1)(B) that would highlight the fact that the court of appeals would have discretion to reject (as well as accept) later-filed declarations.

An attorney participant asked whether there are real problems (with the inmate-filing provisions) that necessitate rule amendments. Judge Colloton responded that the amendments will be worthwhile if they clarify the inmate-filing rule's operation. Mr. Gans stated that the proposed amendments will greatly improve the rule. He stated that in 2013 he had surveyed his fellow circuit clerks. The clerks reported that they have developed ways of handling inmate filings under the current rule. Typically, they look at the filing and if there is evidence of timeliness they accept it – but if a filing seems obviously untimely (as, for instance, when the date next to the inmate's signature post-dates the due date), the clerk will flag the timeliness issue. In the Eighth Circuit, Mr. Gans observed, from 35 to 40 percent of the appeals involve pro se litigants.

After the first day of the meeting concluded, the Chair and Reporter prepared a revised draft of the proposed amendments. The revisions reordered the two subparts of Rule 4(c)(1)(A), and revised Rule 4(c)(1)(B) to underscore the court of appeals' discretion concerning whether to permit a later-filed declaration. On the second day of the meeting, copies of the revised drafts were circulated to Committee members. After the Reporter summarized the changes to the drafts, a member moved to approve for publication the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), the proposed amendments to Forms 1 and 5, and the proposed new Form 7, as shown in the revised drafts circulated to the Committee that morning. The motion was seconded and passed by voice vote without dissent.

B. Item No. 12-AP-E (length limits, including matters now governed by page limits)

Judge Colloton noted that Item No. 12-AP-E grew out of Professor Katyal's suggestion that the length limit for petitions for rehearing en banc be stated using type-volume limits rather than word limits. The project expanded to encompass other questions relating to length limits. One question is whether the Rules should be amended to ensure uniform treatment (across different types of documents) concerning items to be excluded when computing length. Another question relates to the choice – made in connection with the 1998 amendments that produced current Rule 32 – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. While deliberating over the formulae to use when converting existing page limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments – namely, that one page was equivalent to 280 words – appears to have been mistaken. Based on earlier research by Mr. Letter on behalf of the D.C. Circuit's rules committee, a better estimate appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

The proposed amendments, as restyled by Professor Kimble, were set out in the Reporter's April 22 memorandum to the Committee. Judge Colloton explained that, for briefs prepared using a computer, the proposals would replace existing page limits in Rules 5, 21, 27, 35, and 40 with type-volume limits. For briefs prepared without the use of a computer, the proposals would retain the existing page limits set forth in Rules 5, 21, 27, 35, and 40. A new Rule 32(f) would set forth one globally-applicable list of items to be excluded when computing length. The new type-volume limits in Rules 5, 21, 27, 35, and 40 would reflect an assumption that one page is equivalent to 250 words or to 26 lines of text. The amendments would also shorten the type-volume briefing length limits currently set out in Rules 28.1(e)(2) and 32(a)(7)(B), to reflect the more realistic estimate of 250 words per page. The Reporter mentioned that the draft tentatively included, in Rules 5, 21, 27, 35, and 40, cross-references to new Rule 32(f)'s list of exclusions. Professor Kimble, however, has explained that these cross-references are unnecessary and undesirable.

Judge Colloton invited Professor Katyal to discuss the proposals. Professor Katyal thanked the Committee for its work on this topic. The shift from page limits to type-volume limits, he said, will helpfully remove an opportunity for gamesmanship by lawyers who sought to manipulate page limits. The distinction between briefs produced by computer and briefs produced without a computer is analogous, Professor Katyal suggested, to the distinction made in the U.S. Supreme Court's rules between documents set out on 8 ½ by 11 inch paper and documents printed in booklet format. Professor Katyal suggested deleting, from Rule 32(f)'s list of exclusions, the amicus-brief authorship-and-funding disclosure; omitting that item from the list of exclusions would ensure that the Appellate Rules continue to parallel the Supreme Court's Rules in this regard. Professor Katyal noted that proposed Rule 32(f) carries forward the exclusion (currently set out in Rule 32(a)(7)(B)(iii)) of any "addendum containing statutes, rules, or regulations." In contrast to Supreme Court Rule 33.1(d) – which excludes "verbatim quotations required under [Supreme Court] Rule 14.1(f) and Rule 24.1(f)" even when they are set out in the text of the brief rather than in an appendix – Rule 32 does not exclude statutory quotations when they are in the body of the brief.

Professor Katyal predicted that, in contrast to the salutary shift to type-volume limits, the proposed reduction in briefing length limits would be much more controversial. In complex cases, lawyers need the full 14,000 words, and a reduction to 12,500 would force lawyers to spend time trying to reduce the length yet further or seeking permission to file an over-length brief. Recently, Professor Katyal reported, he had been involved in briefing some appeals for which it was very difficult to stay within the 14,000-word limit. Another attorney participant, however, suggested that shortening the briefing length limits would be acceptable. Briefs, he stated, seem to have become longer in recent years. This participant suggested adding the cover page to Rule 32(f)'s list of items to be excluded when computing length. He also suggested revising the Committee Note's statement that the page limits in Rules 5, 21, 27, 35, and 40 had been "subject to manipulation by lawyers."

An appellate judge member stated that she supported rationalizing the treatment of exclusions. Another appellate judge member stated that he supported shortening the length

limits; he reported that briefs seem to be about 60 pages long now, and 50 pages would be preferable. Mr. Letter noted his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake. On the other hand, he said, some cases really are complex. And a number of Assistant United States Attorneys have reported to him that some circuits are unwilling to grant permission to file an over-length brief; accordingly, the prospect of a reduction (of the briefing length limit) to 12,500 words worries those AUSAs. And, Mr. Letter suggested, traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so. The more stringent the length limit, the more likely that a litigant might fail to brief an issue that the court believes should have been addressed.

As for changing the page limits in Rules 5, 21, 27, 35, and 40 to type-volume limits, Mr. Letter noted that he had not heard many complaints about the page limits, and he wondered whether the type-volume limits would be cumbersome for clerks' offices to administer. Mr. Gans acknowledged that it is easier to check for compliance with a page limit than for compliance with a word limit, but he stated that the type-volume limits are administrable so long as the document includes a certificate of compliance with the limit.

Reflecting on his analysis of a sample of briefs filed in 2008 (i.e., under the current type-volume limits), Mr. Gans noted that he had been surprised to see how many of those briefs would actually have complied with a 12,500-word limit. An appellate judge member reported a different experience; in the Eleventh Circuit, he said, lawyers tend to use all the space that is permitted to them. This judge member noted that the choice of length limit presents a tradeoff: One prefers shorter briefs when possible, but in complex cases one wants the briefs to help work out all the issues. An attorney member stated that he favored reducing the length limits of briefs.

An appellate judge member asked whether a circuit could adopt a local rule setting a more generous length limit than the Appellate Rules. The Reporter stated that Rule 32(e) authorizes local rules that would set longer limits than those in Rule 32(a). Although no similar provision exists in Rule 28.1, the Reporter suggested that a circuit that wished to accept longer briefs could, in practice, make clear that it was willing to do so. The judge member, noting that the proposed amendments distinguish between "handwritten or typewritten" papers and papers "produced using a computer," asked which of those categories would encompass a typewriter with memory. The Reporter observed that there is a California state court rule that distinguishes between briefs "produced on a computer" and briefs "produced on a typewriter"; it might be useful, she suggested, to investigate whether the relevant California courts have encountered issues with respect to the use of typewriters with memory.

An attorney member stated that he opposed the reduction in briefing length limits. If attorneys use the full permitted length, it is because the case requires it. An appellate judge member responded that things seemed to work well, prior to the 1998 amendments, under the shorter length limit. Another appellate judge member observed that the Eleventh Circuit is willing to permit over-length briefs in complex cases. An attorney member responded that he is

generally hesitant to request such permission; another attorney member noted that he shares this reluctance. Mr. Letter noted that the circuits vary in their willingness to permit over-length briefs. An attorney member suggested that, since 1998, circumstances may have changed; perhaps the law is more complex, and perhaps lawyers are more prone to prolixity.

An appellate judge observed that the discussion evidenced a clear divide between the perspectives of judges and the perspectives of attorneys. His court, he observed, often asks the lawyers for further briefing on particular issues. He wondered whether the bar would be shocked by a proposal to reduce length limits to 12,500 words, and he asked whether it would be useful to publish alternative proposals for comment.

An appellate judge member suggested removing the cross-references to new Rule 32(f) in the rules that set specific length limits. The Reporter asked whether the Committee wished to include – among the items to be excluded when computing length – the Rule 35(b)(1) statement concerning the reasons for en banc hearing or rehearing. An attorney participant suggested that the statement should be excluded from the length limit because such statements tend to be short. An appellate judge member disagreed, explaining that this statement is the heart of the petition for en banc rehearing. Nothing, this judge member said, requires the statement to be formulaic; and excluding the statement from the length limit might tempt lawyers to expand the statement. Mr. Gans agreed with the appellate judge member’s prediction. The Reporter, noting that the local-rule equivalent of this statement is excluded from the length limit in the Eleventh Circuit, asked whether lawyers in that circuit abuse that exclusion by expanding the statement. An appellate judge member said that they do not.

A motion was made to adopt the proposed amendments as set out in the Reporter’s April 22 memorandum, but with revisions that would (1) delete the cross-references to Rule 32(f); (2) include the Rule 35(b)(1) statement when computing length; (3) add the cover page to Rule 32(f)’s list of excluded items; (4) omit the authorship-and-funding disclosure statement from Rule 32(f)’s list; (5) revise the reference to “rules” in Rule 32(f)’s final bullet point so as to encompass exclusions set out in local circuit rules; and (6) revise the Committee Notes’ discussion of the disadvantages of page limits. The motion was seconded, and it passed by a vote of six to four. It was observed that, when the proposed amendments are published for comment, the transmittal memo could point out the possibility that a circuit has authority to expand the length limit if it wishes to do so. On the evening of April 28, the Chair and Reporter compiled a revised draft of the proposed amendments. The Committee reviewed the revised draft when it met the following morning.

C. Item No. 13-AP-B (amicus briefs on rehearing)

Judge Colloton introduced Item No. 13-AP-B, which concerns amicus filings in connection with rehearing petitions. Mr. Roy T. Englert, Jr. has pointed out that the Appellate Rules currently do not provide guidance concerning the length or timing of such filings. Judge Colloton directed the Committee’s attention to the proposed draft amendments set out in the Reporter’s April 22 memorandum, and noted that the bracketed options in the draft highlighted

choices for the Committee if it decided to proceed with the proposals.

The first and most basic choice, Judge Colloton noted, is whether there should be a national rule on this topic. If so, then should the rule provide that all amici need leave of court to file briefs at the rehearing stage, or should the rule take the same approach currently taken (for the merits-briefing stage) by Rule 29(a), which permits certain governmental amici to file without party consent or court leave? Judge Colloton pointed out that the proposed draft would re-number the existing portions of Rule 29 as Rule 29(a), and would add a new Rule 29(b) to address the rehearing stage. Proposed Rule 29(b) would merely set default rules, and would allow circuits to opt out of those default rules by local rule or order in a case.

An appellate judge member reported that the Eleventh Circuit's local rule on this topic works well. An attorney member underscored how important it is for practitioners to know what the rules are. Judge Colloton solicited the Committee's views on proposed Rule 29(b)(2), which would state when court leave is required for amicus filings at the rehearing stage. Mr. Letter stated that the rule should allow the United States to file amicus briefs without court leave or party consent. Such filings, he noted, would occur rarely, and only with the approval of the Solicitor General. Dispensing with the requirement of court leave will save the court's time (by avoiding the need for motions for leave) and would assist the government in situations where the need to file an amicus brief arises suddenly. An attorney member asked whether States would be treated the same as the United States in this respect. Judge Colloton responded that they would. An appellate judge stated that he favored extending to the rehearing stage the Rule 29(a) approach. Another appellate judge member agreed. A third appellate judge member concurred, noting that requiring court leave would not make a difference in practice because the court will always grant the government leave to make an amicus filing.

Judge Colloton next asked the Committee what the default length limit should be for amicus filings at the rehearing stage. An attorney member suggested that half of the party's length limit would be appropriate, and another attorney participant agreed. Half of 15 pages would be 7 ½ pages. Rounding up to 8 pages and multiplying by 250 words per page would yield a limit of 2,000 words. The Reporter asked whether it would be worthwhile to distinguish, in this provision, between typewritten briefs and briefs produced using a computer. The consensus was that it would not be worthwhile: Would-be amici will prepare their briefs using computers, and the access-to-court concerns that weigh in favor of setting page limits (in addition to type-volume limits) for parties' filings would not apply with the same force to amicus filings.

Judge Colloton asked Committee members for their views on the timing of amicus filings in support of a rehearing petition. A deadline of three days after the filing of the rehearing petition, he suggested, might be best because it provides the amicus with a time lag but the time lag is not so long that it will interfere with the processing of the petition. An appellate judge member agreed that a relatively short deadline is desirable; the Third Circuit, this judge observed, processes rehearing petitions expeditiously. Another appellate judge member noted that the practice in the Federal Circuit is somewhat different. A petition for rehearing in the

Federal Circuit goes first to the panel that decided the appeal, and only after that to the en banc court. Thus, the Federal Circuit takes somewhat longer to process rehearing petitions. This appellate judge member also noted that amicus filings can serve a particularly important function when the party's rehearing petition is poorly done.

An appellate judge member asked whether amici and parties tend to coordinate with each other at this stage of the litigation. An attorney member responded that coordination is customary. This member observed that, in setting the timing for amicus briefs in support of the petition, it is important not to allow so much time to the amicus that the party opposing the petition will be rushed when preparing the response. Another attorney member agreed that, in a typical instance, the party opposing rehearing is more rushed than the party seeking rehearing. Judge Colloton asked whether, in that case, it would be preferable to require the amicus to file simultaneously with the party seeking rehearing. An attorney member said that simultaneous filing could result in amici needlessly duplicating arguments made in the rehearing petition. Another attorney member suggested that the three-day time lag made the most sense. Mr. Letter asked whether the Committee Note should urge would-be amici to coordinate, when possible, with the party seeking rehearing so as to be able to file the amicus brief simultaneously with the rehearing petition.

An attorney member noted that Supreme Court Rule 37.2 addresses the timing for amici supporting either side, and he asked whether proposed Rule 29(b) should likewise address the timing of an amicus filing in opposition to rehearing. Mr. Letter suggested that such filings should be due on the same date as any response.

By consensus, the Committee resolved to consider a revised draft of the proposed Rule 29 amendments and to vote on the proposal the next day. On the evening of April 28, the Chair and Reporter prepared a revised draft that reflected the Committee's choices concerning the default rules in proposed Rule 29(b). Those choices were to (1) track current Rule 29's approach to the question of when amicus filings are permitted; (2) set a type-volume limit of 2,000 words in proposed Rule 29(b)(4); and (3) revise the timing provision in proposed Rule 29(b)(5).

The Committee reviewed the revised proposal on the morning of April 29. After the Committee made a few style changes to proposed Rule 29(b)(5), a motion was made to approve the proposed amendments (as revised) for publication. The motion was seconded and passed by voice vote without dissent.

D. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, and 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton invited Judge Chagares – who chairs the Standing Committee's CM/ECF Subcommittee – to introduce the topic of potential changes relating to electronic filing. Judge Chagares reported that the Subcommittee had asked the Reporters to the Advisory Committees to identify rules that might warrant amendment in the light of the shift to electronic filing. The Subcommittee also is moving forward with proposals to amend the "three-day rule" in each set

of rules. The three-day rule in Appellate Rule 26(c) adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. The rules, Judge Chagares explained, should be amended to reflect the fact that the extra three days are no longer needed when service is accomplished electronically.

The Reporter asked the Committee members for their thoughts on the two possible alternatives – shown in the agenda materials – for amending Rule 26(c) to exclude electronic service from the three-day rule. The first approach would retain the structure of existing Rule 26(c). The current Rule makes the three extra days available “unless the paper is delivered on the date of service stated in the proof of service,” and then explains that “a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.” To exclude electronic service from the compass of the three-day rule, one could simply delete “not,” so that the Rule would specify that “a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.” The second approach would restructure the Rule to track the three-day rules in the other sets of Rules. Under the second approach, the Rule would state that “[w]hen a party may or must act within a specified time after being served and service is made under Rule 25(c)(1)(B) (mail) or (C) (third-party commercial carrier), 3 days are added after the period would otherwise expire under Rule 26(a).” The only downside to this approach, the Reporter suggested, would be the possibility that a party who is served might not always be able to distinguish readily between personal service (which would not trigger the three-day rule) and service by third-party commercial carrier (which would).

An attorney member suggested adopting the second approach; it would be very unlikely, he said, for confusion between personal service and service by a commercial carrier to cause a problem. An appellate judge member, however, expressed support for the first approach. Another attorney member stated that he favored the first approach because it is explicit. An appellate judge observed that the Committee might in future decide to make further changes to Rule 26(c); in the meantime, he suggested, the first approach might be appropriately incremental. A motion was made to approve the proposed amendment to Rule 26(c) as shown in the first approach (i.e., deleting the word “not”). The motion was seconded and passed by voice vote without opposition.

Mr. Letter noted that the DOJ does not oppose the deletion of electronic service from the types of service that trigger the three-day rule. He observed, however, that a problem does exist when attorneys take unfair advantage of their opponents by serving papers electronically the last thing on a Friday night. An attorney member concurred, and expressed a broader concern that midnight deadlines for electronic filing are very unhealthy for the family life of lawyers and their staffs.

The Reporter observed that the CM/ECF Subcommittee may also consider, in future, whether to recommend eliminating the three-day rule entirely. Such a change, she suggested, might raise concerns with respect to cases involving pro se litigants, who typically serve papers by mail. Mr. Letter noted that the DOJ already experiences a significant time lag in processing

papers served on it by mail, due to the need to screen the mail for security reasons.

Judge Chagares reported that the CM/ECF Subcommittee had asked Professor Capra to prepare a template for a rule that would provide two definitions designed to accommodate electronic methods. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically.

The Subcommittee also has been considering whether a rule amendment would be warranted on the topic of electronically filed documents that include signatures by someone other than the electronic filer. The question arises in the bankruptcy context with respect to attorney filings containing debtors' signatures, but the issue is not limited to that context. The Bankruptcy Rules Committee, at its spring meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal. Mr. Letter noted that problems arise with respect to fraudulent signatures on bankruptcy petitions. The FBI, he reported, requires an original signature for purposes of handwriting analysis.

Judge Chagares noted, as well, Mr. Rabiej's recent proposal that the requirement of proof of service be eliminated for instances when service is accomplished through CM/ECF. The Civil Rules Committee is considering a similar proposal.

Finally, Judge Chagares mentioned Item No. 13-AP-D, which concerns suggestions submitted by Judge S. Martin Teel, Jr., concerning Rules 6(b)(2)(B)(iii) and 3(d)(1). Judge Teel, a United States Bankruptcy Judge, suggests deleting Rule 6(b)(2)(B)(iii)'s reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel explains that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questions why Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. Judge Chagares suggested that there does not appear to be any current problem arising from these features of Rules 3 and 6. By consensus, the Committee decided to remove Item No. 13-AP-D from its study agenda.

E. Item No. 07-AP-E (FRAP 4(a)(4) and "timely")

Judge Colloton introduced Item No. 07-AP-E, which concerns whether to amend Rule 4(a)(4) to address a circuit split that has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4). A majority of the circuits to address this issue have concluded that such a motion does not count as timely; but the Sixth Circuit has held to the contrary.

Judge Colloton reviewed possible options for amending Rule 4(a)(4) to adopt either the majority or minority approach. To adopt the majority approach, one might simply revise the

current rule to refer, not to timely motions, but to motions filed “within the time allowed by” the Federal Rules of Civil Procedure; this could be called the “concise” approach. Or one might retain the word “timely” and add a new subdivision to define what “timely” means (and does not mean); one could call this the “definitional” approach. Judge Colloton solicited the Committee’s views on whether it would be worthwhile to amend Rule 4(a)(4) to clarify this question – and, if so, what position the Rule should be amended to take.

An appellate judge member stated that, among the options for implementing the majority view, he preferred the concise approach. The Reporter asked which approach would be most informative for lawyers with less experience in appellate practice. Another appellate judge member observed that it may be natural (though erroneous) for district judges to assume that they can extend the deadlines for motions under Civil Rules 50, 52, and 59. An attorney member agreed, and noted that in such instances it would also be natural for lawyers to assume that they could rely on such an extension. The appellate judge member suggested that a definitional approach would not be out of place in Rule 4(a); that rule already includes subdivision (a)(7), which defines entry of judgment.

It was suggested that the proposed Committee Note set forth on page 288 of the agenda book was too long, and that some of the Note could be replaced by a cite to the relevant Sixth Circuit decision. An appellate judge member suggested that the Committee amend the Rule to adopt the majority approach. The sense of the Committee proving to be in agreement with this suggestion, the Committee next turned to the choice between the “concise” and “definitional” approaches. A straw poll disclosed a vote of 7 to 2 in favor of the “concise” approach. One of the attorney members who voted in favor of the concise approach stated, however, that he wished to ensure that the Committee Note provided some instruction to lawyers about the problem of non-extendable deadlines.

On the evening of April 28, the Chair and Reporter revised the Committee Note to reflect the Committee’s discussion. On the morning of April 29, the Committee reviewed the revised Committee Note. Professor Coquillette confirmed that, in this context, it was permissible for the Committee Note to cite a case (namely, the Sixth Circuit decision that the amendment is designed to reject). The Committee made one further change, to the Committee Note’s characterization of the circuit split. A motion was made to approve the proposed amendment – namely, the “concise” approach adopting the majority view of “timely” – and the revised Committee Note. The motion was seconded and passed by voice vote without opposition.

V. Discussion Items

A. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A (disclosure requirements)

Judge Colloton introduced these agenda items, which relate to disclosure requirements.

Item No. 08-AP-J concerns a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do

with conflict screening. Two of the three aspects of the Codes of Conduct Committee's inquiry focused on criminal and bankruptcy practice. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee's suggestion, and those aspects of Item No. 08-AP-J thus present no issues for the Appellate Rules Committee. However, the Committee's inquiry also highlighted possible overlaps among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system. That topic, Judge Colloton suggested, may be worth pursuing. Some circuits require disclosures beyond those mandated by the Appellate Rules. The Appellate Rules Committee, working with the Codes of Conduct Committee, may wish to consider whether any additional disclosures should be required by the Appellate Rules. Judges would like to be apprised of information that is relevant to a possible need to recuse from a case.

An attorney member agreed that this question is worth pursuing. Another attorney member suggested that, conversely, Appellate Rule 26.1's existing disclosure requirement may be overbroad. Rule 26.1 requires nongovernmental corporate parties to identify any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock. The attorney member asked why this requirement should encompass instances when an entity holds the stock in a beneficial capacity as trustee. Stock ownership frequently changes, the member observed, and the Rule could be read to require updates each time such changes put ownership above the 10 percent threshold.

The Reporter mentioned that Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c). The ABA Council of Appellate Lawyers suggested revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit "a disclosure statement like that required of parties by Rule 26.1." The Council's suggestion appeared to proceed from the premise that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But it is difficult to imagine what sort of difference would arise. A corporate amicus should understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules' current language. The Reporter suggested that the Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R arises from suggestions made by Chief Judge Easterbrook. He points out that the term "corporation" in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. The Reporter suggested that the Committee not proceed further with this aspect of Chief Judge Easterbrook's comments. Chief Judge Easterbrook's other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse. This aspect of Item No. 08-AP-R, the Reporter

suggested, provides an apt vehicle for pursuing the sorts of inquiries Judge Colloton noted.

By consensus, the Committee removed Item Nos. 08-AP-J and 09-AP-A from, but retained Item No. 08-AP-R on, its agenda.

B. Item Nos. 09-AP-D & 11-AP-F (response to *Mohawk Industries*)

Judge Colloton reminded the Committee that Item Nos. 09-AP-D and 11-AP-F arise from the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). In *Mohawk*, the Court held that a district court's order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine. The *Mohawk* Court stated that choices concerning the appealability of interlocutory orders ideally should be made through the rulemaking process rather than by judicial decision – a point that echoed the Court's earlier, similar statement in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

The Committee asked Andrea Kuperman to perform some initial research on the doctrinal landscape of the appealability of prejudgment orders. Judge Colloton observed that the agenda materials included a memorandum by Ms. Kuperman that surveys types of interlocutory decisions that are clearly appealable (or not appealable) under current Supreme Court caselaw, as well as types of interlocutory decisions the treatment of which has divided the lower courts. Judge Colloton expressed appreciation for Ms. Kuperman's hard work and helpful memorandum. The initial question for the Committee, he suggested, is whether a general overhaul of the treatment of interlocutory orders would be a manageable project for the Committee, or whether it would be wiser for the Committee to consider the appealability of particular types of interlocutory orders as and when a suggestion brings that specific type of order to the Committee's attention.

Judge Sutton recalled that the Committee has, in the past, noted complexities and difficulties in the treatment of decisions concerning qualified immunity. That appealability question, he noted, is presented in a case before the Supreme Court this Term (*Plumhoff v. Rickard* (No. 12-1117)). An attorney member stated that it would be wildly unrealistic to attempt a global project to overhaul the treatment of appealability of interlocutory orders. Even a project focused solely on addressing the appealability of qualified-immunity rulings, he suggested, would take several years to complete.

An appellate judge member proposed removing this item from the Committee's agenda. Mr. Katsas, though, suggested that it would be useful for the Committee to discuss further the appealability of attorney-client privilege rulings. Mr. Letter agreed, noting that the Court in *Mohawk* had highlighted the possibility of rulemaking on the privilege-appeals topic. In response to an invitation by Judge Colloton, Mr. Katsas and Mr. Letter agreed to work with the Reporter on the topic of attorney-client-privilege appeals, with a view to presenting a report to the Committee at its fall 2014 meeting.

C. Item No. 12-AP-F (class action objector appeals)

Judge Colloton introduced this item, which concerns a proposal for addressing appeals by objectors to a class action settlement. He invited the Reporter to summarize briefly the Committee's research thus far. The Reporter noted that district judges may lack full information concerning the fairness of a proposed settlement, and that objectors can be a helpful source of such information. Civil Rule 23(e) is designed to promote careful scrutiny of a proposed class settlement; it requires notice, a hearing, and a finding that the proposed settlement is fair, reasonable, and adequate. Rule 23(e) authorizes objections by any class member, and requires court approval for the withdrawal of such an objection once it has been made.

Concerns have been raised that some objectors lodge objections for the purpose of extracting a side payment from class counsel in exchange for dropping the objection. Rule 23(e)'s requirement of court approval for the withdrawal of objections constrains such pay-offs while the case is in the trial court, but no rule imposes a similar constraint during an objector's appeal from a district court order approving the settlement. If an objector appeals but then drops the appeal in exchange for a side payment, two costs arise: First, the extraction of the side payment functions as a tax on class counsel and could be viewed as unseemly; and second, the discontinuance of an appeal that raised serious issues about the fairness of the class settlement deprives class members of the opportunity to benefit from the resolution of the merits of the appeal.

Various strategies have been proposed for addressing the problem. The objector-appellant's leverage for extracting a side payment arises from the fact that, in practice, such an appeal will often delay implementation of the settlement. Thus, one approach focuses on decreasing the objector-appellant's leverage by speeding the implementation of the settlement despite the pendency of the appeal. Quick-pay provisions (allowing for payment of some or all of class counsel's fees while the appeal is pending) provide an example of this approach.

Another approach would be to set hurdles that an objector must surmount in order to appeal. Some courts have, for example, required sizeable appeal bonds as a condition for taking such an appeal; but there are questions about whether the size of a bond for costs on appeal (under Appellate Rule 7) can be enlarged to take account of anticipated attorney fees and costs associated with delay in implementation of the settlement. At the Committee's spring 2013 meeting, Judge D. Brooks Smith and Professor John E. Lopatka presented their proposal for amendments to Appellate Rules 7 and 39 that would presumptively require objector-appellants to post a bond for costs on appeal that would include costs and attorney fees attributable to the pendency of the appeal (and that would presumptively require imposition of those fees and costs if the court of appeals affirms the order approving the settlement). An appellate judge member suggested that it would be worthwhile for the Committee to consider the appeal-bond possibility further; another appellate judge member noted the need to take care not to deter objector appeals that raise valid questions about a settlement's propriety.

Another way of setting a hurdle for objector appeals would be to impose a "certificate of

appealability” (“COA”) requirement – akin to that imposed on habeas petitioners, who must make “a substantial showing of the denial of a constitutional right” in order to obtain the COA that is a requisite for an appeal of the denial of a habeas petition. The Reporter questioned, however, whether a COA requirement could be imposed by rulemaking without an accompanying statutory change.

Judge Colloton observed that the Committee was indebted to Marie Leary for her painstaking and informative study concerning class-action-objector appeals. He invited Ms. Leary to summarize her findings for the Committee. Ms. Leary explained that she had searched the CM/ECF district court databases for cases (filed in 2008 or later) in the Second, Seventh, and Ninth Circuits in which an appeal was taken from an order approving a class settlement. Objector appeals tend to be relatively rare as a proportion of each circuit’s overall appellate caseload; however, they are a significant feature in large multidistrict litigation and nationwide class actions.

Ms. Leary found that the trend concerning disposition of objector appeals in the Second Circuit differs from the trend concerning disposition of such appeals in the Seventh and Ninth Circuits. In the Seventh and Ninth Circuits, objector appeals tend to be voluntarily dismissed (under Appellate Rule 42(b)) within 200 days after the appeal was filed (and before the appellant files its brief). By contrast, in the Second Circuit a majority of terminated appeals were decided on the merits (by unpublished summary orders). Ms. Leary observed that the explanation for this difference is not clear; she wondered whether the Second Circuit puts the appeals on an expedited track for disposition.

Ms. Leary noted a feature of practice in the Ninth Circuit concerning Rule 7 cost bonds. In instances where the district court ordered the objector to post a cost bond but the objector failed to do so, the Ninth Circuit did not dismiss the appeal for failure to post the bond; rather, the court deferred (until the time of argument) its ruling on the consequences of the failure. Although the Ninth Circuit thus appears not to have responded immediately to the failure to post the bond, that failure did not go unnoticed in the court below; in some cases, it was followed by contempt findings and the imposition of sanctions by the district court.

Judge Colloton reported that he had discussed with Ms. Leary, and with Judge Jeremy Fogel (the Director of the FJC), the possibility of conducting a survey of attorneys who practice in this field. Judge Fogel and others within the FJC had expressed concern about possible obstacles to conducting an effective survey study on the topic of class-action-objector appeals. Instead, Judge Fogel proposed that the Committee consider co-sponsoring (with the Civil Rules Committee) a mini-conference on class action practice. Such a mini-conference could bring together knowledgeable participants to discuss review of class settlements both in the district court and on appeal. Judge Sutton observed that the Civil Rules Committee has already discussed the possibility of planning a mini-conference on class action practice. Judge Colloton noted that the Appellate Rules Committee would be glad to work with Judge Robert Michael Dow, Jr. – the Chair of the Civil Rules Committee’s Rule 23 Subcommittee – on the planning for such a mini-conference.

A member asked whether it would be useful for Ms. Leary to examine how objector appeals fare in other circuits, such as the Fifth Circuit. Judge Colloton invited Ms. Leary to discuss the methodology for her study, which has been, of necessity, very labor-intensive. Ms. Leary explained that there is no quick way to identify the relevant appeals using the CM/ECF databases at the level of the courts of appeals; thus, one must start by searching for class actions at the level of the district court and then identifying, within that pool of cases, the subset of cases that feature an appeal from a judgment approving a class settlement.

An appellate judge member asked whether it would be possible to address inappropriate objector appeals by sanctioning the objector's attorney. The Reporter noted reports that district judges tend not to want to spend time on such sanctions motions. Likewise, Professor Coquillette has observed a reluctance to pursue the possibility of attorney discipline under Model Rules 3.4 and 8.4.

Mr. Letter suggested that the general topic warranted further consideration by the Appellate Rules Committee, in conjunction with the Civil Rules Committee. By consensus, the Committee retained this item on its agenda.

D. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce Item No. 13-AP-C, which arose from the suggestion by three Justices, in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Committee consider whether to propose rules to expedite appellate proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). The Convention requires courts in the United States to order a child returned to his or her country of habitual residence if the child has been wrongfully removed to the United States. In *Chafin*, the Court held that an appeal from such an order did not become moot upon the child's return to the country of habitual residence. In response to concerns that being sent back and forth across national borders would harm the children involved, the *Chafin* Court observed that the goals of the Convention (and the federal legislation that implements it) could be served by a combination of expedited proceedings and (where appropriate) stays. Justice Ginsburg, joined by Justices Scalia and Breyer, concurred in *Chafin* and suggested that the rulemakers consider this topic.

The Civil and Appellate Rules Committees discussed the Justices' suggestion at their spring 2013 meetings, as did the Standing Committee at its June 2013 meeting. In September 2013, Judge Sutton wrote to Justice Ginsburg to thank her for her suggestion and to report the Committees' view that the best course, as an initial matter, would be to address the topic by judicial education rather than rulemaking. Many courts already do expedite child custody matters under the Convention, and Appellate Rule 2 gives courts of appeals the flexibility to do so. Judge Fogel has committed, on behalf of the FJC, to educating judges about the need, and existing tools, for expediting disposition of such matters. Judge Sutton reported that Justice Ginsburg had responded that she viewed this approach as a sound one and that she appreciated the Committees' attention to the matter.

By consensus, the Committee removed this item from its agenda.

VI. Additional Old Business and New Business

A. Item No. 13-AP-E (audiorecordings of appellate arguments)

Judge Colloton invited the Reporter to summarize her research concerning Item No. 13-AP-E, which arose from Mr. Garre's suggestion that the Committee consider adopting a rule concerning the release of audiorecordings of appellate arguments.

The Reporter noted that the circuits take widely differing approaches to the release of such audio, although the trend appears to be toward more and faster access. The Second and Eleventh Circuits provide the least access to audio recordings; they do not post audio online, though they permit attorneys to buy the audio on CDs. The Tenth Circuit posts online what appears to be audio of a few selected arguments; as to other arguments, one must make a motion to obtain the audio. At the other end of the spectrum are circuits that provide quick and full online access to argument audio. The DC Circuit and Eighth Circuits post the audio on the same day as the argument; the Ninth Circuit, on the day after argument; and the Fourth Circuit, two days after argument. The other six circuits make audio available online, but the Reporter had been unable to discern (from online sources) precisely how quick and how comprehensive their postings are.

An attorney member voiced support for a national rule requiring prompt posting of audio; the Second Circuit, he reported, had recently taken three weeks to provide an audio CD of a particular argument. Judge Chagares pointed out that the Third Circuit is currently studying questions relating to videorecordings of court proceedings, and he expressed interest in hearing any views that participants might have on that topic.

An appellate judge member asked whether problems have arisen, in any cases, concerning references made during an argument to information that is subject to redaction requirements. The Reporter noted her tentative recollection that at least one circuit has a local provision setting out a procedure for seeking to have the audio sealed in such an instance.

Judge Sutton suggested that this matter seems to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management ("CACM"). He observed that Judge Amy J. St. Eve, who now serves as a member of the Standing Committee, used to be a member of CACM.

By consensus, the Committee decided to remove this item from its study agenda, with the understanding that Judge Colloton would communicate to Judge Julie A. Robinson (the Chair of CACM) the interest in this topic that had been expressed by members of the Committee.

B. Item No. 13-AP-H (*Ryan v. Schad* and *Bell v. Thompson* / FRAP 41)

Judge Colloton introduced this item, which the operation of Appellate Rule 41 in light of the Supreme Court's decisions in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). Rule 41(b) provides that “[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later,” but also provides that “[t]he court may shorten or extend the time.” Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively “stays the mandate until disposition of the petition or motion.” A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that “the stay continues until the Supreme Court's final disposition.” Rule 41(d)(2)(D) directs that “[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed.”

One question is whether Rule 41 requires the court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying a petition for a writ of certiorari. Does Rule 41(b) allow the court of appeals discretion to continue to stay the mandate even after the Supreme Court's denial of certiorari and rehearing? The Court did not decide this question in either *Bell* or *Schad*; it ruled that even if the court of appeals has authority to stay the mandate following the denial of certiorari, it could only do so if warranted by extraordinary circumstances (which, the Court held, were not present in either *Bell* or *Schad*).

An attorney member asked why a court of appeals would ever extend the stay of the mandate after the Supreme Court has denied certiorari. The Reporter noted that both *Bell* and *Schad* were death penalty cases. In *Bell*, the court of appeals had affirmed the denial of a death row prisoner's habeas petition, but later (having called for and examined the district court record) vacated and remanded for an evidentiary hearing. The problem was that, months before this vacatur, the Supreme Court had denied the inmate's petition for rehearing with respect to the Court's denial of the inmate's petition for certiorari. In the interim that followed the Supreme Court's final disposition of the petition for certiorari, the court of appeals had failed to notify the parties that it had stayed its mandate, and the state had proceeded in its preparations for the inmate's execution in reliance on its belief that the court of appeals was done with the case.

Judge Colloton noted that this fact pattern presents a second question – namely, whether a court of appeals can stay the issuance of the mandate, under Rule 41(b), merely through inaction, or whether the court must act affirmatively in order to accomplish such a stay. The original Rule 41 had provided that the mandate would issue 21 days after entry of the court of appeals' judgment “unless the time is shortened or enlarged by order.” The words “by order” were deleted during the 1998 restyling of Rule 41. An appellate judge participant suggested that there may be a problematic lack of transparency in a case where the court of appeals stays the mandate without telling the parties that it is doing so. Another appellate judge responded that this particular issue could be addressed by “unstyling” Rule 41(b) – i.e., by returning to the Rule the “by order” that had been deleted during the restyling.

When considering whether to amend Rule 41 to remove the court of appeals' discretion to extend the stay of the mandate after the Supreme Court's final disposition of a certiorari petition, Judge Colloton noted, the Committee might also wish to consider the relevance of the caselaw recognizing an inherent authority, in the courts of appeals, to recall their mandates when warranted by extraordinary circumstances. Even if Rule 41 were amended to remove the court of appeals' discretion to *stay* the mandate after the Supreme Court's final disposition of a certiorari petition, presumably the courts of appeals would retain this inherent authority to recall the mandate in extraordinary circumstances. Are there reasons, Judge Colloton asked, to require a court of appeals to first issue and then recall its mandate in such circumstances (rather than permitting the court of appeals simply to stay the mandate)?

An appellate judge participant suggested that it is important for courts of appeals to retain some flexibility in these matters. An attorney member responded that he thought the court of appeals' discretion concerning stays of the mandate should be less after the Supreme Court has finished with the case than it is before the Supreme Court has ruled on the case. Another attorney member, though, wondered why the Court's denial of certiorari should mark a change in the scope of the court of appeals' discretion; this member noted that, as a formal matter, the denial of certiorari leaves the judgment below untouched.

The agenda materials mentioned, in addition, a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." When rehearing is sought in the Supreme Court after a denial of certiorari, the "Supreme Court's final disposition" can occur later than the date when "a copy of a Supreme Court order denying the petition for writ of certiorari is filed." An appellate judge member stated that the Committee should consider whether to adjust Rule 41(d)(2)(D)'s wording to fit more closely with that in Rule 41(d)(2)(B). This issue, he stated, had raised questions in cases that he had litigated before he became a judge.

An attorney member voiced support for considering ways to clarify Rule 41's operation. Another attorney member agreed, and suggested that the Rule should be revised so as to make clear that the court of appeals cannot stay a mandate through mere inaction.

C. Item No. 14-AP-A (FRAP 29(e) and timing of amicus briefs)

Judge Colloton invited the Reporter to introduce Item No. 14-AP-A, which arises from a suggestion by Dean Alan Morrison that Rule 29(e) be revised to set the time period for filing an amicus brief by reference to the due date, rather than the filing date, of the relevant party's brief and to permit extensions of the amicus-brief due date based on party consent. Rule 29(e)'s due date for amicus filings is "no later than 7 days after the principal brief of the party being supported is filed." Dean Morrison points out that if the party files its brief before the due date, the would-be amicus might find that its deadline is very short (or even that the deadline has

already passed) by the time that the amicus becomes aware of the occasion for filing the brief. It would be better, Dean Morrison suggests, if the amicus could rely on having 7 days after the original due date for the party's brief, even if the party files its brief early.

The Reporter noted that pegging the amicus-brief deadline to the due date, rather than the filing date, of the party's brief might pose no problems in a case where the briefing schedule is set by scheduling order. In such a case, the early filing of the appellant's brief would not move up the due date for the appellee's brief, and so the appellee would have sufficient time to review any amicus briefs filed in support of the appellant before filing its own brief. However, in instances when no scheduling order sets the briefing schedule, Rule 31(a)(1) provides that the appellee's brief is due 30 days after service of the appellant's brief – which means that early filing of the appellant's brief moves up the deadline for the appellee's brief as well. In such instances, leaving the amicus-brief deadline at 7 days after the appellant's original filing deadline could leave the appellee with insufficient time to take account of the amicus filing when drafting its own brief.

Thus, the Reporter suggested, the proposal to peg the amicus-brief deadline to the due date for the party's brief seems unlikely to succeed. If the Committee were to agree with that view, that would leave for consideration the proposal to revise Rule 29(e) to allow the extension of the amicus-brief due date by consent of the parties.

An attorney member asked why a rule amendment on this topic is needed; under the current Rule, a would-be amicus can ask the court to extend the deadline. It was also noted that a would-be amicus who is interested in a particular appeal can sign up to receive electronic notifications of docket activity in that appeal, and can obtain electronic copies of the parties' briefs.

Another attorney member asked whether there is any reason not to permit extensions of the Rule 29(e) deadline by party consent. The Reporter observed that, if all parties consent to the extension of the amicus-brief deadline, that would seem to address the concern that an extension of the amicus's deadline would disadvantage the appellee. She asked whether judges would object if extensions were available based on party consent without court leave. An appellate judge member responded that judges would have concerns with such an approach, because it is important to keep cases moving. Another appellate judge member expressed agreement with this view. Another appellate judge predicted that such extensions would generate motions by appellees seeking additional time to file their own briefs; Mr. Letter asked, however, whether a consented-to extension would be likely to throw off the parties' briefing schedule. Mr. Gans suggested that there would be complexities associated with changing Rule 29(e)'s timing provision.

By consensus, the Committee decided to remove this item from its agenda.

D. Item No. 14-AP-B (standard for appellate review of sentencing errors)

Judge Colloton introduced this item, which arises from a suggestion by Judge Jon O. Newman that the Criminal Rules Committee and the Appellate Rules Committee consider a rule amendment to provide “that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of ‘plain error’ review, unless the error was harmless.” Judge Colloton voiced an expectation that the Criminal Rules Committee would take the lead in addressing this suggestion. Judge Reena Raggi, the Chair of the Criminal Rules Committee, has asked a subcommittee (headed by Judge Raymond M. Kethledge) to examine the proposal.

Mr. Letter agreed that it would make sense for the Appellate Rules Committee to wait and see what the Criminal Rules Committee decided with respect to Judge Newman’s proposal. An appellate judge member suggested that the Committee not proceed with the proposal.

By consensus, the Committee decided to remove this item from its agenda. Judge Colloton undertook to write to Judge Newman about the Committee's discussion.

E. Information item (proposal by Lawyers for Civil Justice, et al., regarding Civil Rule 23(f))

Judge Colloton invited the Reporter to summarize this information item. The Reporter explained that Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, DRI – The Voice of the Defense Bar, and the International Association of Defense Counsel (collectively, “LCJ”) had submitted a collection of class-action-related proposals to the Civil Rules Committee, and that the excerpt from those proposals that was included in the Appellate Rules Committee’s agenda materials concerned appeals, under Civil Rule 23(f), from orders concerning class certification. LCJ states that the circuits vary widely in both the standards for granting permission to appeal under Civil Rule 23(f) and also the frequency with which they grant such permission. LCJ suggests that Civil Rule 23(f) be amended to authorize appeals as of right from class certification rulings.

The Reporter observed that she is skeptical about the desirability of such an amendment. Professors Cooper and Marcus have noted that a significant body of appellate caselaw concerning class certification has developed since the adoption of Civil Rule 23(f) in 1998. Other topics concerning class certification – such as the standards for certification of settlement classes, or the proper role of “issues” classes – seem like more productive targets for inquiry.

An appellate judge, however, observed that the low rate at which some circuits grant permission for Rule 23(f) appeals is noteworthy.

F. Information item (*Ray Haluch Gravel Co.*)

Judge Colloton invited the Reporter to summarize the Court’s recent decision in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers and*

Participating Employers, 134 S. Ct. 773 (2014). The Reporter reminded the Committee that in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Court had held that a district court's decision on the merits of a case is final for purposes of 28 U.S.C. § 1291 even if the court has not yet ruled on a request for attorney's fees. In *Ray Haluch Gravel*, the Court held that the *Budinich* rule applies even if the basis for the request for attorney fees is contractual rather than statutory.

Responding to the argument that this ruling would result in piecemeal appeals in instances where it would be more desirable for the fee appeal and the merits appeal to be adjudicated together, the *Ray Haluch Gravel* Court reasoned that piecemeal appeals could be avoided, where necessary, by recourse to the Civil Rule 58(e) mechanism that permits a Civil Rule 54(d)(2) motion for attorney fees to be treated the same as a timely Civil Rule 59 motion for purposes of tolling the time to appeal. The Court noted the possibility that some contractual attorney fee requests might not qualify for this mechanism because Rule 54(d)(2) appears not to encompass attorney-fee claims that must, under the relevant substantive law, "be proved at trial as an element of damages." The Court did not seem concerned by the possibility that the Civil Rule 58(e) mechanism might be unavailable in some cases involving claims for contractual attorney fees. Nor has the Appellate Rules Committee received reports of problems arising from such a gap in Rule 58(e)'s coverage. Accordingly, the Reporter did not suggest that the Committee investigate this issue further, though it may be useful to monitor the caselaw for any further developments.

VII. Adjournment

The Committee adjourned at 10:30 a.m. on April 29, 2014.

Respectfully submitted,

Catherine T. Struve
Reporter

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TAB 6A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

RE: Report of Advisory Committee on Evidence Rules

DATE: April 10, 2014

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on April 4, 2014 at the University of Maine School of Law, Portland, Maine. The meeting was preceded by a Symposium on the Challenges of Electronic Evidence that the University of Maine School of Law hosted at the Committee’s request. The Committee is not proposing any action items for the Standing Committee at its May 2014 meeting.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Challenges of Electronic Evidence

Prior to the commencement of the spring meeting, at the request of the Committee, the University of Maine School of Law hosted a Symposium on the Challenges of Electronic Evidence. Symposium panelists addressed topics focused on the intersection between the Evidence Rules and emerging technologies. Their presentations included several thoughtful and detailed proposals that will provide valuable assistance to the Committee as it considers whether to propose amendments

to the Rules of Evidence, or to recommend best practices to the Bench and Bar, to accommodate ever-increasing changes in technology.

The Committee was particularly pleased that Judge Jeffrey S. Sutton, Chair of the Standing Committee, was able to participate as a panelist and present an overview of the challenges of addressing technological change through rulemaking. In addition to Judge Sutton, Judge Paul Grimm (District of Maryland), Chief Judge John A. Woodcock (District of Maine, and a member of the Committee), Gregory P. Joseph, Esquire (private practice, New York City), and John Haried, Esquire (Department of Justice) addressed authenticity issues; Professor Jeffrey Bellin (William and Mary Marshall-Wythe College of Law), Paul Shechtman, Esquire (private practice, New York City, and a member of the Committee), and Professor Deirdre Smith (University of Maine School of Law) discussed hearsay and related issues; Judge Shira A. Scheindlin (Southern District of New York) and David Shonka, Esquire (Federal Trade Commission) addressed adverse inferences; Daniel Gelb, Esquire (private practice, Boston) discussed expert witness issues; Andrew Goldsmith, Esquire (Department of Justice) made a presentation concerning Fed. R. Evid. 502(d) orders in grand jury proceedings; and George Paul, Esquire (private practice, Phoenix), and Paul Lippe, Esquire (CEO, Legal OnRamp) addressed possible forthcoming changes in electronic technology. Committee Reporter, Professor Daniel J. Capra, organized the Symposium and served as moderator.

The proceedings will be published in the *Fordham Law Review*.

B. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

As previously reported, the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) that the Standing Committee approved at its June 2013 meeting for transmittal to the Judicial Conference were approved by the Judicial Conference on the consent calendar at its September 2013 meeting. The amendments were subsequently adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. The Court submitted the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) to the Congress on April 25, 2014.

C. Possible Amendment to Rule 803(16)

The Committee engaged in a preliminary discussion about whether Rule 803(16) — which provides a hearsay exception for “ancient documents” — should be amended or repealed. The Committee intends to discuss this matter further at its fall meeting.

Rule 803(16) provides that, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Although the rationale for this exception has been questioned, it appears that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. This exception may prove to be more problematic, however, with the development and exploding use of electronically stored information (“ESI”). If the premise that ESI can easily be retained for more than 20 years proves to be true over

time, it is possible that the ancient documents exception will be used much more frequently. And Rule 803(16) could be relied on to introduce unreliable hearsay, because reliable hearsay is often admissible under one of the reliability-based exceptions, such as for business records. Moreover, the need for an ancient documents exception is questionable as applied to ESI because there may well be ample reliable electronic data available to prove any dispute of fact.

The Committee identified questions that should be addressed before a decision could be made concerning proposing an amendment to, or the repeal of, Rule 803(16), and this matter will be on the agenda for the Committee's fall meeting.

D. Possible Amendment to Rule 609(a)(2)

The Committee discussed whether Rule 609(a)(2) should be amended and concluded unanimously that it should not.

Rule 609(a)(2) provides that a witness's recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect.

Committee members expressed various reasons for retaining Rule 609(a)(2) in its present form, and they voted unanimously to retain it.

E. Possible Amendments to the Hearsay Exceptions

In response to a referral from the Clerk of Court of the Seventh Circuit, the Committee discussed proposed changes to hearsay exceptions in the Rules of Evidence that Judge Posner suggested in his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2013). The Committee unanimously concluded that no such changes should be made at this time.

Judge Posner proposed the following three amendments: (1) Rule 803(1) (the exception for present sense impressions) should be abrogated because its premise — that declarants do not have time to lie if their statements are made at or near the time of an event — is empirically unsupported and belied by social science research; (2) Rule 803(2) (the exception for excited utterances) should be abrogated because its premise — that declarants cannot lie if they are startled — is empirically unsupported and belied by social science research; and (3) Rule 807 (the residual exception) should replace most or all of the hearsay exceptions, so that the trial judge would admit hearsay evidence whenever the judge determines it to be reliable. Judge Posner opined that the hearsay rule and its exceptions are “too complex, as well as being archaic.”

Although Committee members agreed with Judge Posner in certain respects, there was no sentiment to change hearsay exceptions that have been addressed by the Supreme Court of the United States itself, or to take the significant step of replacing specific, known hearsay exceptions with a balancing test to be applied on an individual-judge basis — a proposal that was rejected when the Rules of Evidence were adopted originally.

Although Judge Posner's suggestions were not adopted, it is possible that the Committee will consider as part of its study of the impact of technological changes on the Rules of Evidence whether changes are needed to any of the hearsay exceptions, including Rule 803(1) and Rule 803(2).

F. Report on the Effect of CM/ECF on the Evidence Rules

The Committee Reporter made a presentation concerning the Standing Committee's Subcommittee on Electronic Case Filing and Case Management ("CM/ECF") and the possible effect of CM/ECF on the Evidence Rules. He concluded that very few, if any, changes needed to be made to the Evidence Rules because (1) the Restyled Evidence Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material "includes electronically stored information"; and (2) the Evidence Rules are concerned with admissibility, and generally not with such physical acts as filing and mailing.

The Committee considered the presentation and reviewed the Reporter's written report and determined that there was no need to consider any amendment to the Evidence Rules to accommodate electronic case filing using CM/ECF.

G. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

H. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as

experienced by courts, practitioners, and academic commentators. Under this standard, the Reporter periodically presents possible amendments for Committee consideration.

I. Privileges Report

At the spring 2014 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the state secrets privilege, the informant's privilege, the political vote privilege, and the deliberative process privilege. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law.

Professor Broun's work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2014 Meeting

The draft of the minutes of the Committee's spring 2014 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 4, 2014

Portland, Maine

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 4, 2014, at the University of Maine School of Law.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. William K. Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Arthur L. Harris, Liaison from the Bankruptcy Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office

Professor Deirdre Smith, University of Maine Law School
Professor Jeffrey Bellin, William and Mary Law School
Peter Murray, Esq.
George Paul, Esq.
Daniel Gelb, Esq.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Pitegoff and Professor Deirdre Smith of the University of Maine School of Law for hosting the Committee meeting and the Symposium on Electronic Evidence.

Approval of Minutes

The minutes of the Spring 2013 Committee meeting were approved. (The Fall meeting was canceled due to the government shutdown).

New Members and Other Business

Judge Fitzwater introduced and welcomed the new Committee member, Judge Livingston of the Second Circuit Court of Appeals. He also introduced A.J. Kramer, Public Defender for the District of Columbia, who was attending his first meeting in person.

Judge Fitzwater also noted that this would be his last meeting presiding as Chair of the Committee. He congratulated the incoming Chair, Judge Sessions. The Reporter stated that Judge Fitzwater will be honored at the next meeting for his stellar service to and leadership of the Evidence Rules Committee for the past four years.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Standing Committee did discuss the proposal to amend the Bankruptcy Rules to provide for electronic signatures — a proposal that the Evidence Rules Committee had previously reviewed.

Discussion of the Electronic Evidence Symposium

Judge Fitzwater extended his compliments to all of the panelists at the Symposium on the challenges of electronic evidence, which took place on the morning of the Committee meeting. He noted that a number of detailed and credible proposals for change to the Evidence Rules — to accommodate electronic evidence — were made and discussed by the panelists. The Reporter stated that these proposals will form the bulk of the Committee's agenda in the next year.

Judge Sutton observed that even if some of the proposals made at the Symposium might not end up to be appropriate for rule amendment — because, for example, they may be too specific or subject to obsolescence due to changes in technology — the Committee might consider working on those proposals with the goal of establishing a “best practices” template that could be distributed to judges and litigants.

II. Privileges Report

Professor Broun, the Committee’s consultant on privileges, presented his analysis of the state secrets privilege, the informant’s privilege, the political vote privilege and the deliberative process privilege. This presentation was part of Professor Broun’s continuing work to develop an article that he will publish on the federal common law of privileges. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law. He noted that instead of a general rule on waiver, he had included separate waiver rules on each of the privileges, as the waiver rules differed somewhat among the privileges.

The Chair emphasized that Professor Broun’s work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for the Committee’s guidance on where to publish the survey rules. The Committee agreed that it would be better to have the survey published in a law review article, or the Federal Rules Decisions, rather than under the auspices of the FJC — in order to avoid any inference that the survey rules had received an imprimatur from the Committee. Once it is published independently, the FJC and the Committee could use Professor Broun’s extensive work as a valuable resource.

Committee members expressed profound gratitude to Professor Broun for his excellent work in keeping the Committee apprised of developments in the area of privileges.

III. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for “ancient documents.” If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. The Committee considered the Reporter’s memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored

information. If it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter noted that the memorandum on the ancient documents exception and its relationship to ESI was preliminary, and he was simply asking whether the Committee was interested in considering a formal proposal for amendment at the next meeting. A member responded that he was very interested in considering the proposal, noting that the possible widespread application of Rule 803(16) to ESI was an issue that the Committee should address before it becomes a serious problem. That member suggested that the most viable proposal would be to limit applicability of the exception to situations of necessity, i.e., the exception should only apply where the proponent could not find other more reliable information through reasonable efforts. Another Committee member suggested that the exception should be eliminated “before people discover it exists.”

Other Committee members noted that before a rule amendment is actually proposed, the Committee has to be sure that its factual premises are sound. That involves two questions: 1) is it really the case that ESI will be preserved for more than 20 years, given the prevalence of data destruction programs?; and 2) even if ESI is preserved unchanged for such a long period, will it be easy to retrieve? The Reporter stated that he would research these questions and seek to provide answers before the next meeting.

The Committee resolved to further consider a possible amendment to Rule 803(16) at the next meeting.

IV. Report on Effect of cm/ecf on the Evidence Rules

The Reporter discussed the work of the Standing Committee’s Subcommittee on electronic case filing and case management. The Subcommittee is chaired by Judge Chagares and has members from each of the Advisory Committees. Judge Woodcock is serving as the representative of the Evidence Rules Committee. The Advisory Committee Reporters serve as consultants, and each of the Reporters prepared a memorandum on changes that might be necessary to their respective rules due to electronic case filing. For example, if a rule referred to hardcopy (e.g., covers on a brief, written notice, copies, etc.), or to a physical act (e.g., mailing), it might need to be amended to accommodate electronic information and electronic filing.

The Reporter to the Evidence Rules Committee prepared a report on the possible effect of cm/ecf on the Evidence Rules, and that report was included in the agenda book for the Fall meeting.

The report concluded that very few, if any, changes needed to be made to the Evidence Rules, for two reasons: 1) the Restyled Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material “includes electronically stored information”; and 2) the Evidence Rules are concerned with admissibility and generally not with such physical acts as filing and mailing.

The Evidence Rules Committee reviewed the report and determined that there was no need at this point to consider any amendment to the Evidence Rules to accommodate electronic case filing.

V. Consideration of Changes to the Hearsay Exceptions

In his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2013), Judge Posner proposed three changes to the Federal Rules of Evidence hearsay exceptions:

- 1) Rule 803(1) (the exception for present sense impressions) should be abrogated, because its premise — that declarants don’t have time to lie if their statement is made at or near the time of an event — is empirically unsupported and belied by social science research.
- 2) Rule 803(2) (the exception for excited utterances) should be abrogated, because its premise — that declarants can’t lie if they are startled — is empirically unsupported and belied by social science research.
- 3) Rule 807 (the residual exception) should “swallow” most or all of the hearsay exceptions, so that the trial judge would allow hearsay evidence to be admitted whenever the court determines it to be reliable. This proposal was based on Judge Posner’s conclusion that the hearsay rule and its exceptions are “too complex, as well as being archaic.”

The clerk of the Seventh Circuit referred Judge Posner’s opinion to the Advisory Committee for its consideration.

Committee members generally agreed that the empirical support for the stated justifications for Rules 803(1) and 803(2) was weak. But one member argued that statements fitting into these exceptions could be justified on another ground — that they are made at or near an event, so are not memory-dependent and unlikely to be generated for purposes of litigation. Moreover, the Evidence Rules are now operating in a time of great technological change, and abrogating well-established hearsay exceptions may result in unintended consequences. Another member pointed out that in its cases construing the Confrontation Clause, the Supreme Court has expressly relied on the justifications of the excited utterance exception in finding statements in response to an emergency to be properly admitted. In sum, the Committee determined that at this point the case had not been made for abrogating the hearsay exceptions for excited utterances and present sense impressions.

As to the proposal to scrap the hearsay exceptions in favor of a single rule allowing hearsay to be admitted whenever it was found reliable, Committee members noted that a similar proposal was made by the Advisory Committee when the Federal Rules were being drafted. That proposal was roundly criticized by judges and litigants. Judges opposed the rule because they wanted to have the guidance of categorical rules to apply — they did not want to have to reinvent the reliability wheel for every piece of hearsay offered at a trial. And litigants were concerned about unpredictable results depending on the judge’s personal approach to hearsay — thus undermining the possibility of settlement. Committee members saw no reason to think that these criticisms were any less valid today than they were in 1970. Moreover, members expressed concern that there would be little or no effective appellate review of a trial court’s hearsay rulings. Finally, the Reporter observed that experience under the residual exception indicated that courts applying a totality of circumstances approach often admitted hearsay of dubious reliability against criminal defendants — until that practice was curtailed by the Supreme Court’s Confrontation Clause cases starting with *Crawford*. Thus the track record for a rigorous application of a case-by-case approach to reliability is not strong.

No Committee member moved for further consideration of a proposed amendment to the hearsay exceptions along the lines suggested in *United States v. Boyce*.

VI. Possible Amendment to Rule 609(a)(2)

Evidence Rule 609(a)(2) provides that a witness’s recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect. The Reporter prepared a memorandum setting forth these suggestions for change.

Committee members found that the Rule rationally distinguished convictions that involved dishonesty or false statement from those that did not. Convictions involving dishonesty or false statement are logically more probative of a witness’s character for truthfulness than those that are not. Indeed Congress — which devoted more time and consideration to Rule 609(a)(2) than any other rule — could reasonably have thought that a balancing test would be of little use because a trial judge could plausibly find that falsity-based convictions are probative enough to satisfy any balancing test.

Other Committee members noted that Rule 609(a)(2) has the virtue of simplicity and predictability. They observed that the practice in some states such as New York, in which the courts employ balancing tests for all convictions, results in different rulings from different judges. Other members stated that Rule 609(a) was already a complex and detailed rule, with two separate balancing tests for non-falsity based convictions, and a distinction between falsity-based misdemeanors (automatically admitted) and non-falsity based misdemeanors (never admitted). So

any attempt to add a third balancing test in the rule, for falsity-based convictions, would only add to the complexity of the rule.

The Committee unanimously rejected the proposal to add a balancing test to Rule 609(a)(2).

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation was in flux, and suggested that it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Next Meeting

The Fall 2014 meeting of the Committee is scheduled for Friday, October 24, at Duke Law School.

Respectfully submitted,

Daniel J. Capra

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TAB 7A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 22 and 23, 2014, in Austin, Texas, at the University of Texas School of Law. The draft minutes of that meeting accompany this report in Appendix C. The Committee's actions fall into two categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2013. One hundred and sixty-four comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee and working group conference calls prior to the spring meeting and in Committee discussions in Austin. The Advisory Committee now seeks the Standing Committee's final approval of some of the published items: one rule amendment and 29 revised or new forms, most of which were products of the Forms Modernization Project. Because the Committee made significant changes after publication to the chapter 13 plan form and related rules, it requests that the revised form and rules be republished.

The Committee voted not to proceed further with the electronic signature amendment to Rule 5005(a). The reasons for the Committee's decision to withdraw the proposed amendment are discussed below under Information Items.

Second, the Advisory Committee took action on new proposed rule and form amendments. The Committee requests publication for public comment of (1) the remaining group of modernized forms; (2) a new chapter 15 petition and related rule amendments; (3) an amendment to clarify the scope of Rule 3002.1; (4) an amendment to Rule 9006(f) that parallels amendments proposed by other Advisory Committees to eliminate the three-day rule following electronic service; and (5) a revised proof-of-claim attachment form for claims secured by home mortgages.

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2013 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rule 9006(f) and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, 427;

(A2) minor amendments to Official Forms 3A and 3B, for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication;

(B1) amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, and Official Form 113, for which the Committee seeks approval for republication in August 2014; and

(B2) matters for which the Advisory Committee seeks approval for publication in August 2014—amendments to Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and instructions; and the abrogation of Official Forms 11A and 11B.

Part III of this report discusses two information items.

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2013. The Advisory Committee recommends that the Standing Committee approve the proposed rule and form

amendments that were published for comment in August 2013 and are discussed below.

The discussion of each action item indicates its proposed effective date. Appendix A includes the text of the amended rule and forms that are in this group.

Action Item 1. **Rule 9006(f)** would be amended to change the words “after service” to “after being served,” so that the rule would begin, “When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served,” The amendment, which parallels an amendment to Civil Rule 6(d) that was published at the same time, is intended to clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made

No comments were submitted in response to the publication, and the Advisory Committee unanimously approved it as published. Because the Advisory Committee is requesting publication this summer of an additional amendment to Rule 9006(f) (see Action Item 10), the Committee expects that, if the pending amendment is approved, the Standing Committee will hold it in abeyance to allow both amendments to be sent together to the Judicial Conference. Following this course would likely result in a December 1, 2016, effective date for both amendments.

Action Item 2. **Official Forms 17A, 17B, and 17C** were proposed in connection with the revision of the bankruptcy appellate rules. Form 17A (Notice of Appeal and Statement of Election) would be amended and renumbered, and Forms 17B (Optional Appellee Statement of Election to Proceed in District Court) and 17C (Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)) would be new.

Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the “type-volume limitation”).

No comments were submitted in response to the publication of these forms, and the Advisory Committee unanimously approved them at the spring meeting. The Committee requests that the Standing Committee approve these forms and forward them to the Judicial Conference, with the recommendation that they go into effect on December 1, 2014, the presumptive effective date of the revised Part VIII bankruptcy rules. These forms will be renumbered as Official Forms 417A, 417B, and 417C when the remaining modernized forms go into effect.

Action Item 3. **Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2** are the modernized “means test” forms that were initially published in 2012 as part of the first phase

of the Forms Modernization Project (“FMP”). The Advisory Committee revised these forms after their initial publication, and the Standing Committee republished them in 2013. In response to the republication, six comments were submitted.

Commenters generally viewed the revisions of the means test forms positively. The National Conference of Bankruptcy Judges (“NCBJ”), for example, thought that the reorganization and revision of the forms made them easier to read and understand, thereby making them easier for debtors to complete and providing clearer information to creditors and trustees.

The comments made a number of detailed suggestions about the wording or content of specific provisions of the means test forms. In response the Advisory Committee made several changes. The changes of greatest significance include the following:

- An instruction about asking for help at the clerk’s office was revised to make it clear that the clerk’s office could help a filer locate means test data, but that it could not help in completing the form. In addition, the applicable web address for accessing the necessary data was moved to the instructions, where it can be updated as necessary without having to go through the form amendment process.
- The instruction about the grounds for denying chapter 7 relief was revised to state more accurately that “Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims.”
- An error on line 33 of Form 22A-2 was corrected by removing the instruction “Do not deduct mortgage payments previously deducted as an operating expense in Line 9.”
- The omission of a space on Form 22B for claiming a marital deduction if the debtor has a non-filing spouse was corrected by adding space for the marital deduction on lines 12-14 of the revised form.

Some of the comments raised issues that had previously been debated and resolved by the Advisory Committee in promulgating the existing forms. The Advisory Committee voted not to revisit those legal issues in the context of modernizing the forms. The proposed forms would therefore continue the existing treatment with respect to the following issues:

- Whether the income of a nondebtor spouse not used for household expenses of the debtor or the debtor’s dependents is included in current monthly income as defined by §101(10A).

- Whether a chapter 7 debtor who completes the means-test-exemption form (B22A-1Supp) must also complete the Statement of Your Current Monthly Income (B22A-1).
- Whether the means test exemption for reservists and National Guard members is temporary.
- Whether space should be provided in Forms 22A-2 and 22C-2 for a debtor to deduct additional expenses beyond those already listed.
- Whether business expenses should be deducted before, rather than after, calculation of the applicable commitment period.
- Whether the forms should expressly provide a debtor the option of using a different method for determining the number of dependents, along with an explanation of why a different method was used.
- In Forms 22A-2 and 22C-2, whether taxes and insurance included in the mortgage payment should be identified on line 9b (monthly amounts due for debts secured by debtor's residence) rather than on line 33 (deductions for debt payments).
- Whether vehicle ownership expenses should be a predetermined allowance based on the IRS Standards rather than the debtor's actual expenses.
- Whether the debtor should be allowed to deduct ongoing retirement plan contributions as specified in § 541(b)(7).

In drafting revised Form 22C-2, the Advisory Committee made a substantive change in addition to the stylistic and formatting changes proposed by the FMP. It added Part 3 in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), which held that changes to income or expenses reported elsewhere on the 22C forms that have occurred by the time of confirmation or are virtually certain to occur must be considered by the court in determining the debtor's projected disposable income. One comment suggested that debtors should be required to report expected changes only if they are virtually certain to occur within one year of the filing. The Advisory Committee rejected the suggestion because *Lanning* did not specify any time limit for changes that are virtually certain to occur.

The Advisory Committee requests that the Standing Committee approve Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 and send them to the Judicial Conference for approval, with an effective date of December 1, 2014. When the remaining modernized forms become effective, the means test forms will be renumbered Official Forms 108-1, 108-1Supp, 108-2, 109, 110-1, and 110-2.

Action Item 4. Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 are the modernized forms for individual-debtor cases that were published in 2013. They are the products of the second phase of the FMP, and they include forms filed at the commencement of an individual case (petition, schedules, and accompanying documents), the debtor's statement of financial affairs, and other documents required in individual-debtor cases.

Twenty-five formal comments were submitted by the February 18, 2014, deadline, and one other letter was informally submitted to the Committee. The overall evaluation of the published forms was mixed—some of the comments were positive, some were negative, and many made constructive suggestions for specific changes to particular forms. The Advisory Committee made a number of changes suggested by the comments but concluded that the changes do not require republication. The following discussion addresses the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Some of the comments—including ones submitted by the NCBJ, Robert G. Drummond, Rommel Jairam, and Mike Waters—praised the new forms as representing a step in the right direction because they are more readable, easier to fill out, and easier to understand than the current forms. Several others, however, made critical comments similar to ones that were considered by the Advisory Committee and the Standing Committee last year in connection with the initial group of modernized forms. They included criticisms that the new forms will encourage *pro se* filings because they are easier to understand; that they improperly provide legal advice; and that they are too long.

There was nothing in the comments that caused the Advisory Committee to reconsider either its decision to proceed with the project or its earlier responses to these particular criticisms. Whether the use of plain English, clearer instructions, and a cleaner format will encourage more filing without the assistance of counsel has been the subject of discussion since the beginning of the FMP. Members of the Committee believe that comprehensive instructions that explain the magnitude of what the bankruptcy filing requires and that provide ample warnings about the significance of the forms and the possible consequences of inadequate filings should deter, not encourage, uninformed *pro se* filings. In addition, members think that it is important that forms be understandable to all debtors, whether or not represented, because debtors are required to sign the forms under penalty of perjury. The Committee also concluded that eliminating all instructions that provided legal statements would reduce the value of the instructions in explaining both the meaning of the forms and the information necessary to complete them. The instructions were revised, however, to clarify that the person completing the forms is responsible for doing so properly. Finally, the Committee continues to believe that the changes in format that contribute to greater length are likely to prompt more accurate, usable information. The forms also direct the debtor to skip inapplicable questions or sections. The ability of debtors to truncate answers—when the questions either do not apply or have been fully answered—should reduce the length of many of the filed forms.

The Petition and Related Forms—Official Forms 101, 101A, 101B, 104, and 105. The Advisory Committee made one change to the petition in response to an original suggestion rather than a comment made after publication, and the Committee made several other changes to both the petition and Forms 101A and 101B in response to comments made by the NCBJ following publication.

Line 13 of the petition was revised to remind small business debtors to attach their most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or, if any of the documents do not exist, to follow the procedure in § 1116(1)(B) of the Bankruptcy Code. This change responded to Suggestion 13-BK-B, submitted by Bankruptcy Judge Eric Frank (E.D. Pa.), which noted that there is a frequent lack of compliance with § 1116(1), and suggested that the problem might be addressed by calling attention to the statutory requirement on the petition.

In response to the NCBJ's comments on the petition and eviction judgment forms, the Advisory Committee made several changes, including the following:

- The language regarding fee waivers on line 8 of Form 101 was clarified to explain that a judge has discretion regarding whether to waive fees.
- The description of a sole proprietorship on line 12 of Form 101 was revised to make clearer that a sole proprietor is not a separate entity.
- Among the statements in Part 7 of Form 101 that a chapter 7 debtor must sign under penalty of perjury is the statement that the debtor is aware of the option to proceed under chapters 7, 11, 12, and 13. This statement was revised to limit it to chapters for which the debtor is eligible.
- Space was added to Form 101A for a debtor to indicate whether an eviction judgment had been entered against him and to provide information about the landlord who obtained the judgment.
- The debtor's certifications in Forms 101A and 101B were revised to clarify that the debtor is required to pay only the amount in default, not the entire amount that would ultimately be owed on the lease.

Schedules—Official Forms 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec. The publication of the revised schedules prompted a number of comments. The most significant ones are listed below, along with the Committee's response.

Schedule A/B: Property

- Several comments questioned the instruction to separately list and describe property worth more than \$500. This dollar amount had been included to avoid the listing of *de minimis* property items. In response to the comments, the \$500 minimum was deleted because it has no basis in the Code or rules.
- Several comments said that Schedule A/B should include information about any liens on listed property. The Committee chose not to make this change because the information is available on Schedule D, and software permits the integration of information from various schedules.
- In the description of vehicles, the published draft sought information about a vehicle's mileage in broad categories. Based on a comment that actual mileage would be more helpful in assessing the value of a vehicle, the FMP revised line 3 to ask the approximate mileage of each vehicle.
- In response to a comment, the Committee added an inquiry about the nature of the debtor's ownership interest, if known, for each item of real property.
- The Committee decided not to adopt several changes from existing practice that were proposed by commenters. It reasoned that the proposed changes were outside the scope of the modernization project and were not necessitated by changes in the law.

Schedule C: The Property You Claim as Exempt

The published version of this form included a substantive change in response to *Schwab v. Reilly*, 560 U.S. 770 (2010). In that decision the Supreme Court stated that "Where . . . it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as 'full fair market value (FMV)' or '100% of FMV.'" *Id.* at 792-93.

Over the past several years, the Advisory Committee has considered several different ways to revise Schedule C so as to allow debtors to exercise the *Schwab* option. A proposed amendment to Schedule C was published in 2011, but the Committee withdrew after it met with substantial opposition, particularly from bankruptcy trustees. They stated that the option to claim as exempt "Full fair market value of the exempted property" would encourage debtors to claim the full fair market value of an asset as exempt, even when using an exemption capped at an amount less than the asset's value. They argued that the increase in such exemption claims would then lead to a "plethora of objections."

A later revision of the form that the FMP proposed was previewed by the Standing Committee at the January 2013 meeting. Some members found that attempt unclear. They

suggested ways that the form might be improved, including highlighting the instructions about the *Schwab* option and allowing a debtor to claim as exempt “100% of fair market value, up to any applicable statutory limit.” That wording was incorporated into the proposed draft of Schedule C that was published last summer.

Once again this aspect of the revision of Schedule C proved to be controversial. Several of the comments were critical, but from different perspectives. The National Association of Consumer Bankruptcy Attorneys objected that the form as drafted would not provide a debtor finality regarding his exemptions. It suggested that Schedule C and Rule 4003(b) be amended in a way that would allow the debtor to clearly claim as exempt the entire value of the debtor’s interest in property and that would require interested parties to object by the deadline for objections to exemptions, even if the objection was based on valuation of the asset claimed as exempt. The National Conference of Bankruptcy Judges thought that the form was confusing and that it would lead to increased exemption litigation. It recommended that the second option be changed to “100% of fair market value (*for exemptions unlimited in dollar amount*).” The National Association of Bankruptcy Trustees (“NABT”) objected to the second option for much the same reason that it had opposed the 2011 proposed amendment of Schedule C. It supported the change suggested by the NCBJ.

The Committee voted to retain the published wording of the second option. It allows the debtor an exemption choice of 100% fair market value, as *Schwab* authorized, without disregarding exemption limits. Unlike the NCBJ’s proposal, proposed Schedule C permits a debtor to exempt all of her interest in certain property even when there is an exemption cap, so long as the value of that interest does not exceed the cap.

Schedule D: Creditors Who Have Claims Secured by Property; Schedule E/F: Creditors Who Have Unsecured Claims

Many of the comments on Schedules D and E/F addressed narrow wording or technical issues. One comment objected to requiring claims to be listed in the alphabetical order of the creditors’ names. The Committee revised the instruction to require an alphabetical listing “as much as possible.” Another comment objected to the instruction to list creditors holding multiple claims separately for each claim and to list the last four digits of the account number for each claim. The Committee concluded that this information facilitates claims audits and assists creditors in identifying the debtor. Because some creditors are abandoning the practice of using social security numbers to identify account holders, they need account numbers. The Bankruptcy Clerks Advisory Group suggested the deletion in Part 4 of the explanation that certain totals from Schedule E/F are needed for statistical reasons. The Committee rejected this suggestion because Congress requires the collection and submission to it of the data, and debtors should be informed why the information is being sought.

Schedule G: Executory Contracts and Unexpired Leases, and Schedule H: Your Codebtors

The Committee made minor wording changes to the beginning of these forms in response to the NCBJ’s editing suggestions.

Official Form 106Dec

In response to comments from the NCBJ and the US Trustee Program, the criminal penalty explanation was revised to say that individuals who commit one of the enumerated crimes related to the schedules can be fined up to \$250,000, rather than \$500,000, and can be imprisoned for up to 20 years, rather than 5 years.

Official Form 107—Statement of Financial Affairs for Individuals Filing For Bankruptcy.
The following changes were made to Form 107 in response to comments:

- In response to comments about the omission of the debtor’s marital status from the published form, the Advisory Committee added new question 1, which asks the debtor’s current marital status. It does not ask, as some wanted, whether the debtor has previously been married or for the name of any former spouse. The Committee concluded that, if that information might be significant, the trustee can ask the debtor for it without having the information on forms in the public record.
- The NABT commented that line 5, which asked about whether the debtor’s debts are primarily consumer debts, failed to recognize that the response for Debtor 1 and Debtor 2 in a jointly administered case could be different. As a result of this comment, line 6 (formerly line 5) was changed from “My debts are not primarily consumer debts” to “Neither Debtor 1 nor Debtor 2 has primarily consumer debts.”
- At the suggestion of NCBJ, on line 18 an example of a transfer made as security was inserted in order to clarify the information requested.
- On line 22, the instruction that the debtor not include information about storage units that are part of the building where the debtor lives was deleted in response to NCBJ’s comment that a debtor should provide information about storage units located elsewhere in his apartment building.
- At NCBJ’s suggestion, and in order to be consistent throughout the forms, a warning to the debtor about the consequences of a false statement was added to Part 12.

Official Form 112—Statement of Intention of Individuals Filing Under Chapter 7. Two comments observed that the word “give” on the published form is not the equivalent of “surrender,” which is the word used in the pertinent statutes. The Advisory Committee agreed and made the appropriate change. The options regarding what a debtor intends to do with property that secures a debt were clarified by changing the wording and format of the debtor’s options.

Official Form 119—Bankruptcy Petition Preparer’s Notice, Declaration, and Signature. In response to a comment that a petition preparer should separately sign each document prepared, the Advisory Committee revised Form 119 to state that the declaration on that form is made part of each document identified as having been prepared by the petition preparer. Form 119 follows the existing practice of providing a specific declaration that petition preparers can use with multiple documents.

Official Form 121—Statement About Your Social Security Numbers. Several changes were made to the introductory instructions in response to the comments. The following sentence was moved from the second paragraph to the first paragraph: “Please consult local court procedures for submission requirements.” In the second paragraph, the last sentence was deleted in order to eliminate a potential misimpression about the extent to which the debtor’s full social security number will be made available to creditors. The warning regarding potential criminal penalties was rewritten to make it consistent with the other warnings in the individual case commencement documents.

Official Form 318—Order of Discharge. The NCBJ suggested several changes in the discharge order, including that the information regarding the discharge be merged, rather than having separate notices to creditors and to the debtor. The Advisory Committee agreed with that suggestion and revised the discharge order to make clear that the information provided pertains to both debtors and creditors. The NABT requested that information be provided that points out the limited impact of discharge on case administration and the debtor’s on-going duties to cooperate in administration. The Committee concluded that the NABT’s request required going into greater detail than is necessary on this form.

Official Form 423—Certification About a Financial Management Course. The Bankruptcy Clerks Advisory Group suggested that the form explain what happens if the course provider advises the clerk of court of the debtor’s completion of the course. The Advisory Committee added a sentence stating that in that situation the debtor does not need to file the certificate.

Official Form 427—Cover Sheet for Reaffirmation Agreement. The Advisory Committee made a change to the Cover Sheet after publication in response to Suggestion 13-BK-K submitted by Mike Bates. Agreeing with his suggestion, the Committee revised line 3 of the form to clarify that § 524(k)(3)(E)(i)(I) and (ii)(I) allows, under some circumstances, disclosure of the simple rate of interest rather than the annual percentage rate.

The Advisory Committee requests that the Standing Committee approve Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 but that the forms not be forwarded to the Judicial Conference until the Standing Committee gives final approval to the modernized forms that will be published this summer (see Action Item 13). Because of the new numbering system for the forms and because there will be separate case-opening forms for individual and non-individual cases rather

than the current unified forms, both groups of forms need to take effect on the same date. The Advisory Committee recommends that the effective date be December 1, 2015, or as soon thereafter as is technologically feasible.

A2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that amendments to Official Forms 3A and 3B be approved and forwarded to the Judicial Conference and that the amended forms become effective on December 1, 2014.** Because the amendments are minor, technical changes, the Advisory Committee concluded that publication for comment is not required. The text of the amended forms is set out in Appendix A.

Action Item 5. **Official Form 3A** is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). **Official Form 3B** is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by § 1930(f). The modernized version of Form 3A, which went into effect on December 1, 2013, includes at line 1 the filing fee amount for each chapter. The version of 3B that went into effect at the same time refers to the specific chapter 7 filing fee amount in the order that is part of the form. Because these amounts are subject to periodic change by the Judicial Conference, the Advisory Committee voted unanimously to remove them from the forms. Filing fee amounts will continue to be stated in Director's Forms that are used by clerk's offices to provide information about bankruptcy to individual debtors (current Director's Form 200 and 201). The proposed change will permit fee information provided to debtors to remain current without having to go through the formal forms amendment process.

B. Items for Publication in August 2014

The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

B1. Rule and Form Amendments for Which Republication Is Sought

Action Item 6. **Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009**

As the Advisory Committee has previously reported, it has undertaken a multi-year project to create an official form for plans in chapter 13 cases. The chapter 13 plan form project is intended to eliminate the current anomaly of a major aspect of consumer bankruptcy practice not having a national form for presenting essential information to parties in interest. The Committee sees the adoption of a form for chapter 13 plans as bringing greater coherence to the presentation of information in chapter 13 cases and improving the procedures for preparing, reviewing, and confirming chapter 13 plans. The form (Official Form 113) was published for public comment in August 2013 along with related amendments to nine of the Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). After considering the public

comments, the Advisory Committee has proposed a number of changes to the plan form and rule amendments. Accordingly, the Advisory Committee seeks republication of both the plan form and the package of accompanying rule amendments.

The Advisory Committee anticipated that the plan form and related rule amendments would generate significant interest, and, as expected, a large number of comments were submitted. The Advisory Committee received approximately 150 public comments related to the chapter 13 plan form project. In addition, two witnesses testified about the project at a public hearing in January 2014. The Advisory Committee's Chapter 13 Plan Form Working Group exhaustively reviewed and discussed the comments received. In all, the Working Group convened for nine multi-hour conference calls to consider issues and concerns raised by the comments.

The current proposals for changes to the plan form are discussed below at Action Item 7. The principal comments and resulting changes to the rule amendments are discussed in this section.

Rule 2002

The published amendment to Rule 2002 would require giving 21 days' notice of the time to object to confirmation of a chapter 13 plan and 28 days' notice of the date of the confirmation hearing. Few comments were submitted on this amendment, and the Advisory Committee made no changes to the published rule. One comment suggested altering Rule 2002 to limit the required notice of pre-confirmation plan modifications. The Working Group, however, recommended against making changes to the basic notice provisions already included in the Bankruptcy Rules. A more comprehensive project on noticing may be undertaken by the Advisory Committee, and reconsideration of these issues would be more appropriate in that context.

Rule 3002

The published amendment to Rule 3002 included two significant changes to the rule. The first would alter Rule 3002(a) to state that the holder of a secured claim must file a proof of claim in order to have an allowed claim. The second would alter Rule 3002(c) principally to shorten the bar date—that is, the deadline by which a creditor must file a timely proof of claim—to 60 days after the petition is filed. The published amendment to Rule 3002(c) would provide an additional period of 60 days after the initial 60-day bar date. This additional 60-day period would allow holders of mortgage claims to file the supplemental documents required by Bankruptcy Rule 3001(c)(1) and (d). These changes drew a large number of comments.

Although in general the comments supported the thrust of the amended rule, they raised a number of issues. A comment from the NCBJ urged the removal of language stating that the failure of an entity to file a proof of claim does not void a creditor's lien. Apart from criticism of the phrasing of the statement, the comment objected that the provision strayed into an area of substantive law. Nevertheless, the Advisory Committee retained the language, which makes

clear that the change in Rule 3002(a) to require secured creditors to file proofs of claim is not in tension with the general rule that a secured creditor's lien survives bankruptcy even if no proof of claim is filed. The language used in the published amendment is drawn directly (and intentionally) from § 506(d)(2) of the Bankruptcy Code. Several comments took issue with the bifurcated bar date for mortgage claims on the ground that a 120-day period gave unwarranted favored treatment to mortgage creditors. By contrast, a comment by a group of large mortgage servicers expressed the concern that a bifurcated bar date might give rise to new disputes about proofs of claim. The Advisory Committee is satisfied that the general 60-day bar date will usually be sufficient time for filing proofs of claim. The bifurcated bar date for mortgage claims reflects the concern that retrieval of required supporting documents for those claims may take longer than 60 days. This proposal was generated through discussions at a mini-conference held in Chicago in January 2013 in which representatives from a number of stakeholders in the chapter 13 process (including mortgage servicers) participated. The Advisory Committee believes that the additional supporting documents to be filed by the end of the 120-day period will generate significant disputes in very few cases.

The Advisory Committee has approved two changes to the language of amended Rule 3002(c). One is a wording change to ensure consistency of terminology throughout the rule with respect to the starting point for calculating the bar date. The second clarifies that the listed exceptions to Rule 3002(c) apply to all cases—and not only involuntary chapter 7 cases— included in the subdivision.

Rule 3007

The Advisory Committee received a limited number of comments on the published amendment to Rule 3007, which governs objections to claims. Some of the comments offered stylistic suggestions that the Advisory Committee did not adopt. Others were more substantive and touched on service requirements. The Advisory Committee addressed service requirements for objections to claims at its fall 2013 meeting, when it approved amendments to Rule 3007(a) that were published for comment in 2011. Under amended Rule 3007(a), service of a claim objection would be made on most claimants by mailing notice to the person listed on the proof of claim. Service on federal government and insured depository institution claimants, however, would be made according to the applicable provisions of Rule 7004. The amended rule would also clarify that a hearing need not be held on every claim objection, so long as the claimant received notice and an opportunity for a hearing. Finally, the Committee voted at the fall 2013 meeting to delete the following language that was included in the proposed amendment to Rule 3007(a) published for comment last summer: “Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a” This deletion was made because Rule 3012 does not address objections to claims, which is the subject of Rule 3007. Thus no exception to the latter rule is required.

Rule 3012

Amended Rule 3012 would govern the valuation of secured claims and priority claims. The published amendment drew support and opposition. A number of comments endorsed the

key change in the rule—an express provision permitting a chapter 13 plan to include a request for the determination of allowed secured claim values. Other comments opposed this change to the rules on various grounds, including concerns about due process and concerns about the amended rule’s treatment of claims by governmental units. The Advisory Committee did not find the due process objections persuasive in light of the heightened service requirements the amended rules would impose when a request for valuation is made through a chapter 13 plan. The objection to the treatment of governmental units (their secured claims could not be valued in a plan) was also unpersuasive. The different treatment of these claims is driven by the statutory grant of a longer bar date for the claims of governmental units.

The Advisory Committee approved a change to the published Rule 3012(c) to clarify that a request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim. The Advisory Committee also approved amendments to Rule 3012(b) at the fall 2013 meeting. With the amendments, Rule 3012(b) would require service in the manner provided in Rule 7004 for a chapter 12 or 13 plan that requests determination of the amount of a secured claim, but would leave to Rules 3007(a) and 9014(b) the method of service for claim objections and motions to determine the amount of a secured claim, respectively.

Rule 3015

The published amendments to Rule 3015 proposed several changes in the rule. Amended Rule 3015(c) would require that plans filed in chapter 13 cases must “be prepared as prescribed by the appropriate Official Form” and that provisions deviating from the Official Form are effective only if they are placed in the part of the form reserved for nonstandard provisions. Amended Rule 3015(f) would require that objections to plan confirmation be made at least seven days before the confirmation hearing. Amended Rule 3015(g) would make clear that the valuation of a secured claim in a confirmed plan is binding on the holder of the claim. And Amended Rule 3015(h) governs the service of a plan modified after confirmation.

Most of the comments critical of the amended rule objected to the provision in Rule 3015(c) requiring use of the Official Form for chapter 13 plans. The Advisory Committee’s consideration of the question whether to go forward with the chapter 13 plan form is discussed below in Action Item 7. Although the Advisory Committee has decided to continue pursuing a mandatory plan form, the published amended rule does not account for the possibility that a national plan form might not be adopted at a time when the rule is in effect. The Advisory Committee altered the language of Rule 3015(c) to account for this possibility.

The Advisory Committee made two other changes to the published version of Rule 3015. First, language has been added to Rule 3015(f) to require objections to be filed “at least seven days before the *date set for the* hearing on confirmation.” This change responds to comments pointing out that some districts, while setting confirmation hearing dates, ordinarily confirm plans without a hearing if there are no objections. Under the new language, a deadline for objections would be clear even if no hearing is held. Second, prompted by a comment from the

IRS's Office of General Counsel, the Advisory Committee has made a small change to Rule 3015(g). The language of amended Rule 3012(g) has been altered to provide that any "determination made *in accordance with Rule 3012*"—rather than "under Rule 3012"—will be binding.

Finally, the Advisory Committee has added a sentence to the Committee Note for Rule 3015 to make clear that service under Rule 3015(h) does not necessarily require heightened Rule 7004 service. Another change to the Committee Note regarding Rule 3015(h) was made to point out that the option to serve a summary of a proposed plan modification remains in the rule.

Rule 4003

The published amendment to Rule 4003(d) would permit a lien avoidance proceeding under § 522(f) of the Bankruptcy Code to be commenced through a chapter 13 plan as well as by motion. Several comments raised questions about an ambiguity in the amended rule as to the requirements for service of a plan seeking lien avoidance. The Advisory Committee added clarifying language stating that only the affected creditors need to receive the heightened service provided under Rule 7004.

Rule 5009

Several comments raised concerns about the published amendment to Rule 5009(d). That provision would permit a debtor to request "an order determining that the lien on" property of the estate "has been satisfied." The final sentence of the amended rule provides further than an "order entered under this subdivision is effective as a release of the lien." The comments questioned whether the terms "satisfied" and "release" were used appropriately, while other comments questioned whether a bankruptcy court has the authority to enter the order contemplated by the amended rule.

The Advisory Committee decided to alter the amendment. The phrase "an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan" has been substituted in the first sentence of the rule. This language clarifies that the order would merely seek a declaration of the effects of a confirmed plan. Furthermore, the Advisory Committee decided to remove the final sentence as unnecessary.

Rule 7001

Few comments addressed the amendment to Rule 7001, which makes clear that an adversary proceeding is not needed for proceedings under Rule 3012 or 4003(d). Although a number of comments supported the amendment, the NCBJ expressed reservations. In particular, the NCBJ viewed Rule 3012 as addressing relief by motion, which would not be a "proceeding" that would need to be excluded from Rule 7001(2). The Advisory Committee understood the meaning of proceedings to be broader than adversary proceedings—in other words, something could be called a proceeding and not be categorized as an adversary proceeding. Accordingly, the additional clarity of amended Rule 7001 was deemed worthwhile.

The Advisory Committee decided to make a change to the wording of the amendment, however. The published amendment referred to “a proceeding to determine the validity, priority, or extent of a lien or other interest in property, not including a proceeding under Rule 3012 or Rule 4003(d).” The Advisory Committee concluded that it would be more accurate to substitute “but not a proceeding under Rule 3012 or Rule 4003(d)” at the end of the amended sentence.

Rule 9009

The published amendment to Rule 9009, which governs the use and alteration of Official Forms, would have effected significant changes to the current rule. In general, current Rule 9009 requires only substantial compliance with Official Forms and expressly provides that “[f]orms may be combined and their contents rearranged to permit economies in their use.” The published amendment to Rule 9009 is more restrictive and would require the use of Official Forms “without alteration, except as otherwise provided in these rules or in a particular Official Form.” This more restrictive version of Rule 9009 was prompted by the confluence of the Advisory Committee’s Forms Modernization Project and the publication of the chapter 13 plan form project. For each project, the Advisory Committee had devoted a great deal of attention to the format, sequencing, and presentation of information. In particular, the chapter 13 plan form requires nonstandard provisions to appear only in one portion of the form, and it would defeat the purpose of this feature if the form could be rearranged freely.

The amended rule drew approximately twenty comments. Many of the comments opposed the amended rule principally out of opposition to the chapter 13 plan form. Even comments that expressed support for the plan form, however, raised concerns about the amended rule. These comments read the amended rule as requiring nearly “pixel by pixel” reproduction of an Official Form, which would be impractical in many circumstances—particularly when forms are generated (as is increasingly common) by bankruptcy preparation software or by court electronic case filing systems. The Working Group and the Subcommittee on Forms, after reviewing the comments, agreed that the rule should permit a greater degree of flexibility in the use and reproduction of forms. The revised amendment would allow deviations from an Official Form if permitted by the national instructions for the form in addition to those deviations permitted by the Bankruptcy Rules or the form itself. It would also allow “minor changes not affecting wording or the order of presenting information” on a form. The five specified exceptions to the general rule in the published amendment have accordingly been pared down to three, and these are now given as examples of permissible “minor changes” to a form.

Action Item 7. Official Form 113

As noted above, the chapter 13 plan form generated a large number of public comments. Although few of the comments submitted early in the public comment period expressed outright opposition to adoption of any national plan form, later comments more commonly expressed general opposition to a national form. The expressions of opposition prompted the Working Group to question whether the Advisory Committee should consider abandoning the project or proposing a plan form merely as an option that might be adopted by individual bankruptcy courts

or judges. After thorough deliberation, the Working Group concluded that the chapter 13 plan form and rule amendments should be recommended as currently structured and that it would defeat the goal of greater uniformity in chapter 13 practice if the form were turned into an optional one.

At the same time, the Working Group proposed a number of significant changes to the published form in response to the concerns raised by the comments. The Advisory Committee agreed with the Working Group's recommended changes and seeks republication of the form in light of these changes.

Public Comments on the Plan Form

A significant number of negative comments criticized the plan form for diminishing the freedom of debtors to propose lawful chapter 13 plans and infringing upon the authority of bankruptcy judges to adjudicate and administer chapter 13 cases. This concern was—by far—the most commonly expressed criticism of the project. For example, a significant number of comments opposed the plan form because it presents the option (in a choice of checkboxes) for a debtor to make ongoing payments directly to secured creditors rather than through the “conduit” of a chapter 13 trustee. This point was made in concrete form by Chief Judge Robert Nugent (D. Kan.), on behalf of the bankruptcy judges of the district, who objected that the form would disrupt his court's policy of requiring debtors to make ongoing mortgage payments through the chapter 13 trustee—a policy that Chief Judge Nugent believes has led to the successful administration of chapter 13 cases in the district. Many comments from similar “conduit” districts echoed Chief Judge Nugent's concern. On the other hand, Judge S. Martin Teel (Bankr. D.D.C.) expressed the inverse concern—that the form gave debtors the option of making ongoing payments to secured creditors through the trustee, even though his court is not a conduit district.

The Working Group decided that this concern rested on a misapprehension of the purpose and function of the chapter 13 plan form. The form is merely that—a form. It is not, in itself, a plan. Rather, it presents features typically found in chapter 13 plans in an ordered sequence. Nothing in the form diminishes the debtor's ability to propose a plan of the debtor's choosing. Similarly, the form does not mandate that a court accept the debtor's choice of a particular option included on the form. The Working Group recommended the addition of an explicit warning to the form—as the first item of the form text—to remind debtors of this point, and the Advisory Committee accepted that recommendation. The proposed warning states: “This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district.”

Three other concerns were most commonly expressed by the public comments. First, a number of comments objected that the plan form would be too long and complex, which would mean increased attorney time (and cost) to complete the form, increased court time to review it, increased confusion and litigation, and a costly transition period from current practices. Second,

some comments objected that the form should *not* seek to promote greater uniformity, because local variations are valuable—and perhaps inevitable—in chapter 13. Third, comments raised the related concern that the plan form was an unwise attempt by the Advisory Committee to regionalize or nationalize consumer bankruptcy practice. The Advisory Committee concluded that these concerns, while understandable, were misplaced.

First, the length of the form as published would not reflect the length of the form when used to file a typical chapter 13 plan. The various parts of the form, as explicitly stated on the document, need not be reproduced if the debtor does not include information in a particular section. For that reason, the Advisory Committee intends to include in a revised committee note a partially “collapsed” form showing the length of a typical plan in practice. The Working Group also received feedback from “real world” implementations of the form. Debra Miller, a chapter 13 trustee (N.D. Ind.), reported in a comment and in testimony at the public hearing that her district had adopted the draft plan form a year ago. Although Ms. Miller provided suggestions for clarifying and streamlining the form, she explained that it had not led to confusion or an increase in litigation.

Second, the Advisory Committee continues to see great value in encouraging more uniformity in chapter 13 procedures. A national plan form would benefit debtors, creditors, and courts by simplifying the preparation and review of chapter 13 plans and by allowing lower cost software programs and legal education programs for attorneys practicing in chapter 13 cases. Similarly, although the Advisory Committee cannot abridge, enlarge, or modify substantive rights in bankruptcy, more uniform procedures would have the beneficial effect of encouraging the clarification of open questions of law in chapter 13 cases. Because current chapter 13 procedures across the country are so fragmented, an appeal in one case arising in a particular district has limited persuasive force elsewhere. Having a common plan form would thereby lead to greater clarity in the law governing chapter 13 cases.

Third, the Advisory Committee believes the concerns about regionalize or nationalized consumer bankruptcy practice are unwarranted. The Advisory Committee did not set out to restructure the consumer debtor bar. And it does not believe that any such restructuring would be the likely outcome of adopting a national plan form. Other areas of consumer debtor practice in which forms are more uniform (most significantly, in chapter 7) have not been transformed in the manner feared by these comments.

Changes to the Published Form

In addition to the changes discussed above, the Advisory Committee has altered a number of parts of the plan form. Three changes are particularly worthy of note. First, the revised plan form provides for greater flexibility as to the manner in which a debtor funds a chapter 13 plan, including the provision of payments by multiple “steps” of varying durations and the provision of more options concerning the commitment of a debtor’s tax refund. Second, the Advisory Committee altered Part 7 of the plan form, which sets forth the order of distribution of payments to creditors. As published, Part 7 listed payments of the trustee’s fee, followed by payments to

secured creditors, with the remaining spaces left blank. Part 7 generated a heavy volume of comments, with a split between those seeking a more detailed order of distributions, those seeking no order of distributions at all (in favor of having the trustee determine the order), and those seeking a completely blank order of distributions. The Advisory Committee decided to leave this part blank with the exception of the provision of payment of the trustee's fee. The revised Committee Note, however, now states that the debtor may choose to leave the order of distribution to the trustee's direction. Third, the Advisory Committee altered the signature box (Part 10). As published, this part of the plan form required only debtors' attorneys and pro se debtors to sign the form. On further reflection, the Advisory Committee has decided to make signatures by represented debtors optional. A number of comments noted that debtors' attorneys might want their clients to sign the plan, both to increase the evidentiary value of the plan in the proceedings and also to verify that the debtor has reviewed the plan's contents.

Republication of the Plan Form and Rule Amendments as a Package

The Advisory Committee wishes to republish both the plan form and rule amendments, with many members supporting the adoption of the rule amendments only in conjunction with a national plan form. The Committee recommends soliciting public comment on whether the form and rules should be considered as an integrated package. Two members of the Committee dissented from this aspect of the republication request.

B2. Rule and Form Amendments for Which Publication Is Sought

Action Item 8. Rules 1010, 1011, 1012, 2002

The Advisory Committee will seek permission to publish amendments to the Bankruptcy Rules in order to improve procedures for international bankruptcy cases. Under chapter 15 of the Bankruptcy Code, a representative of a foreign debtor may petition a United States court to recognize a foreign proceeding in a cross-border insolvency case. If the recognition petition is granted, certain provisions of the Bankruptcy Code will apply to assist the foreign representative in administering the debtor's assets or in pursuing other relief. Shortly after chapter 15 was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The explanation for these amendments requires a brief background on the chapter 15 process. Chapter 15 defines two categories of foreign proceeding. Section 1502(4) defines a "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the "center of its main interests." Section 1502(5), on the other hand, defines a "foreign nonmain proceeding," as a foreign proceeding (other than a foreign main proceeding) pending in a country

“where the debtor has an establishment.” Section 1517(c) requires that a petition for recognition be decided “at the earliest possible time” after notice and a hearing. Section 1520(a) provides that upon recognition of a foreign main proceeding, the automatic stay under § 362 applies to the debtor and the property of the debtor in the United States. With a foreign nonmain proceeding, however, the foreign representative must apply for a grant of “any appropriate relief,” including a stay of actions against the debtor and the property of the debtor. § 1521(a).

The Advisory Committee’s Subcommittee on Technology and Cross-Border Insolvency noted a number of oddities in the Bankruptcy Rules’ treatment of the two types of foreign proceedings. Rule 1010 requires the clerk to issue a summons for service when a petition for the recognition of a foreign *nonmain* proceeding is filed—but not when a petition for the recognition of a foreign main proceeding is filed. Yet Rule 1011, which governs responses to a petition for recognition of a foreign proceeding, appears to contemplate that service of the summons will be made in all cases. Rule 1011(b) provides that “[d]efenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 21 days *after service of the summons.*” (emphasis added). Thus, under Rule 1011(b), service of the summons triggers the time period for responding to a petition for recognition of a foreign main or nonmain proceeding, yet no summons issues with a foreign main proceeding under Rule 1010. Rule 2002(q) further complicates the picture. That rule requires service of at least 21 days’ notice of the hearing on a recognition petition. But the rule does not explicitly address when the court should set the hearing. This raises the concern that if the court must wait until the expiration of the response times under Civil Rule 12 (generally 21 days), as possibly indicated by Rule 1011(b), then an unnecessary delay may occur between the petition’s filing and the recognition hearing date. That delay would be contrary to the Code’s requirement of prompt adjudication of a petition for recognition. Rule 2002(q) also contains another gap. It does not address how courts should treat requests for provisional relief—a commonplace part of chapter 15 practice—in advance of a recognition hearing.

The Subcommittee concluded that the Bankruptcy Rules contain procedures that are ill suited for chapter 15 cases. The amendments would drop the requirement of issuing a summons after the filing of a petition for recognition—a requirement that appears to be honored in the breach in some courts entertaining chapter 15 cases. Procedures for objections and other responses to a petition would be governed by a new Rule 1012. Rule 2002(q) would be amended in three respects. First, the rule would expressly require a prompt hearing on a petition for recognition. Second, the rule would indicate the contents of the hearing notice. Third, the rule would permit the court to combine a hearing on provisional relief with the recognition hearing in a manner similar to that contemplated by Rule 65 of the Civil Rules (made applicable in bankruptcy under Rules 1018 and 7065). These changes are intended to ensure that the Bankruptcy Rules set forth more accurate and effective procedures for the adjudication of chapter 15 cases.

Acting on the Subcommittee’s recommendation, the Advisory Committee voted to seek permission to publish these amendments to the Bankruptcy Rules. The amendments would be

published together with a new form for chapter 15 petitions (Official Form 401), discussed separately in Action Item 11.

Action Item 9. Rule 3002.1 applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. It requires the creditor to give notice of any changes in the periodic payment amount and notice of any fees, expenses, or charges that are incurred after the bankruptcy case is filed. The proposed amendments would clarify when the rule applies and when its requirements cease.

Since the rule went into effect in 2011, a conflict in the case law has arisen over whether the rule applies to a case in which the debtor is not curing a prepetition mortgage default under the plan but is maintaining mortgage payments while the case is pending. The source of the confusion is the rule's reference to "claims . . . provided for under § 1322(b)(5) of the Code in the debtor's plan." That statutory provision authorizes a chapter 13 plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." Some courts have read that provision as not applying unless the debtor has defaulted on the mortgage prior to commencement of the chapter 13 case. As a result, they have held that the reporting obligations under Rule 3002.1 do not apply if no default is being cured. *See, e.g., In re Weigel*, 485 B.R. 327, 328 (Bankr. E.D. Va. 2012); *In re Walleth*, 2012 WL 4062657 at * 2 (Bankr. D. Vt. 2012). Other courts have interpreted § 1322(b)(5) as authorizing maintenance of mortgage payments even when there is no need to cure a default. Based on that view, they have applied Rule 3002.1 to cases with a maintenance-only plan. *See, e.g., In re Tollios*, 491 B.R. 886 (Bankr. N.D. Ill. 2013); *In re Cloud*, 2013 WL 441543 at * 2 (Bankr. S.D. Ga. 2013).

The Advisory Committee concluded unanimously that a creditor's obligations under Rule 3002.1 to keep a debtor informed about the status of a mortgage should apply whenever a chapter 13 plan provides for continuing payments on the mortgage while the bankruptcy case is pending. The goal of Rule 3002.1 is to allow a debtor to be current on a home mortgage at the end of a successful chapter 13 case. Whether or not there was a prepetition default, proper payment of the mortgage during the case requires accurate information about any changes in payment amounts and the assessment of any fees and charges. The Committee therefore acted positively on the suggestion of Bankruptcy Judge Carol Doyle (N.D. Ill.) (Suggestion 13-BK-E) that the rule be amended to clarify that it applies to any chapter 13 plan that provides for the maintenance of home mortgage payments. The proposed amendment would remove the reference to § 1322(b)(5) in subdivision (a) and add in its place the requirement that the plan "provides that either the trustee or the debtor will make contractual installment payments."

In proposing that amendment, the Advisory Committee is also attempting to resolve another case conflict—whether Rule 3002.1 applies only when the chapter 13 trustee makes the ongoing mortgage payments (sometimes incorrectly referred to as "payments under the plan") or whether the rule also applies when the debtor makes the mortgage payments directly (sometimes incorrectly referred to as "payments outside the plan"). The Committee's intent in promulgating

the rule was for the rule to apply in either situation, and the Committee Note so stated. Because a few courts have limited the rule's applicability to trustee-payment cases, however, the Committee voted unanimously to clarify in the proposed amendment that the rule applies to plans in which either the trustee or the debtor will maintain mortgage payments.

Finally, the Advisory Committee voted to propose an amendment of Rule 3002.1(a) to address an issue on which the rule is currently silent—when do the creditor's obligations under the rule cease? If during a chapter 13 case a creditor obtains relief from the automatic stay in order to foreclose on the home mortgage, there would generally be no reason to continue to inform the debtor about changes in payment amounts or assessment of fees, since payment will usually be discontinued. Based on the current rule's silence, however, some courts have concluded that there is no basis for relieving the creditor of its obligations under the rule in that situation. *See, e.g., In re Kraska*, 2012 WL 1267993 (Bankr. N.D. Ohio 2012); *In re Full*, 2012 Bankr. LEXIS 4704 (Bankr. D.S.C. 2012).

The Committee voted, with 3 dissents, to propose the addition of the following sentence at the end of Rule 3002.1(a): "Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence securing the claim." Members who opposed the amendment noted that in some cases debtors have a continuing need for the mortgage information because they will seek to cure their postpetition default or obtain a mortgage modification. A paragraph was added to the Committee Note to encourage courts in appropriate situations to be open to requests to continue the reporting requirements after stay relief is granted.

Action Item 10. Rule 9006(f) is proposed to be amended in response to a recommendation of the Standing Committee's CM/ECF Subcommittee. The amendment would eliminate the three-day extension to time periods when service is effected electronically. It would therefore parallel amendments to Civil Rule 6(d), which was presented to the Standing Committee at its January meeting, and Appellate Rule 26(c) and Criminal Rule 45(c), which are being proposed for publication at this meeting.

The Advisory Committee agreed with the CM/ECF Subcommittee's rationale for eliminating the three-day rule in the case of electronic service. Now that electronic service is widely used, reliable, and generally instantaneous, there is no reason to extend the time in which the party served must take action following service. Elimination of the three additional days when electronic service is used also facilitates day-of-the-week counting, which the Time Computation Project brought to the rules.

The Advisory Committee discussed whether the amendment should go beyond electronic service and either eliminate the three-day rule altogether or eliminate it for some additional methods of service. In the end the Committee voted unanimously to propose an amendment that is limited to electronic service. Members concluded that it is important to have uniformity in

how time is computed under the various federal rules, and the Committee therefore favored proposing an amendment that is consistent with the CM/ECF Subcommittee's recommendation.

Action Item 11. Official Form 401

The Advisory Committee will seek publication of an Official Form for chapter 15 petitions. The creation of the form arose from the ongoing work of the Forms Modernization Project. While drafting a new voluntary petition form for non-individual debtors, the FMP received comments suggesting that a separate chapter 15 petition form should be drafted. In particular, the U.S. Trustee Program recommended the creation of a separate form to allow the deletion of information on the voluntary petition form that is relevant only to chapter 15 cases.

A draft chapter 15 petition form, designated as Official Form 401, was presented to the Advisory Committee for preliminary discussion at its fall 2013 meeting. The Subcommittee on Technology and Cross-Border Insolvency then sought further input from a group of outside reviewers with expertise in chapter 15 cases. These reviewers—from judicial, academic, and practice backgrounds—noted a number of suggested changes to the draft form. On the whole, the reviewers' comments are positive and helpful, and the Subcommittee found a number of their suggested changes to be improvements that were incorporated into a revised draft. The Advisory Committee accepted the Subcommittee's recommendation and voted to seek publication of the form.

As described in Action Item 8, the Advisory Committee anticipates that the new petition form will be published together with the chapter 15-related amendments to the Bankruptcy Rules.

Action Item 12. Official Form 410A (currently Form 10A) is the Mortgage Proof of Claim Attachment. The form is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The form currently requires a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges that remain unpaid; and a statement of the amount necessary to cure any default as of the petition date. The Advisory Committee seeks publication for public comment of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts.

When the Advisory Committee was considering the promulgation of Official Form 10A, it heard from some commenters that a full or partial mortgage account history should be required. The Committee concluded then that a more summary form would better convey the necessary information, but it determined to reconsider the issue after a period of experience with the new form.

The Committee held a mini-conference of interested entities in September 2012. There was general agreement among participants on the following suggestions for revision of the attachment form:

- A detailed payment history should be attached to the proof of claim. The payment history should be in a form that can be automated.
- Disclosure requirements should be uniform nationwide; local variations should be prohibited.
- The proof of claim attachment should include the amount of the regular mortgage payment applicable as of the petition date.
- The proof of claim attachment should show the calculation of the total claim as of the petition date.

The Advisory Committee later created a Mortgage Forms Working Group to follow up on suggestions that emerged at the mini-conference. The Group consists of several members of the Committee, an invited bankruptcy judge, a chapter 13 trustee, and an attorney for a mortgage lender and servicer. The Working Group drafted a new attachment form and presented it to the Advisory Committee at the spring meeting, where it was unanimously approved for publication.

The new form would require a home mortgage claimant to provide a history of the loan account starting with the “First Date of Default.” As explained in the Committee Note and Instructions, that date is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable. The loan history would show when payments were due; when the debtor made payments and how those payments were applied; when fees and charges were incurred; and what the balances were for the various components of the loan after amounts were received or fees and charges were incurred. Advocates of requiring a loan history have stated that disclosure of this information would enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others.

From the mortgage claimant’s perspective, the proposed attachment form has the advantage of being in a format that can be automated, unlike the existing form that must be completed by hand. Outreach to various lenders indicated that automation of the form would be feasible for them. The pending amendments to Rule 9009 would require the uniform implementation of the new form in all districts, thereby allowing creditors to develop universally applicable software for form completion.

In addition to requiring a loan history, the proposed Form 410A would provide spaces for calculating the total amount of the debt and any prepetition arrearage. It also calls for the claimant to state the amount of the monthly mortgage payment as of the petition date.

The Advisory Committee requests that the proposed form be published this summer, along with its Instructions and a sample form that shows how the form would be completed in an illustrative case.

Action Item 13. The nearly final installment of the Forms Modernization Project.

The restyled forms for which the Advisory Committee is now seeking publication constitute the last major group of Official Forms that will be revised by the Forms Modernization Project (“FMP”).¹ This group of forms consists primarily of case opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also to be published are two revised individual debtor forms and the announcement of the proposed abrogation of two Official Forms.

Specifically, the modernized forms for which publication is sought are the following (in addition to the three forms that were separately discussed in Action Items 7, 11, and 12):

11A	General Power of Attorney (Abrogated)
11B	Special Power of Attorney (Abrogated)
106J	Schedule J: Your Expenses
106J-2	Schedule J-2: Expenses for Separate Household of Debtor 2
201	Voluntary Petition for Non-Individuals Filing for Bankruptcy
202	Declaration Under Penalty of Perjury for Non-Individual Debtors
204	Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders
205	Involuntary Petition Against a Non-Individual
206Sum	Summary of Assets and Liabilities for Non-Individuals
206A/B	Schedule A/B: Assets—Real and Personal Property
206D	Schedule D: Creditors Who Have Claims Secured by Property
206E/F	Schedule E/F: Creditors Who Have Unsecured Claims
206G	Schedule G: Executory Contracts and Unexpired Leases
206H	Schedule H: Codebtors
207	Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy
309A	Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Individuals or Joint Debtors)

¹ The forms that remain to be restyled are current Official Forms 25A (Plan of Reorganization in Small Business Case Under Chapter 11), 25B (Disclosure Statement in Small Business Case Under Chapter 11), 25C (Small Business Monthly Operating Report), and 26 (Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor’s Estate Holds a Substantial or Continuing Interest).

309B	Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Individuals or Joint Debtors)
309C	Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Corporations or Partnerships)
309D	Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Corporations or Partnerships)
309E	Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)
309F	Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)
309G	Notice of Chapter 12 Bankruptcy Case (For Individuals or Joint Debtors)
309H	Notice of Chapter 12 Bankruptcy Case (For Corporations or Partnerships)
309I	Notice of Chapter 13 Bankruptcy Case
312	Order and Notice for Hearing on Disclosure Statement
313	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined With Notice Thereof
314	Class [] Ballot for Accepting or Rejecting Plan of Reorganization
315	Order Confirming Plan
410	Proof of Claim
410S1	Notice of Mortgage Payment Change
410S2	Notice of Postpetition Mortgage Fees, Expenses, and Charges
416A	Caption (Full)
416B	Caption (Short Title)
416D	Caption for Use in Adversary Proceeding
424	Certification to Court of Appeals by All Parties

An instruction booklet for non-individuals is also included for comment.

Before the spring 2012 meeting of the Advisory Committee, the FMP adopted the following guidelines for drafting the non-individual debtor forms:

- Eliminate requests for information that pertain only to individuals.
- To the extent possible, parallel how businesses commonly keep their financial records.
- Include information identifying where and how the requested information departs from information maintained according to standard accounting practices.
- Provide better instructions about how to value assets listed in the schedules, and provide a valuation methodology that will allow people who commonly sign schedules to respond without needing expert asset valuations.
- Revise the secured debt schedule to clarify when debts are cross-collateralized and the relative priority of secured creditors.

- Require responsive information to be set out in the forms themselves and not simply included as attachments.
- Use a more open-ended response format, as compared to the draft individual debtor forms.
- Keep interdistrict variations to a minimum, particularly with respect to the mailing matrix.

The drafting of the modernized non-individual forms was done using an iterative approach. A drafting group of the FMP prepared drafts of the non-individual forms. Then, with assistance of Beth Wiggins and Molly Johnson from the Federal Judicial Center, research was done on ways in which the non-individual forms could be improved. They obtained input from the groups of professionals who reviewed the individual forms, as well as groups of chapter 11 attorneys, the National Association of Bankruptcy Trustees, representatives of the U.S. Trustee Program, a Western District of Michigan group assembled by Bankruptcy Judge Jeffrey Hughes, an Eastern District of California group assembled by Bankruptcy Judge Christopher Klein, and form software vendors. The Advisory Committee also had an opportunity to review the forms and make suggestions at its fall 2013 meeting. After additional revisions were made, the forms were presented to the Advisory Committee at the spring meeting. The Committee unanimously approved them for publication.

The proposed revisions to this group of forms consist primarily of creating separate case-opening forms for non-individual cases, renumbering all of the forms, and making changes to style and format. In addition, the Advisory Committee is proposing the changes noted below to a few of the forms in this group.

Official Forms 11A and 11B. The Committee is proposing the abrogation of these Official Forms and their replacement with Director's Forms. Parties routinely modify these power of attorney forms to conform to state law, the needs of the case, or local practice. There is no reason that the exact language of these forms needs to be used. Because the proposed amendment to Rule 9009 would restrict alteration of Official Forms, except as provided in the rules, form instructions, or in a particular Official Form, the Committee determined that the subject of these forms would be better handled by Director's Forms. The latter forms may be altered as needed, and their use is not mandatory unless required by a local rule.

Official Forms 106J and 106J-2. These forms are part of the debtors' schedules in a joint case. Official Form 106J-2 (Schedule J-2: Expenses for Separate Household of Debtor 2) is new. It would be used only in a joint case in which the spouses maintain separate households. Debtor 2's monthly expenses would be itemized and totaled on Form 106J-2, and then that total would be listed on line 22b of Form 106J (Schedule J: Your Expenses) to be used in the calculation of

the debtors' total monthly expenses. Form 106J would be amended to add line 22b and to include references to Official Form 106J-2 at lines 1 and 22b.

Combination of Forms. In four instances, the Advisory Committee has combined two existing forms into one. Official Form 206A/B (Schedule A/B: Assets—Real and Personal Property) is a combination of existing Forms 6A and 6B for use in non-individual cases. Similarly, Official Form 206E/F (Schedule E/F: Creditors Who Have Unsecured Claims) is a combination of existing Forms 6E and 6F for use in non-individual cases. Two sets of notices of a bankruptcy case filing were also merged. Official Form 309E (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) combines existing Forms 9E and 9E(Alt), and Official Form 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)) does the same for existing Forms 9F and 9F(Alt).

Publication of this last group of modernized forms this summer means that they could go into effect on December 1, 2015, if no further publication is required and the Judicial Conference approves them. The timing of the implementation of the next generation of the CM/ECF system, however, may require a delayed implementation of the modernized forms to ensure that it is technologically feasible to capture the data reported on them. For that reason the Advisory Committee suggests that the effective date of these forms and the ones discussed under Action Item 4 be December 1, 2015, or as soon thereafter as the available technology allows.

III. Information Items

A. Withdrawal of Rule 5005 Amendment. On the Advisory Committee's recommendation, the Standing Committee last August published an amendment to Rule 5005(a) to govern electronic signatures. As proposed, this national rule would have replaced local rules and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. That scanned signature could have been used with the same force and effect as an original signature, and retention of the original document with the wet signature would not have been required.

The rule was published with alternative provisions suggested by the CM/ECF Subcommittee for ensuring the integrity of a scanned signature. Alternative 1 deemed the filing attorney's act of filing the document and the scanned signature to certify that the signature was part of the original document, and Alternative 2 required the acknowledgment of a notary public that the scanned signature was part of the original document. The publication package contained a note that called attention to the alternative provisions and specifically sought comment on whether one of the provisions was preferable.

Nineteen comments were submitted on the Rule 5005(a) amendment. Everyone who commented on the alternatives preferred Alternative 1. Most of those comments explained the reasons for the preference without commenting more broadly on the desirability of the overall amendment. Seven comments expressed opposition to adoption of the amendment. Included in

that group was the detailed comment submitted by the Deputy Attorney General. Among the reasons for the commenters' opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents would require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement would make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult. Four of the comments gave suggestions for revising the wording or scope of the amendment.

Several of the comments favoring Alternative 1 stated that requiring the acknowledgment of a notary public would be at odds with 28 U.S.C. § 1746, which dispenses with notarization. Some also stated that the requirement would entail additional delay and expense and would be infeasible because many law offices no longer have notaries readily available. Clerks commented that Alternative 2 would impose additional work on the clerk's office, as they would be required to perform a new quality assurance step for each filing covered by the rule. The general view expressed was that Alternative 2 would be awkward, cumbersome, and a step backwards.

Commenters who said that using scanned signature pages would require more work than current procedures require appeared to be accustomed to using an s/ electronic signature for debtors, and they did not express any dissatisfaction with having to retain documents with an original signature. They said the current procedures work well and have streamlined the filing of documents in bankruptcy courts. A couple of these comments stated that some debtors' attorneys do not have scanners or do not know how to merge scanned and electronically created documents. One clerk questioned whether software packages allow the use of scanned pages and asserted that a majority of attorneys probably do not know how to file documents using the CM/ECF system. An attorney stated that filing a 50-page petition and related documents would require the scanning of a number of signature pages, which would be a burden on the filing attorney and the court. One comment stated that the clerk's office in her district has been discouraging the uploading of scanned signatures for years.

The main basis for the Department of Justice's opposition to the proposed rule was that eliminating the requirement for retaining original signatures would adversely affect the Department's ability to successfully prosecute bankruptcy crimes and to pursue civil enforcement actions for bankruptcy fraud and abuse. The Deputy Attorney General's comment was informed by a poll of federal prosecutors who are involved in prosecuting white collar crime. Ninety-two percent of respondents indicated that they saw no problem that needs fixing, and 57% said that eliminating the retention of original signatures would make their job of prosecuting bankruptcy crimes more difficult. They expressed concern that debtors' repudiation of signatures is more likely with electronic signatures and that proving that a signature belongs to the defendant would be more difficult. Circumstantial proof of authenticity would be required because the FBI will not provide conclusive expert testimony on handwriting analysis without the original signatures.

The Department of Justice comment also questioned the need for a change in the procedure regarding electronic signatures. The Deputy Attorney General argued that the adverse impact on law enforcement would outweigh the reasons given for the proposed amendment. He stated that any concern that the retention requirement could be inconsistent with a lawyer's duty to the client is unwarranted, that having different retention periods among the districts is no different than other local rule differences, and that the burden on attorneys to retain documents is a fairly constant one, as older documents can be destroyed each year as their retention period expires.

The issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF system constitute legally sufficient best evidence in the absence of an original signed document. In response to that request, in August 2012 the Committee on Court Administration and Case Management ("CACM") requested the various rules committees to consider creating "a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM's preferred approach was the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature.

After reviewing the comments submitted in response to publication, the Advisory Committee voted unanimously to withdraw the amendment to Rule 5005(a). Comments from attorneys did not indicate dissatisfaction with current procedures. No comment expressed relief that retention would no longer be required, and some attorneys said that the current procedures work well. While the concerns of the Department of Justice about existing procedures for the retention of documents with wet signatures had prompted the Committee's pursuit of an amendment to Rule 5005(a), the Department's current position is one of opposition to the proposed amendment. The Committee attached significant weight to the Department's views and concluded that, given the lack of indication of a need for change, the Committee should not proceed further with the amendment.

B. Announcement of New Advisory Committee Chair. The Advisory Committee welcomed the news that current Committee member Judge Sandra Ikuta (9th Cir.) will become its chair beginning on October 1.

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The draft minutes of the April 22-23, 2014 meeting of the Advisory Committee on Bankruptcy Rules will be distributed separately.

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APPENDIX A

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

Rule 9006. Computing and Extending Time

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER
RULE 5(b)(2)(D), (E), OR (F) F.R. CIV. P. When there is a right or requirement
to act or undertake some proceedings within a prescribed period after ~~service~~
being served and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.
Civ. P., three days are added after the prescribed period would otherwise expire
under Rule 9006(a).

* * * * *

COMMITTEE NOTE

Subdivision (f) is amended to conform to a corresponding amendment of
Civil Rule 6(d). The amendment clarifies that only the party that is served by
mail or under the specified provisions of Civil Rule 5—and not the party making
service—is permitted to add three days to any prescribed period for taking action
after service is made.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

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

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COMMITTEE NOTE

The amounts of the bankruptcy filing fees for various chapters listed on page one of the form were removed from the form. The correct fee amounts are listed on Director's Forms 200 and 201A where they can be updated as necessary without having to go through the official form amendment process.

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APPENDIX A.2

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is an amended filing

Official Form B 3A

Application for Individuals to Pay the Filing Fee in Installments

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

- Chapter 7
- Chapter 11
- Chapter 12
- Chapter 13

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay...

\$ _____	<input type="checkbox"/> With the filing of the petition	_____
	<input type="checkbox"/> On or before this date.....	MM / DD / YYYY
\$ _____	On or before this date.....	_____
		MM / DD / YYYY
\$ _____	On or before this date.....	_____
		MM / DD / YYYY
+ \$ _____	On or before this date.....	_____
		MM / DD / YYYY

Total \$ _____

◀ Your total must equal the entire fee for the chapter you checked in line 1.

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

x _____	x _____	x _____
Signature of Debtor 1	Signature of Debtor 2	Your attorney's name and signature, if you used one
Date _____	Date _____	Date _____
MM / DD / YYYY	MM / DD / YYYY	MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Chapter filing under:
 Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A), the court orders that:

The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

The debtor(s) must pay the filing fee according to the following terms:

You must pay... **On or before this date...**

\$ _____ _____
Month / day / year

\$ _____ _____
Month / day / year

\$ _____ _____
Month / day / year

+ \$ _____ _____
Month / day / year

Total

\$ _____

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

Month / day / year

By the court: _____
United States Bankruptcy Judge

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is an amended filing

Official Form B 3B

Application to Have the Chapter 7 Filing Fee Waived

12/14

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

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

- You
- Your spouse
- Your dependents

_____ How many dependents?

_____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.

If you have already filled out *Schedule I: Your Income*, see line 10 of that schedule.

That person's average monthly net income (take-home pay)

You \$ _____

Your spouse ... + \$ _____

Subtotal..... \$ _____

Subtract any non-cash governmental assistance that you included above. - \$ _____

Your family's average monthly net income Total..... \$ _____

3. Do you receive non-cash governmental assistance?

- No
- Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

- No
- Yes. Explain.

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.

Include amounts paid by any government assistance that you reported on line 2. \$

If you have already filled out Schedule J, Your Expenses, copy line 22 from that form.

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

- No
Yes. Identify who.....

Empty box for identifying family members.

8. Does anyone other than you regularly pay any of these expenses?

- No
Yes. How much do you regularly receive as contributions? \$ monthly

If you have already filled out Schedule I: Your Income, copy the total from line 11.

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

- No
Yes. Explain.....

Empty box for explaining expense changes.

Part 3: Tell the Court About Your Property

If you have already filled out Schedule A: Real Property (Official Form B 6A) and Schedule B: Personal Property (Official Form B 6B), attach copies to this application and go to Part 4.

10. How much cash do you have?

Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: \$

11. Bank accounts and other deposits of money?

Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

Table with columns: Institution name, Amount. Rows for Checking account, Savings account, and Other financial accounts.

12. Your home? (if you own it outright or are purchasing it)

Examples: House, condominium, manufactured home, or mobile home

Form fields for Number, Street, City, State, ZIP Code, Current value, and Amount you owe on mortgage and liens.

13. Other real estate?

Form fields for Number, Street, City, State, ZIP Code, Current value, and Amount you owe on mortgage and liens.

14. The vehicles you own?

Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Form fields for Make, Model, Year, Mileage, Current value, and Amount you owe on liens for multiple vehicles.

15. Other assets?

Describe the other assets:

Do not include household items and clothing.

[Empty box for describing other assets]

Current value: \$
Amount you owe on liens: \$

16. Money or property due you?

Who owes you the money or property?

How much is owed?

Do you believe you will likely receive payment in the next 180 days?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

[Lines for who owes money]

[Lines for amount owed]

No
Yes. Explain:

[Empty box for explanation]

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

- No
Yes. Whom did you pay? Check all that apply:
An attorney
A bankruptcy petition preparer, paralegal, or typing service
Someone else

How much did you pay? \$

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

- No
Yes. Whom do you expect to pay? Check all that apply:
An attorney
A bankruptcy petition preparer, paralegal, or typing service
Someone else

How much do you expect to pay? \$

19. Has anyone paid someone on your behalf for services for this case?

- No
Yes. Who was paid on your behalf? Check all that apply:
An attorney
A bankruptcy petition preparer, paralegal, or typing service
Someone else
Who paid? Check all that apply:
Parent
Brother or sister
Friend
Pastor or clergy
Someone else

How much did someone else pay? \$

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

- No
Yes. District When Case number
District When Case number
District When Case number

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

X Signature of Debtor 1 Date
X Signature of Debtor 2 Date

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Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(if known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B 3B), the court orders that the application is:

Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

Denied. The debtor must pay the filing fee according to the following terms:

<u>You must pay...</u>	<u>On or before this date...</u>
\$ _____	_____ / _____ / _____ Month / day / year
\$ _____	_____ / _____ / _____ Month / day / year
\$ _____	_____ / _____ / _____ Month / day / year
+ \$ _____	_____ / _____ / _____ Month / day / year
Total	_____

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

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COMMITTEE NOTE

The amount of the chapter 7 filing fee is no longer preprinted on the blank order attached to the form. If the request for a fee waiver is denied, and the court instead orders payment by installments, the court or clerk will prepare the order with correct fee amount.

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[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

Signature of attorney for appellant(s) (or appellant(s)
if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney
(or appellant(s) if not represented by an attorney):

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

Draft: May 10, 2013

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):

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COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

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[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

Signature

Date: _____

Print name of person signing certificate of compliance:

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COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

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Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

If you are filing under chapter 11, 12, or 13, do not fill out this form.

How to fill out these forms

Official Forms 22A-1 and 22A-2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims.

You must file 22A-1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

Similarly, *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) determines whether you may be exempted from the presumption of abuse because you do not have primarily consumer debts or because you have provided certain military or homeland defense services. If one of these exemptions applies, you should file a supplement, Form 22A-1Supp, and verify the supplement by completing Part 3 of Form 22A-1. If you qualify for an exemption, you are not required to fill out any part of Form 22A-1 other than the verification. If the exemptions do not apply, you should complete all of the parts of Form 22A-1 and file it without the supplemental form.

If you and your spouse are filing together, you and your spouse may file a single Form 22A-1. However, if an exemption on Form 22A-1Supp applies to only one of you, separate forms may be required.

11 U.S.C. § 707(b)(2)(C).

If your completed Form 22A-1 shows income above the median, you must file the second form, *Chapter 7 Means Test Calculation* (Official Form 22A-2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you are presumed to have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write \$0.

Information for completing the forms

To fill out several lines of the forms, you must look up information provided on websites or from other sources. For information to complete line 13 of Form 22A-1 and lines 6-15, 30, and 36 of Form 22A-2, go to: www.justice.gov/ust/eo/bapcpa/meanstesting.htm.

For the *Bankruptcy Basics* information referred to on line 36 of Form 22A-2, go to: www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx.

If you do not have a computer with internet access, you may be able to use a public computer at the bankruptcy clerk's office or at a public library.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

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

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(if known)

Check one box only as directed in this form and in Form 22A-1Supp:

1. There is no presumption of abuse.

2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A-2).

3. The Means Test does not apply now because of qualified military service but it could apply later.

Check if this is an amended filing

Official Form 22A-1

Chapter 7 Statement of Your Current Monthly Income

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
- Not married.** Fill out Column A, lines 2-11.
 - Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
 - Married and your spouse is NOT filing with you. You and your spouse are:**
 - Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
 - Living separately or are legally separated.** Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

	<i>Column A For you</i>	<i>Column B Debtor 2 or non-filing spouse</i>
2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____
5. Net income from operating a business, profession, or farm		
Gross receipts (before all deductions)	\$ _____	
Ordinary and necessary operating expenses	- \$ _____	
Net monthly income from a business, profession, or farm	\$ _____ Copy here →	\$ _____
6. Net income from rental and other real property		
Gross receipts (before all deductions)	\$ _____	
Ordinary and necessary operating expenses	- \$ _____	
Net monthly income from rental or other real property	\$ _____ Copy here →	\$ _____
7. Interest, dividends, and royalties	\$ _____	\$ _____

Column A For you Column B Debtor 2 or non-filing spouse

8. Unemployment compensation

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ...

For you ... \$ For your spouse ... \$

\$ \$

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.

\$ \$

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.

10a. \$ \$

10b. \$ \$

10c. Total amounts from separate pages, if any. +\$ +\$

11. Calculate your total current monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

\$ + \$ = \$ Total current monthly income

Part 2: Determine Whether the Means Test Applies to You

12. Calculate your current monthly income for the year. Follow these steps:

12a. Copy your total current monthly income from line 11 ... Copy line 11 here -> 12a. \$ x 12 12b. The result is your annual income for this part of the form. 12b. \$

13. Calculate the median family income that applies to you. Follow these steps:

Fill in the state in which you live. Fill in the number of people in your household. Fill in the median family income for your state and size of household. ... 13. \$ To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. How do the lines compare?

14a. Line 12b is less than or equal to line 13. On the top of page 1, check box 1, There is no presumption of abuse. Go to Part 3. 14b. Line 12b is more than line 13. On the top of page 1, check box 2, The presumption of abuse is determined by Form 22A-2. Go to Part 3 and fill out Form 22A-2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

X Signature of Debtor 1

X Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 22A-2.

If you checked line 14b, fill out Form 22A-2 and file it with this form.

Fill in this information to identify your case:

Debtor 1	_____	_____	_____
	First Name	Middle Name	Last Name
Debtor 2 (Spouse, if filing)	_____	_____	_____
	First Name	Middle Name	Last Name
United States Bankruptcy Court for the:	_____		District of _____
			(State)
Case number (If known)	_____		

 Check if this is an amended filing
Official Form 22A–1Supp**Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14**

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.” Make sure that your answer is consistent with the “Nature of Debts” box on page 1 of the *Voluntary Petition* (Official Form 1).
- No. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse*, and sign Part 3. Then submit this supplement with the signed Form 22A-1.
- Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))?
- No. Go to line 3.
- Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1).
- No. Go to line 3.
- Yes. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse*, and sign Part 3. Then submit this supplement with the signed Form 22A-1.
3. **Are you or have you been a Reservist or member of the National Guard?**
- No. Complete Form 22A-1. Do not submit this supplement.
- Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)
- No. Complete Form 22A-1. Do not submit this supplement.
- Yes. Check any one of the following categories that applies:
- I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty.
- I was called to active duty after September 11, 2001**, for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.
- I am performing a homeland defense activity for at least 90 days.**
- I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 22A-1. On the top of page 1 of Form 22A-1, check box 1, *There is no presumption of abuse*, and sign Part 3. Then submit this supplement with the signed Form 22A-1. You are not required to fill out the rest of Official Form 22A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(if known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

- 1. There is no presumption of abuse.
 - 2. There is a presumption of abuse.
- Check if this is an amended filing

Official Form 22A-2 Chapter 7 Means Test Calculation

12/14

To fill out this form, you will need your completed copy of *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1).

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

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** Copy line 11 from Official Form 22A-1 here → 1. \$ _____

2. **Did you fill out Column B in Part 1 of Form 22A-1?**

- No. Fill in \$0 on line 3d.
- Yes. Is your spouse filing with you?
 - No. Go to line 3.
 - Yes. Fill in \$0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

On line 11, Column B of Form 22A-1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

- No. Fill in 0 on line 3d.
- Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	Fill in the amount you are subtracting from your spouse's income
3a. _____	\$ _____
3b. _____	\$ _____
3c. _____	+ \$ _____
3d. Total. Add lines 3a, 3b, and 3c.	\$ _____

Copy total here → 3d. — \$ _____

4. **Adjust your current monthly income.** Subtract line 3d from line 1.

\$ _____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 22A-1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to you, it means both you and your spouse if Column B of Form 22A-1 is filled in.

5. The number of people used in determining your deductions from income

Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

[Empty box for line 5]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. Food, clothing, and other items: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. \$ _____

7. Out-of-pocket health care allowance: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person \$ _____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. \$ _____ Copy line 7c here -> \$ _____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person \$ _____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. \$ _____ Copy line 7f here -> + \$ _____

7g. Total. Add lines 7c and 7f..... \$ _____ Copy total here -> 7g. \$ _____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- Housing and utilities – Insurance and operating expenses
- Housing and utilities – Mortgage or rent expenses

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. \$ _____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. \$ _____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Average monthly payment
_____	\$ _____
_____	\$ _____
_____	+ \$ _____
9b. Total average monthly payment	\$ _____

Copy line 9b here → - \$ _____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense. Subtract line 9b (total average monthly payment) from line 9a (mortgage or rent expense). If this amount is less than \$0, enter \$0. 9c. \$ _____ Copy line 9c here → \$ _____

10. If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim. \$ _____

Explain why: _____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- 0. Go to line 14.
- 1. Go to line 12.
- 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. \$ _____

13. Vehicle ownership or lease expense: Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 Describe Vehicle 1: _____

13a. Ownership or leasing costs using IRS Local Standard 13a. \$ _____

13b. Average monthly payment for all debts secured by Vehicle 1. Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Table with 2 columns: Name of each creditor for Vehicle 1, Average monthly payment

Copy 13b here - \$ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense Subtract line 13b from line 13a. If this amount is less than \$0, enter \$0. 13c. \$ Copy net Vehicle 1 expense here

Vehicle 2 Describe Vehicle 2: _____

13d. Ownership or leasing costs using IRS Local Standard 13d. \$ _____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Table with 2 columns: Name of each creditor for Vehicle 2, Average monthly payment

Copy 13e here - \$ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense Subtract line 13e from 13d. If this amount is less than \$0, enter \$0. 13f. \$ Copy net Vehicle 2 expense here

14. Public transportation expense: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the Public Transportation expense allowance regardless of whether you use public transportation. \$

15. Additional public transportation expense: If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for Public Transportation. \$

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. \$ _____

Do not include real estate, sales, or use taxes.

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. \$ _____

Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings.

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. \$ _____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. \$ _____

Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

20. **Education:** The total monthly amount that you pay for education that is either required:
 as a condition for your job, or
 for your physically or mentally challenged dependent child if no public education is available for similar services. \$ _____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. \$ _____
Do not include payments for any elementary or secondary school education.

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. \$ _____
Payments for health insurance or health savings accounts should be listed only in line 25.

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + \$ _____

Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of Official Form 22A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.** \$ _____
Add lines 6 through 23.

Additional Expense Deductions

These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance \$ _____
Disability insurance \$ _____
Health savings account + \$ _____

Total \$ _____ Copy total here → \$ _____

Do you actually spend this total amount?

No. How much do you actually spend? \$ _____
 Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. \$ _____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. \$ _____
By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.
If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. \$ _____
You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than \$156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. \$ _____
You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.
* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. \$ _____
To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.
You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). \$ _____

32. **Add all of the additional expense deductions.** Add lines 25 through 31. \$ _____

Deductions for Debt Payment

33. For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Mortgages on your home:

33a. Copy line 9b here ➔ **Average monthly payment**
\$ _____

Loans on your first two vehicles:

33b. Copy line 13b here. ➔ \$ _____

33c. Copy line 13e here. ➔ \$ _____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d. _____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes	\$ _____
33e. _____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes	\$ _____
33f. _____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes	+ \$ _____
33g. Total average monthly payment. Add lines 33a through 33f.....			<div style="border: 1px solid black; padding: 2px;">\$ _____</div> Copy total here ➔ <div style="border: 1px solid black; padding: 2px;">\$ _____</div>

34. Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?

- No. Go to line 35.
- Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount	Monthly cure amount
_____	_____	\$ _____ ÷ 60 =	\$ _____
_____	_____	\$ _____ ÷ 60 =	\$ _____
_____	_____	\$ _____ ÷ 60 =	+ \$ _____
Total			<div style="border: 1px solid black; padding: 2px;">\$ _____</div> Copy total here ➔ \$ _____

35. Do you owe any priority claims such as a priority tax, child support, or alimony – that are past due as of the filing date of your bankruptcy case? 11 U.S.C. § 507.

- No. Go to line 36.
- Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims \$ _____ ÷ 60 = \$ _____

36. Are you eligible to file a case under Chapter 13? 11 U.S.C. § 109(e). For more information, go online using the link for Bankruptcy Basics specified in the separate instructions for this form. Bankruptcy Basics may also be available at the bankruptcy clerk's office.

- No. Go to line 37.
Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13 \$

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts... X

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form.

Average monthly administrative expense if you were filing under Chapter 13 \$ Copy total here \$

37. Add all of the deductions for debt payment. Add lines 33g through 36.

\$

Total Deductions from Income

38. Add all of the allowed deductions.

Copy line 24, All of the expenses allowed under IRS expense allowances \$

Copy line 32, All of the additional expense deductions \$

Copy line 37, All of the deductions for debt payment + \$

Total deductions \$ Copy total here \$

Part 3: Determine Whether There Is a Presumption of Abuse

39. Calculate monthly disposable income for 60 months

39a. Copy line 4, adjusted current monthly income \$

39b. Copy line 38, Total deductions - \$

39c. Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a. \$ Copy line 39c here \$

For the next 60 months (5 years) x 60

39d. Total. Multiply line 39c by 60. 39d. \$ Copy line 39d here \$

40. Find out whether there is a presumption of abuse. Check the box that applies:

- The line 39d is less than \$7,475*. On the top of page 1 of this form, check box 1, There is no presumption of abuse. Go to Part 5.
The line 39d is more than \$12,475*. On the top of page 1 of this form, check box 2, There is a presumption of abuse. You may fill out Part 4 if you claim special circumstances. Then go to Part 5.
The line 39d is at least \$7,475*, but not more than \$12,475*. Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. Fill in the amount of your total nonpriority unsecured debt. If you filled out A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules (Official Form 6), you may refer to line 3b on that form.

38a. \$

x .25

41b. 25% of your total nonpriority unsecured debt. 11 U.S.C. § 707(b)(2)(A)(i)(I) Multiply line 41a by 0.25.

Calculation box with dollar signs and an arrow pointing to a result box.

42. Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.

Check the box that applies:

- Line 39d is less than line 41b. On the top of page 1 of this form, check box 1, There is no presumption of abuse. Go to Part 5.
Line 39d is equal to or more than line 41b. On the top of page 1 of this form, check box 2, There is a presumption of abuse. You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative? 11 U.S.C. § 707(b)(2)(B).

- No. Go to Part 5.
Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Table with 2 columns: Give a detailed explanation of the special circumstances, Average monthly expense or income adjustment. Includes four rows for data entry.

Part 5: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

Signature of Debtor 1

Signature of Debtor 2

Date MM/DD / YYYY

Date MM/DD / YYYY

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Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court

12/01/14

If you are filing under chapter 7, 12, or 13, do not fill out this form.

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write \$0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form

uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

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

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.

- Not married.** Fill out Column A, lines 2-11.
- Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
- Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

<i>Column A</i> For Debtor 1	<i>Column B</i> Debtor 2 or non-filing spouse
--	---

<p>2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).</p> <p>3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.</p> <p>4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.</p> <p>5. Net income from operating a business, profession, or farm</p> <p>Gross receipts (before all deductions) \$ _____</p> <p>Ordinary and necessary operating expenses - \$ _____</p> <p>Net monthly income from a business, profession, or farm \$ _____</p>	<p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p>	<p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p>
<p>6. Net income from rental and other real property</p> <p>Gross receipts (before all deductions) \$ _____</p> <p>Ordinary and necessary operating expenses - \$ _____</p> <p>Net monthly income from rental or other real property \$ _____</p>	<p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p>	<p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p>

Column A For Debtor 1	Column B Debtor 2 or non-filing spouse
--------------------------	--

7. **Interest, dividends, and royalties**

\$ _____	\$ _____
----------	----------

8. **Unemployment compensation**

\$ _____	\$ _____
----------	----------

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓

For you \$ _____

For your spouse..... \$ _____

9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.

\$ _____	\$ _____
----------	----------

10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.

10a. _____ \$ _____

\$ _____	\$ _____
----------	----------

10b. _____ \$ _____

\$ _____	\$ _____
----------	----------

10c. Total amounts from separate pages, if any.

+ \$ _____	+ \$ _____
------------	------------

11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

\$ _____	+	\$ _____	=	\$ _____
----------	---	----------	---	----------

Total average monthly income

Part 2: Deduct any applicable marital adjustment

12. **Copy your total average monthly income from line 11.**

\$ _____

13. **Calculate the marital adjustment.** Check one:

- You are not married. Fill in 0 in line 13d.
- You are married and your spouse is filing with you. Fill in 0 in line 13d.
- You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 on line 13d.

13a. _____ \$ _____

\$ _____	\$ _____
----------	----------

13b. _____ \$ _____

\$ _____	\$ _____
----------	----------

13c. _____ + \$ _____

+ \$ _____	+ \$ _____
------------	------------

13d. Total \$ _____

\$ _____	Copy here. →	13d. _____	=	\$ _____
----------	--------------	------------	---	----------

14. **Your current monthly income.** Subtract line 13d from line 12.

14. \$ _____

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

x _____
Signature of Debtor 1

x _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

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Official Forms 22C–1 and 22C–2

Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court

12/01/14

If you are filing under chapter 7, 11, or 12, do not fill out this form.

How to Fill Out these Forms

Official Forms 22C–1 and 22C–2 determine the commitment period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C–1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C–1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 22C–1 also will determine your applicable commitment period—the time period for making payments to your creditors, unless the court orders otherwise.

If your income is above the median, you must file the second form, 22C–2, *Chapter 13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Generally, if you and your spouse are filing together, you should file one statement together.

Understand the terms used in these forms

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Information for completing the forms

To fill out several lines of the forms, you must look up information provided on websites or from other sources. For information to complete line 16c of Form 22C-1 and lines 6-15, 30, and 36 of Form 22C-2, go to: www.justice.gov/ust/eo/bapcpa/meanstesting.htm.

If you do not have a computer with internet access, you may be able to use a public computer at the bankruptcy clerk's office or at a public library.

Things to remember when filling out this form

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

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
 (If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).

2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).

3. The commitment period is 3 years.

4. The commitment period is 5 years.

Check if this is an amended filing

Official Form 22C-1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/14

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

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
- Not married.** Fill out Column A, lines 2-11.
- Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

	Column A For Debtor 1	Column B Debtor 2 or non-filing spouse
2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____
5. Net income from operating a business, profession, or farm		
Gross receipts (before all deductions)	\$ _____	
Ordinary and necessary operating expenses	– \$ _____	
Net monthly income from a business, profession, or farm	\$ _____	\$ _____
	Copy here →	
6. Net income from rental and other real property		
Gross receipts (before all deductions)	\$ _____	
Ordinary and necessary operating expenses	– \$ _____	
Net monthly income from rental or other real property	\$ _____	\$ _____
	Copy here →	

Column A For Debtor 1	Column B Debtor 2 or non-filing spouse
----------------------------------	---

7. **Interest, dividends, and royalties** \$ _____
8. **Unemployment compensation** \$ _____
- Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓
- For you \$ _____
- For your spouse \$ _____
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. \$ _____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.
- 10a. _____ \$ _____
- 10b. _____ \$ _____
- 10c. Total amounts from separate pages, if any. + \$ _____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

\$ _____	\$ _____
\$ _____	\$ _____
\$ _____	\$ _____
\$ _____	\$ _____
+ \$ _____	+ \$ _____
\$ _____	+ \$ _____ = \$ _____
	Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** \$ _____

13. **Calculate the marital adjustment.** Check one:
- You are not married. Fill in 0 in line 13d.
- You are married and your spouse is filing with you. Fill in 0 in line 13d.
- You are married and your spouse is not filing with you.
- Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.
- In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.
- If this adjustment does not apply, enter 0 on line 13d.
- 13a. _____ \$ _____
- 13b. _____ \$ _____
- 13c. _____ + \$ _____
- 13d. Total \$ _____ Copy here. → 13d. _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. \$ _____

15. **Calculate your current monthly income for the year.** Follow these steps:
- 15a. Copy line 14 here → 15a. \$ _____
- Multiply line 15a by 12 (the number of months in a year). **x 12**
- 15b. The result is your current monthly income for the year for this part of the form. 15b. \$ _____

16. Calculate the median family income that applies to you. Follow these steps:

- 16a. Fill in the state in which you live. _____
- 16b. Fill in the number of people in your household. _____
- 16c. Fill in the median family income for your state and size of household.....16c. \$ _____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. How do the lines compare?

- 17a. Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Disposable Income* (Official Form 22C-2).
- 17b. Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3 and fill out Calculation of Disposable Income (Official Form 22C-2).** On line 35 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. §1325(b)(4)

18. Copy your total average monthly income from line 11. 18. \$ _____

19. Deduct the marital adjustment if it applies. If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.

If the marital adjustment does not apply, fill in 0 on line 19a. 19a. — \$ _____

Subtract line 19a from line 18.

19b. \$ _____

20. Calculate your current monthly income for the year. Follow these steps:

20a. Copy line 19b..... 20a. \$ _____

Multiply by 12 (the number of months in a year). **x 12**

20b. The result is your current monthly income for the year for this part of the form. 20b. \$ _____

20c. Copy the median family income for your state and size of household from line 16c. \$ _____

21. How do the lines compare?

- Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.
- Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

x _____
Signature of Debtor 1

x _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 22C-2.

If you checked 17b, fill out Form 22C-2 and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check if this is an amended filing

Official Form 22C-2

Chapter 13 Calculation of Your Disposable Income

12/14

To fill out this form, you will need your completed copy of *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Official Form 22C-1)*.

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

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 22C-1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C-1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. The number of people used in determining your deductions from income

Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. Food, clothing, and other items: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items.

\$ _____

7. Out-of-pocket health care allowance: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person \$

7b. Number of people who are under 65 X

7c. Subtotal. Multiply line 7a by line 7b. \$ Copy line 7c here -> \$

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person \$

7e. Number of people who are 65 or older X

7f. Subtotal. Multiply line 7d by line 7e. \$ Copy line 7f here -> + \$

7g. Total. Add lines 7c and 7f. \$ Copy total here -> 7g. \$

Local Standards

You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- Housing and utilities - Insurance and operating expenses
Housing and utilities - Mortgage or rent expenses

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. Housing and utilities - Insurance and operating expenses: Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. \$

9. Housing and utilities - Mortgage or rent expenses:

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. \$

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Table with 2 columns: Name of the creditor, Average monthly payment. Includes blank rows for entry.

9b. Total average monthly payment \$ Copy line 9b here -> \$ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (total average monthly payment) from line 9a (mortgage or rent expense). If this number is less than \$0, enter \$0. \$ Copy 9c here -> \$

10. If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim. \$

Explain why: _____

11. Local transportation expenses: Check the number of vehicles for which you claim an ownership or operating expense.

- 0. Go to line 14.
1. Go to line 12.
2 or more. Go to line 12.

12. Vehicle operation expense: Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the Operating Costs that apply for your Census region or metropolitan statistical area. \$

13. Vehicle ownership or lease expense: Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 Describe Vehicle 1: [Blank line]

13a. Ownership or leasing costs using IRS Local Standard 13a. \$

13b. Average monthly payment for all debts secured by Vehicle 1. Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Table with 2 columns: Name of each creditor for Vehicle 1, Average monthly payment

\$ Copy13b here - \$ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense Subtract line 13b from line 13a. If this number is less than \$0, enter \$0. 13c. \$ Copy net Vehicle 1 expense here \$

Vehicle 2 Describe Vehicle 2: [Blank line]

13d. Ownership or leasing costs using IRS Local Standard 13d. \$

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Table with 2 columns: Name of each creditor for Vehicle 2, Average monthly payment

\$ Copy here - \$ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense Subtract line 13e from 13d. If this number is less than \$0, enter \$0. 13f. \$ Copy net Vehicle 2 expense here \$

14. Public transportation expense: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the Public Transportation expense allowance regardless of whether you use public transportation. \$

15. Additional public transportation expense: If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for Public Transportation. \$

Other Necessary Expenses

In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

- 16. Taxes: The total monthly amount that you actually pay for federal, state and local taxes...
17. Involuntary deductions: The total monthly payroll deductions that your job requires...
18. Life insurance: The total monthly premiums that you pay for your own term life insurance...
19. Court-ordered payments: The total monthly amount that you pay as required by the order of a court...
20. Education: The total monthly amount that you pay for education that is either required...
21. Childcare: The total monthly amount that you pay for childcare...
22. Additional health care expenses, excluding insurance costs: The monthly amount that you pay for health care...
23. Optional telephones and telephone services: The total monthly amount that you pay for telecommunication services...
24. Add all of the expenses allowed under the IRS expense allowances.

Additional Expense Deductions

These are additional deductions allowed by the Means Test. Note: Do not include any expense allowances listed in lines 6-24.

- 25. Health insurance, disability insurance, and health savings account expenses. The monthly expenses for health insurance, disability insurance, and health savings accounts...
26. Continuing contributions to the care of household or family members. The actual monthly expenses that you will continue to pay...
27. Protection against family violence. The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family...

28. Additional home energy costs. Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. \$ _____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. Education expenses for dependent children who are younger than 18. The monthly expenses (not more than \$156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. \$ _____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. Additional food and clothing expense. The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. \$ _____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. Continuing charitable contributions. The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)3 and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

32. Add all of the additional expense deductions.

Add lines 25 through 31.

\$ []

Deductions for Debt Payment

33. For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Average monthly payment

Mortgages on your home

33a. Copy line 9b here → \$ _____

Loans on your first two vehicles

33b. Copy line 13b here. → \$ _____

33c. Copy line 13e here. → \$ _____

Table with 3 columns: Name of each creditor for other secured debt, Identify property that secures the debt, Does payment include taxes or insurance?

33d. _____ No Yes \$ _____

33e. _____ No Yes \$ _____

33f. _____ No Yes + \$ _____

33g. Total average monthly payment. Add lines 33a through 33f..... \$ [] Copy total here → \$ _____

34. Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?

- No. Go to line 35.
Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the cure amount). Next, divide by 60 and fill in the information below.

Table with 4 columns: Name of the creditor, Identify property that secures the debt, Total cure amount, Monthly cure amount. Includes a Total row with a box for the amount and a 'Copy total here' arrow.

35. Do you owe any priority claims—such as a priority tax, child support, or alimony—that are past due as of the filing date of your bankruptcy case? 11 U.S.C. § 507.

- No. Go to line 36.
Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. \$ _____ ÷ 60 \$ _____

36. Projected monthly Chapter 13 plan payment

\$ _____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).

x _____

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

Average monthly administrative expense \$ _____ Copy total here -> \$ _____

37. Add all of the deductions for debt payment. Add lines 33g through 36.

\$ _____

Total Deductions from Income

38. Add all of the allowed deductions.

Copy line 24, All of the expenses allowed under IRS expense allowances..... \$ _____

Copy line 32, All of the additional expense deductions..... \$ _____

Copy line 37, All of the deductions for debt payment..... + \$ _____

Total deductions

\$ _____ Copy total here -> \$ _____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. Copy your total current monthly income from line 14 of Form 22C-1, Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period. \$

40. Fill in any reasonably necessary income you receive for support for dependent children. The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. \$

41. Fill in all qualified retirement deductions. The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). \$

42. Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A). Copy line 38 here \$

43. Deduction for special circumstances. If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Table with 2 columns: Describe the special circumstances, Amount of expense. Rows 43a, 43b, 43c, 43d. Total. Add lines 43a through 43c. Copy 43d here + \$

44. Total adjustments. Add lines 40 and 43d. \$ Copy total here - \$

45. Calculate your monthly disposable income under § 1325(b)(2). Subtract line 44 from line 39. \$

Part 3: Change in Income or Expenses

46. Change in income or expenses. If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Table with 6 columns: Form, Line, Reason for change, Date of change, Increase or decrease?, Amount of change. Rows for 22C-1 and 22C-2 with checkboxes for Increase/Decrease.

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

x _____
Signature of Debtor 1

x _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the “means test” forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor’s current monthly income and compares that calculation to the median income for households of the same size in the debtor’s state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter 13 Calculation of Your Disposable Income*, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, “Other Necessary Expense” items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court’s decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor’s projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor’s actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor’s life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone

expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and utilities—Insurance and operating expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well for premium payments on the debtor's own policies.

Changes Made After Publication

Official Form 22A-1

The statement for Option 2 at the top of the form was changed to “The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A-2).”

The title of Official Form 22A-1Supp, “Statement of Exemption from Presumption of Abuse Under §707(b)(2)” was added to the text above Part 1.

A reference at line 13 to a web address was removed and added to the separate instructions.

References in Part 3 to Official Form 22A-2 were shortened to the form number.

Official Form 22A-1Supp

Stylistic changes were made.

Official Form 22A-2

References throughout the form to web addresses were removed and added to the separate instructions.

The instruction and check boxes at line 9b pertaining to whether the listed payments include taxes or insurance was removed.

Line 10 was reworded.

The title of line 23 was changed to “Optional telephones and telephone services” and stylistic changes were made.

At line 33, the instruction “Do not deduct mortgage payments previously deducted as an operating expense at line 9” was removed.

A direction was added to second sentence under the “yes” check box at line 36 explaining that chapter 13 expense multipliers for districts in Alabama and North Carolina are maintained by the Administrative Office of the United States Courts, not the Executive Office for United States Trustees.

Official Form 22B

The heading for Part 1 was changed to “Calculate Your Average Monthly income.”

Stylistic changes were made to the instructions after the check boxes in line 1.

Line 11 was changed to “Calculate your total average monthly income.”

Part 2, “Deduct any applicable marital adjustment,” consisting of lines 12 – 14, was added.

Official Form 22C-1

Stylistic changes were made to the instructions after the check boxes in line 1.

A reference at line 16c to a web address was removed and added to the separate instructions.

References in Part 4 to Official Form 22-C2 were shortened to the form number.

Official Form 22C-2

References throughout the form to web addresses were removed and added to the separate instructions.

Line 10 was reworded.

The title of line 23 was changed to “Optional telephones and telephone services” and stylistic changes were made.

A direction was added at line 36 explaining that chapter 13 expense multipliers for districts in Alabama and North Carolina are maintained by the Administrative Office of the United States Courts, not the Executive Office for United States Trustees.

Summary of Public Comment on Official Forms 22A-1 and 22A-1Supp.

13-BK-42. Henry Sommer, NACBA. The language in the box at the upper right hand corner of 22A-1 should be revised to recognize that the debtor may disagree with the way the means test is calculated on the forms.

Form 22A-1 is also inaccurate in stating that it is a calculation of current monthly income (CMI) because CMI does not include income of a nondebtor spouse unless it used for the household expenses of the debtor or the debtor’s dependents.

Form 22A-1 repeats an error in the current form by including nondebtor spousal income in calculating the section 707(b)(7) exemption.

As to the Form 22A-1 supplement, if a debtor completes this form, at least if a verification is added to it, why is Form 22A-1 necessary at all? The NACBA also does not believe an exemption from the means test for reservists or National Guard members is only temporary.

13-BK-56. Scott Ford, Bankruptcy Clerks’ Advisory Group. All references on the forms that encourage the debtor to “ask for help at the clerks’ office of the bankruptcy court” should be replaced with “consult your attorney.”

13-BK-59. National Conference of Bankruptcy Judges.

Suggested several formatting, punctuation and stylistic changes.

Summary of Public Comment on Official Form 22A-2

13-BK-42. Henry Sommer, NACBA. Form 22A-2 continues the error in the current forms of providing no space for a debtor to deduct other expenses permitted by the Internal Revenue Service Expense standards.

Line 33. What is meant by “Do not deduct mortgage payments previously deducted as an operating expense in Line 9”? If we don’t understand it, no pro se debtor will understand it.

13-BK-56. Scott Ford, Bankruptcy Clerks’ Advisory Group. All references on the forms that encourage the debtor to “ask for help at the clerks’ office of the bankruptcy court” should be replaced with “consult your attorney.”

Summary of Public Comment on Official Form 22B

13-BK-42. Henry Sommer, NACBA. This form contains the same error as Official Form 22A-1. Although labeled as a calculation of current monthly income, it does not take into account the “marital deduction” necessary to calculate the debtor’s current monthly income when there is a nonfiling spouse whose income is listed in Column B. Without that deduction, the calculation simply does not conform to the definition of “current monthly income.”

Summary of Public Comment on Official Forms 22C-1 and 22C-2

13-BK-24. Chapter 13 trustees, Central District of California. The revised form at line 5 and possibly line 6 perpetuate an error in the current form by allowing debtors to deduct business expenses before determining the applicable commitment period, contrary to case law in many districts. See, *In re Weigand*, 386 B.R. 238 (9th Cir. B.A.P. 2008). Same issue raised by **13-BK- 35**, Chapter 13 trustee, Robert G. Drummond, **13-BK-153**, Attorney James M. Davis.

13-BK-24. Chapter 13 trustees, Central District of California. The form continues to tie the vehicle ownership expense to the IRS Local Standards, in violation of 11 U.S.C. 707(b)(2)(A)(ii)(I) which provides: “. . . Notwithstanding any other provision of this clause, the monthly expenses of the debtor

[to be determined by reference to the IRS Standards] shall not include any payments for debts.”

13-BK- 35, Chapter 13 trustee, Robert G. Drummond. Part 2, Line 41 of Form 22C-2 allows the debtor to deduct ongoing retirement plan contributions "as specified in 11 U.S.C. § 541(b)(7)." The Ninth Circuit Bankruptcy Appellate Panel in *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (9th Cir. B.A.P. 2012) held that deductions for a debtor's post-petition voluntary 401(k) contributions are not allowed by Section 541(b)(7) when calculating projected disposable income. The proposed Form 22C-1 incorrectly instructs debtors to deduct voluntary contributions to retirement plans when calculating projected disposable income. See also, *Burden v. Sea/art (In re Sea/art)*, 669 F.3d 662 (6th Cir. 2012).

13-BK-42. Henry Sommer, NACBA. The language added in Part 3 of the form in response to the Lanning decision covers a time period that is far too long. It is neither possible nor appropriate to predict the debtor's financial situation several years into the case based simply on a change in 1 or 2 items of income or expense.

13-BK-56. Scott Ford, Bankruptcy Clerks' Advisory Group. All references on the forms that encourage the debtor to "ask for help at the clerks' office of the bankruptcy court" should be replaced with "consult your attorney."

13-BK-59. National Conference of Bankruptcy Judges.

Suggested several formatting, punctuation and stylistic changes.

13-BK-153, Attorney James M. Davis. The proposed forms' distinction and line 5 between "household size" and the number of people used in determining deductions from income is an excellent revision. I also agree that the number of tax exemptions is a reasonable reference point for establishing the number of people used in determining deductions from income. I would suggest, however, revising the instructions to remove the implications about the proper number, an issue on which courts disagree.

I would suggest adding check boxes to indicate whether the payments listed on Line 9b includes taxes and insurance.

I think the language at line 10 is imprecise and would suggest the following rewrite: “If you claim that the U.S. Trustee Program’s division of the IRS Local Standard for housing ~~does not accurately compute the amount that applies to you~~, **is incorrect and affects the calculation of your monthly expenses**, fill in any additional amount you claim.”

It would be helpful if the form required debtors to show the calculation when estimating taxes using withholding and estimated tax refunds.

At line 23, I would suggest mirroring the language of the IRS Collection Financial Standards in the 1st sentence of the 2nd paragraph – in particular, adding cable television to the list of telecommunications services that should not be included.

I would suggest including an itemization for line 41. It would be helpful, at a minimum, to break out the amount claimed as retirement contributions from the amount claimed as retirement loan payments. The statutory basis for these deductions is different, and some courts have reached different conclusions about the permitted deductions. See, e.g., *Seafort v. Burden* (In re Seafort), 669 F.3d 662, 674 n.7 (6th Cir. 2012).

I would suggest revising Line 46 so that it provides a final calculation of monthly projected disposable income.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:
 Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

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

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

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver's license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years

Include trade names and doing business as names

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

5. Where you live

Number Street

City State ZIP Code

County

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

Number Street

P.O. Box

City State ZIP Code

If Debtor 2 lives at a different address:

Number Street

City State ZIP Code

County

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street

P.O. Box

City State ZIP Code

6. Why you are choosing this district to file for bankruptcy

Check one:

I have lived in this district longer than in any other district.

I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explanation.

Check one:

I have lived in this district longer than in any other district.

I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explanation.

Part 2: Tell the Court About Your Bankruptcy Case

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

Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
Chapter 11
Chapter 12
Chapter 13

8. How you will pay the fee

- I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
I need to pay the fee in installments. If you choose this option, sign and attach the Application for Individuals to Pay Your Filing Fee in Installments (Official Form 103A).
I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B) and file it with your petition.

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

- No
Yes. District When Case number
District When Case number
District When Case number

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

- No
Yes. Debtor Relationship to you
District When Case number, if known
Debtor Relationship to you
District When Case number, if known

11. Do you rent your residence?

- No. Go to line 12.
Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?
No. Go to line 12.
Yes. Fill out Initial Statement About an Eviction Judgment Against You (Form 101A) and file it with this bankruptcy petition.

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

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

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

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

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

Name of business, if any
Number Street
City State ZIP Code

Check the appropriate box to describe your business:

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

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

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

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

- No. I am not filing under Chapter 11.
No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

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

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

- No
Yes. What is the hazard?

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

If immediate attention is needed, why is it needed?

Where is the property? Number Street

City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling**15. Tell the court whether you have received briefing about credit counseling.**

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. Are your debts primarily consumer debts? *Consumer debts* are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.”

No. Go to line 16b.
 Yes. Go to line 17.

16b. Are your debts primarily business debts? *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

No. Go to line 16c.
 Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7?

No. I am not filing under Chapter 7. Go to line 18.

Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

No
 Yes

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe?

<input type="checkbox"/> 1-49	<input type="checkbox"/> 1,000-5,000	<input type="checkbox"/> 25,001-50,000
<input type="checkbox"/> 50-99	<input type="checkbox"/> 5,001-10,000	<input type="checkbox"/> 50,001-100,000
<input type="checkbox"/> 100-199	<input type="checkbox"/> 10,001-25,000	<input type="checkbox"/> More than 100,000
<input type="checkbox"/> 200-999		

19. How much do you estimate your assets to be worth?

<input type="checkbox"/> \$0-\$50,000	<input type="checkbox"/> \$1,000,001-\$10 million	<input type="checkbox"/> \$500,000,001-\$1 billion
<input type="checkbox"/> \$50,001-\$100,000	<input type="checkbox"/> \$10,000,001-\$50 million	<input type="checkbox"/> \$1,000,000,001-\$10 billion
<input type="checkbox"/> \$100,001-\$500,000	<input type="checkbox"/> \$50,000,001-\$100 million	<input type="checkbox"/> \$10,000,000,001-\$50 billion
<input type="checkbox"/> \$500,001-\$1 million	<input type="checkbox"/> \$100,000,001-\$500 million	<input type="checkbox"/> More than \$50 billion

20. How much do you estimate your liabilities to be?

<input type="checkbox"/> \$0-\$50,000	<input type="checkbox"/> \$1,000,001-\$10 million	<input type="checkbox"/> \$500,000,001-\$1 billion
<input type="checkbox"/> \$50,001-\$100,000	<input type="checkbox"/> \$10,000,001-\$50 million	<input type="checkbox"/> \$1,000,000,001-\$10 billion
<input type="checkbox"/> \$100,001-\$500,000	<input type="checkbox"/> \$50,000,001-\$100 million	<input type="checkbox"/> \$10,000,000,001-\$50 billion
<input type="checkbox"/> \$500,001-\$1 million	<input type="checkbox"/> \$100,000,001-\$500 million	<input type="checkbox"/> More than \$50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

X _____

Signature of Debtor 1

Executed on _____
 MM / DD / YYYY

X _____

Signature of Debtor 2

Executed on _____
 MM / DD / YYYY

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X

Signature of Attorney for Debtor Date
MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone Email address

Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

x

Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

x

Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself*, line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case*, line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. The status of “being filed” is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question “Do you rent your residence?” (line 11) and Official Forms 101A, *Initial Statement About an Eviction Judgment Against You*, and 101B, *Statement About Payment of An Eviction Judgment Against You*, replace “certification by a debtor who resides as a tenant of residential property,” on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor*, line 12, incorporates options from the “nature of

business” box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention*, line 14, replaces Exhibit C from Official Form 1 and adds the category of “property that needs immediate attention.”

Part 5, *Explain Your Efforts to Receive Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debts owed if the debtor believes they are neither primarily consumer nor business debts.

Part 7, *Sign Here*, deletes from the debtor’s declaration the phrase “to the best of my knowledge, information, and belief” in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. This part combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representative. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP and filed with each document prepared by a BPP.

Changes Made After Publication

The term “bankruptcy filing package” was replaced with either “petition,” “bankruptcy,” or “forms.” The box containing the fee amounts was removed from Part 2, Line 8. Also in Line 8, the modifying language “but is not required to” was added to the explanation that a judge may waive the filing fee. The following instruction was added to Part 3, Line 13: “If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B).” “A building that needs urgent repairs” was added as an example to Part 4, Line 14. The signature line in Part 7 was changed to revise the warning language. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges.

The explanation about waiver of the filing fee may create unrealistic expectations on the part of debtors about the probability that the fee will be waived.

The explanation of what constitutes a “sole proprietorship” in Line 12 would be more accurate if it referred to a sole proprietorship as a business “operated” by the debtor rather than one “owned” by him.

In Line 14, the examples under the initial question should be expanded to include something more common than perishable goods or hungry livestock, such as a building that urgently needs repairs.

The phrase “bankruptcy filing package” should not be used in Line 15 or elsewhere in the proposed forms. The phrase should be replaced by the words “this bankruptcy case” or perhaps “this bankruptcy petition.”

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Official Form 101A

Initial Statement About an Eviction Judgment Against You

12/15

File this form with the court and serve a copy on your landlord when you first file bankruptcy only if:

- you rent your residence; and
- your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence.

Landlord's name _____

Landlord's address _____
 Number Street

_____ City _____ State _____ ZIP Code _____

If you want to stay in your rented residence after you file your case for bankruptcy, also complete the certification below.

Certification About Applicable Law and Deposit of Rent

I certify under penalty of perjury that:

- Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.
- I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

X _____
 Signature of Debtor 1

X _____
 Signature of Debtor 2

Date _____
 MM / DD / YYYY

Date _____
 MM / DD / YYYY

- Stay of Eviction:** (a) **First 30 days after bankruptcy.** If you checked both boxes above, signed the form to certify that both apply, and served your landlord with a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).
- (b) **Stay after the initial 30 days.** If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire delinquent amount to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B), file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the local court's website (to find your court's website, go to www.uscourts.gov/Court_Locator.aspx) for any specific requirements that you might have to meet to serve this statement. 11 U.S.C. §§ 362(b)(22) and 362(l)

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The debtor's declarations about awareness of the criminal penalties for making false statements should be worded consistently throughout the forms.

In Part 7, a debtor filing under chapter 7 is obliged to state that he is "aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7." Although this text appears in the current form, it should be narrowed or deleted. For many debtors, the statement will be untrue: a debtor without regular income, for example, is eligible to file a chapter 7 case but not a case under chapter 13. Pro se debtors, moreover, are unlikely to understand the relief available under other chapters and cannot truthfully make the statement. No purpose is served in forcing them to make it, and the statement is redundant. The debtor is required to state that he has obtained and read the section 342(b) notice (which the clerk of the court is obligated to provide). That notice contains a description of the other chapters.

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Fill in this information to identify your case:

Draft February 28, 2014

Debtor 1	_____	_____	_____
	First Name	Middle Name	Last Name
Debtor 2 (Spouse, if filing)	_____	_____	_____
	First Name	Middle Name	Last Name
United States Bankruptcy Court for the:	_____		District of _____
			(State)
Case number (if known)	_____		

Official Form 101B

Statement About Payment of an Eviction Judgment Against You

12/15

Fill out this form only if:

- you filed *Initial Statement About an Eviction Judgment Against You* (Official Form 101A); and
- you served a copy of Form 101A on your landlord; and
- you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

Certification About Applicable Law and Payment of Eviction Judgment

I certify under penalty of perjury that (Check all that apply):

- Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.
- Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

X _____
Signature of Debtor 1

X _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to http://www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

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COMMITTEE NOTE

Official Form 101A, *Initial Statement About an Eviction Judgment Against You*, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, are new forms promulgated as part of the Forms Modernization Project. They replace the “*Certification by a Debtor Who Resides as a Tenant of Residential Property*” section on Official Form 1, *Voluntary Petition*. The forms apply only in cases of individual debtors.

Official Form 101A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they rent their residence. The form further explains that if the debtor wishes to stay in their residence for 30 days after filing their bankruptcy petition, the certification must be completed. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court, and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire delinquent amount.

Official Form 101B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete, file, and serve the form within 30 days after the petition is filed. Under Official Form 101B, debtors certify under penalty of perjury that they have the right to stay in their residence under state law or other

nonbankruptcy law by paying their landlord the entire delinquent amount and that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Changes Made After Publication

Official Form 101A

The instructions were changed to state that the debtor should file the form and serve a copy on the landlord if the debtor rents a residence and the landlord obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding against the debtor to possess the residence. The form was changed to first require the landlord's name and address. Then the form requires the debtor to complete a certification about applicable law and deposit of rent if the debtor wishes to stay in the residence. The phrase "amount I owe" was changed to "entire delinquent amount." Stylistic changes were made throughout the form.

Official Form 101B

The full title of Official Form 101A was added to the reference to that form in the instructions. The phrase "amount I owe" was changed to "entire delinquent amount."

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges.

Form 101A should be redesigned to permit the form to perform two required functions: (1) provide a place for a debtor to indicate that he has a pre-petition judgment against him, and (2) provide a way for the debtor comply with the requirements for remaining in the property during the first 30 days post-petition. As drafted, Form 101A only performs the second function. But section 362(l)(5)(A) of the Code requires a debtor to indicate "on the bankruptcy petition" whether "there was a judgment for possession of the residential real property in which the debtor resides" regardless of whether the debtor wants to remain in the property.

Form 101A does not offer the debtor a place to give the required statutory indication.

Forms 101A and 101B should indicate more plainly—in large, bold type—the different functions of each form.

The second sentence in each form requires the debtor to certify that he has the right to stay in his residence by paying the landlord “the entire amount I owe.” The phrase is inconsistent with section 362(l) which uses the phrase “entire monetary default.” See 11 U.S.C. § 362(l)(1)(A). To avoid misinterpretation and make the provision consistent with the statutory language, replace the words “I owe” with “in default.”

The instructional note in bold below the line at the bottom of Form 101A should be turned into an expression of the debtor’s awareness of what he must do to take advantage of the statute.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders

12/15

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Also, do not include claims by secured creditors unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: List the 20 Unsecured Claims in Order from Largest to Smallest. Do Not Include Claims by Insiders.

		Unsecured claim
1	<p>What is the nature of the claim? _____ \$ _____</p> <p>Creditor's Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Contact _____</p> <p>Contact phone _____</p> <p>As of the date you file, the claim is: Check all that apply.</p> <p><input type="checkbox"/> Contingent</p> <p><input type="checkbox"/> Unliquidated</p> <p><input type="checkbox"/> Disputed</p> <p><input type="checkbox"/> None of the above apply</p> <p>Does the creditor have a lien on your property?</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Total claim (secured and unsecured): \$ _____</p> <p>Value of security: - \$ _____</p> <p>Unsecured claim \$ _____</p>	
2	<p>What is the nature of the claim? _____ \$ _____</p> <p>Creditor's Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Contact _____</p> <p>Contact phone _____</p> <p>As of the date you file, the claim is: Check all that apply.</p> <p><input type="checkbox"/> Contingent</p> <p><input type="checkbox"/> Unliquidated</p> <p><input type="checkbox"/> Disputed</p> <p><input type="checkbox"/> None of the above apply</p> <p>Does the creditor have a lien on your property?</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Total claim (secured and unsecured): \$ _____</p> <p>Value of security: - \$ _____</p> <p>Unsecured claim \$ _____</p>	

Unsecured claim

3

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

4

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

5

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

6

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

7

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

Unsecured claim

8

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

\$
Value of security:
Unsecured claim

9

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

\$
Value of security:
Unsecured claim

10

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

\$
Value of security:
Unsecured claim

11

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

\$
Value of security:
Unsecured claim

12

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim?
As of the date you file, the claim is: Check all that apply.
Does the creditor have a lien on your property?

\$
Value of security:
Unsecured claim

Unsecured claim

13 _____ **What is the nature of the claim?** _____ \$ _____

Creditor's Name _____

Number Street _____

City State ZIP Code _____

Contact _____

Contact phone _____

As of the date you file, the claim is: Check all that apply.

Contingent

Unliquidated

Disputed

None of the above apply

Does the creditor have a lien on your property?

No

Yes. Total claim (secured and unsecured): \$ _____

Value of security: - \$ _____

Unsecured claim \$ _____

14 _____ **What is the nature of the claim?** _____ \$ _____

Creditor's Name _____

Number Street _____

City State ZIP Code _____

Contact _____

Contact phone _____

As of the date you file, the claim is: Check all that apply.

Contingent

Unliquidated

Disputed

None of the above apply

Does the creditor have a lien on your property?

No

Yes. Total claim (secured and unsecured): \$ _____

Value of security: - \$ _____

Unsecured claim \$ _____

15 _____ **What is the nature of the claim?** _____ \$ _____

Creditor's Name _____

Number Street _____

City State ZIP Code _____

Contact _____

Contact phone _____

As of the date you file, the claim is: Check all that apply.

Contingent

Unliquidated

Disputed

None of the above apply

Does the creditor have a lien on your property?

No

Yes. Total claim (secured and unsecured): \$ _____

Value of security: - \$ _____

Unsecured claim \$ _____

16 _____ **What is the nature of the claim?** _____ \$ _____

Creditor's Name _____

Number Street _____

City State ZIP Code _____

Contact _____

Contact phone _____

As of the date you file, the claim is: Check all that apply.

Contingent

Unliquidated

Disputed

None of the above apply

Does the creditor have a lien on your property?

No

Yes. Total claim (secured and unsecured): \$ _____

Value of security: - \$ _____

Unsecured claim \$ _____

17 _____ **What is the nature of the claim?** _____ \$ _____

Creditor's Name _____

Number Street _____

City State ZIP Code _____

Contact _____

Contact phone _____

As of the date you file, the claim is: Check all that apply.

Contingent

Unliquidated

Disputed

None of the above apply

Does the creditor have a lien on your property?

No

Yes. Total claim (secured and unsecured): \$ _____

Value of security: - \$ _____

Unsecured claim \$ _____

Unsecured claim

18

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim? \$

As of the date you file, the claim is: Check all that apply.

- Contingent
Unliquidated
Disputed
None of the above apply

Does the creditor have a lien on your property?

- No
Yes. Total claim (secured and unsecured): \$
Value of security: \$
Unsecured claim \$

19

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim? \$

As of the date you file, the claim is: Check all that apply.

- Contingent
Unliquidated
Disputed
None of the above apply

Does the creditor have a lien on your property?

- No
Yes. Total claim (secured and unsecured): \$
Value of security: \$
Unsecured claim \$

20

Creditor's Name
Number Street
City State ZIP Code
Contact
Contact phone

What is the nature of the claim? \$

As of the date you file, the claim is: Check all that apply.

- Contingent
Unliquidated
Disputed
None of the above apply

Does the creditor have a lien on your property?

- No
Yes. Total claim (secured and unsecured): \$
Value of security: \$
Unsecured claim \$

Part 2: Sign Below

Under penalty of perjury, I declare that the information provided in this form is true and correct.

X Signature of Debtor 1

X Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

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COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims* in chapter 11 cases filed by individuals or joint debtors. The form is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand and to be more visually appealing. Blanks and checkboxes are provided for specific information about each claim, replacing columns for listing information. A separate, numbered section is provided for each of the 20 claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value that is among the 20 largest unsecured claims. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of “insiders” are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

With respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child's full name, is moved to the general instruction booklet for the forms because it applies to all of the forms.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No public comments were submitted.

Fill in this information to identify the case:

United States Bankruptcy Court for the:
 _____ District of _____
 (State)
 Case number (if known): _____ Chapter _____

Check if this is an amended filing

Official Form 105

Involuntary Petition Against an Individual

12/15

Use this form to begin a bankruptcy case against an individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against a non-individual, use the *Involuntary Petition Against a Non-individual* (Official Form 205). Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

- Chapter 7
 Chapter 11

Part 2: Identify the Debtor

2. Debtor's full name

 First name

 Middle name

 Last name

 Suffix (Sr., Jr., II, III)

3. Other names you know the debtor has used in the last 8 years

Include any assumed, married, maiden, or trade names, or *doing business as* names.

4. Only the last 4 digits of debtor's Social Security Number or federal Individual Taxpayer Identification Number (ITIN)

Unknown

XXX - XX - _____ OR 9 XX - XX - _____

5. Any Employer Identification Numbers (EINs) used in the last 8 years

Unknown

____ - _____
 EIN
 ____ - _____
 EIN

6. Debtor's address

Principal residence

 Number Street

 City State ZIP Code

 County

Mailing address, if different from residence

 Number Street

 City State ZIP Code

Principal place of business

 Number Street

 City State ZIP Code

 County

7. Type of business

- Debtor does not operate a business
- Check one if the debtor operates a business:*
- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- None of the above

8. Type of debt

Each petitioner believes:

- Debts are primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- Debts are primarily business debts.** *Business debts* are debts that were incurred to obtain money for a business or investment or through the operation of the business or investment.

9. Do you know of any bankruptcy cases pending by or against any partner, spouse, or affiliate of this debtor?

- No
- Yes. Debtor _____ Relationship _____
 District _____ Date filed _____ Case number, if known _____
 MM / DD / YYYY
- Debtor _____ Relationship _____
 District _____ Date filed _____ Case number, if known _____
 MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Check one:

Reason for filing in this court.

- Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district.
- A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.
- Other reason. Explain. (See 28 U.S.C. § 1408.) _____

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).
The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked.

- The debtor is generally not paying such debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- No
- Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. Each petitioner's claim

Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
		\$ _____
		\$ _____
		\$ _____
Total		\$ _____

If more than 3 petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's (or representative's) signature under the statement, along with the signature of the petitioner's attorney, and the information on the petitioning creditor, the petitioner's claim, the petitioner's representative, and the attorney following the format on this form.

Part 4: Request for Relief

Petitioners request that an order for relief be entered against the debtor under the chapter specified in Part 1 of this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioners declare under penalty of perjury that the information provided in this petition is true and correct to the best of their knowledge, information, and belief. Petitioners understand that if they make a false statement, they could be fined up to \$250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. If relief is not ordered, the court may award attorneys' fees, costs, damages, and punitive damages. 11 U.S.C. § 303(i).

Petitioners or Petitioners' Representative

X _____
Signature of petitioner or representative, including representative's title

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

Number Street

City State ZIP Code

If petitioner is an individual and is not represented by an attorney:

Contact phone _____

Email _____

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

Attorneys

X _____
Signature of attorney

Printed name

Firm name, if any

Number Street

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

x

Signature of petitioner or representative, including representative's title

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

x

Signature of Attorney

Printed name

Firm name, if any

Number Street

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

x

Signature of petitioner or representative, including representative's title

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

x

Signature of Attorney

Printed name

Firm name, if any

Number Street

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

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COMMITTEE NOTE

Official Form 105, *Involuntary Petition Against an Individual*, which is used only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 5, *Involuntary Petition*. The new form separates questions into four parts likely to be more familiar to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, moves to the beginning of the form the question regarding the chapter of the Bankruptcy Code under which the petition is filed.

Part 2, *Identify the Debtor*, includes the questions regarding the debtor's name, prior names, Social Security Number, Individual Taxpayer Identification Number, and Employer Identification Number. Petitioners must list the address for the debtor's principal residence, mailing address (if different), and principal place of business. Petitioners must indicate whether the debtor operates a business, and, if so, use checkboxes to indicate whether the business falls into certain categories. The statutory definition of "consumer debts" is provided, as well as a definition of "business debts."

Part 3, *Report About the Case*, amends the question regarding venue to advise that venue is "the reason to file in this court" and amends the choices for venue. The first option is revised to read: "Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than any other district." Also, the form adds an option for "Other reason. Explain," with a statutory reference. In the question for Allegations, the exact citation to the Bankruptcy Code is provided for the second allegation, and checkboxes are provided for the last allegation. Petitioners must check "yes" or "no" to answer whether there has been a transfer of any claim against the debtor by or to a petitioner. The information regarding the petitioner's

claims is moved to this part of the form, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, amends the instructions to include a warning about making a false statement, and adds a separate requirement for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, or if a petitioner is an individual and not represented by an attorney, the contact phone and email address of that petitioner must be provided.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No public comments were submitted.

Fill in this information to identify your case and this filing:

Debtor 1 First Name Middle Name Last Name
Debtor 2 (Spouse, if filing) First Name Middle Name Last Name
United States Bankruptcy Court for the: District of (State)
Case number

Check if this is an amended filing

Official Form 106A/B
Schedule A/B: Property

12/15

In each category, separately list and describe items. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. Do you own or have any legal or equitable interest in any residence, building, land, or similar property?

- No. Go to Part 2.
Yes. Where is the property?

1.1. Street address, if available, or other description
City State ZIP Code
County

What is the property? Check all that apply.

- Single-family home
Duplex or multi-unit building
Condominium or cooperative
Manufactured or mobile home
Land
Investment property
Timeshare
Other

Do not deduct secured claims or exemptions. Put the amount of any secured claims on Schedule D: Creditors Who Have Claims Secured by Property.

Current value of the entire property? Current value of the portion you own?
\$ \$

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

Who is an owner of the property? Check one.

- Debtor 1 only
Debtor 2 only
Debtor 1 and Debtor 2 only
At least one of the debtors and another

Check if this is community property (see instructions)

Other information you wish to add about this item, such as local property identification number:

If you own or have more than one, list here:

1.2. Street address, if available, or other description
City State ZIP Code
County

What is the property? Check all that apply.

- Single-family home
Duplex or multi-unit building
Condominium or cooperative
Manufactured or mobile home
Land
Investment property
Timeshare
Other

Do not deduct secured claims or exemptions. Put the amount of any secured claims on Schedule D: Creditors Who Have Claims Secured by Property.

Current value of the entire property? Current value of the portion you own?
\$ \$

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

Who is an owner of the property? Check one.

- Debtor 1 only
Debtor 2 only
Debtor 1 and Debtor 2 only
At least one of the debtors and another

Check if this is community property (see instructions)

Other information you wish to add about this item, such as local property identification number:

1.3. _____
 Street address, if available, or other description

 City State ZIP Code

 County

What is the property? Check all that apply.

- Single-family home
- Duplex or multi-unit building
- Condominium or cooperative
- Manufactured or mobile home
- Land
- Investment property
- Timeshare
- Other _____

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Other information you wish to add about this item, such as local property identification number: _____

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property*.

Current value of the entire property?	Current value of the portion you own?
--	--

\$ _____	\$ _____
----------	----------

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

Check if this is community property (see instructions)

2. **Add the dollar value of the portion you own for all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** →

\$ _____

Part 2: Describe Your Vehicles

Do you own, lease, or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. If you lease a vehicle, also report it on *Schedule G: Executory Contracts and Unexpired Leases*.

3. Cars, vans, trucks, tractors, sport utility vehicles, motorcycles

- No
- Yes

3.1. Make: _____
 Model: _____
 Year: _____
 Approximate mileage: _____
 Other information:

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property?	Current value of the portion you own?
--	--

\$ _____	\$ _____
----------	----------

If you own or have more than one, describe here:

3.2. Make: _____
 Model: _____
 Year: _____
 Approximate mileage: _____
 Other information:

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property?	Current value of the portion you own?
--	--

\$ _____	\$ _____
----------	----------

3.3. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

[Text box for other information]

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property
(see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property? **Current value of the portion you own?**

\$ _____ \$ _____

3.4. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

[Text box for other information]

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property
(see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property? **Current value of the portion you own?**

\$ _____ \$ _____

4. Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories

Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snowmobiles, motorcycle accessories

- No
- Yes

4.1. Make: _____
Model: _____
Year: _____
Other information:

[Text box for other information]

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property
(see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property? **Current value of the portion you own?**

\$ _____ \$ _____

If you own or have more than one, list here:

4.2. Make: _____
Model: _____
Year: _____
Other information:

[Text box for other information]

Who is an owner of the property? Check one.

- Debtor 1 only
- Debtor 2 only
- Debtor 1 and Debtor 2 only
- At least one of the debtors and another

Check if this is community property
(see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property*.

Current value of the entire property? **Current value of the portion you own?**

\$ _____ \$ _____

5. Add the dollar value of the portion you own for all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here

\$ [Text box for total value]

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

6. Household goods and furnishings

Examples: Major appliances, furniture, linens, china, kitchenware

No
 Yes. Describe \$ _____

7. Electronics

Examples: Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games

No
 Yes. Describe \$ _____

8. Collectibles of value

Examples: Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; other collections, memorabilia, collectibles

No
 Yes. Describe \$ _____

9. Equipment for sports and hobbies

Examples: Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments

No
 Yes. Describe \$ _____

10. Firearms

Examples: Pistols, rifles, shotguns, ammunition, and related equipment

No
 Yes. Describe \$ _____

11. Clothes

Examples: Everyday clothes, furs, leather coats, designer wear, shoes, accessories

No
 Yes. Describe \$ _____

12. Jewelry

Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver

No
 Yes. Describe \$ _____

13. Non-farm animals

Examples: Dogs, cats, birds, horses

No
 Yes. Describe \$ _____

14. Any other personal and household items you did not already list, including any health aids you did not list

No
 Yes. Give specific information..... \$ _____

15. Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here \$ _____

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following? **Current value of the portion you own?**
Do not deduct secured claims or exemptions.

16. Cash

Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

No
 Yes..... Cash: \$ _____

17. Deposits of money

Examples: Checking, savings, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

No
 Yes..... Institution name:

17.1. Checking account:	_____	\$ _____
17.2. Checking account:	_____	\$ _____
17.3. Savings account:	_____	\$ _____
17.4. Savings account:	_____	\$ _____
17.5. Certificates of deposit:	_____	\$ _____
17.6. Other financial account:	_____	\$ _____
17.7. Other financial account:	_____	\$ _____
17.8. Other financial account:	_____	\$ _____
17.9. Other financial account:	_____	\$ _____

18. Bonds, mutual funds, or publicly traded stocks

Examples: Bond funds, investment accounts with brokerage firms, money market accounts

No
 Yes..... Institution or issuer name:

_____	\$ _____
_____	\$ _____
_____	\$ _____

19. Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture

No
 Yes. Give specific information about them.....

Name of entity:	%	%
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

20. Government and corporate bonds and other negotiable and non-negotiable instruments

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders. Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

Form for section 20 with checkboxes for 'No' and 'Yes. Give specific information about them...' and lines for issuer name and dollar amounts.

21. Retirement or pension accounts

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

Form for section 21 with checkboxes for 'No' and 'Yes. List each account separately..' and lines for account types (401(k), Pension plan, IRA, etc.) and dollar amounts.

22. Security deposits and prepayments

Your share of all unused deposits you have made so that you may continue service or use from a company. Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

Form for section 22 with checkboxes for 'No' and 'Yes...' and lines for institution name or individual and various categories (Electric, Gas, Heating oil, etc.) with dollar amounts.

23. Annuities (A contract for a periodic payment of money to you, either for life or for a number of years)

Form for section 23 with checkboxes for 'No' and 'Yes...' and lines for issuer name and description and dollar amounts.

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

No

Yes Institution name and description. Separately file the records of any interests. 11 U.S.C. § 521(c):

\$ _____

\$ _____

\$ _____

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

No

Yes. Give specific information about them...

_____ \$ _____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**

Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

No

Yes. Give specific information about them...

_____ \$ _____

27. **Licenses, franchises, and other general intangibles**

Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

No

Yes. Give specific information about them...

_____ \$ _____

Money or property owed to you?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

No

Yes. Give specific information about them, including whether you already filed the returns and the tax years.

Federal: \$ _____
State: \$ _____
Local: \$ _____

29. **Family support**

Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

No

Yes. Give specific information.....

Alimony: \$ _____
Maintenance: \$ _____
Support: \$ _____
Divorce settlement: \$ _____
Property settlement: \$ _____

30. **Other amounts someone owes you**

Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else

No

Yes. Give specific information.....

_____ \$ _____

31. Interests in insurance policies

Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

No

Yes. Name the insurance company of each policy and list its value. ... Company name: Beneficiary: Surrender or refund value: \$

32. Any interest in property that is due you from someone who has died

If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, or are currently entitled to receive property because someone has died.

No

Yes. Give specific information. ... \$

33. Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment

Examples: Accidents, employment disputes, insurance claims, or rights to sue

No

Yes. Describe each claim. ... \$

34. Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims

No

Yes. Describe each claim. ... \$

35. Any financial assets you did not already list

No

Yes. Give specific information. ... \$

36. Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here



\$

Part 5: Describe Any Business-Related Property You Own or Have an Interest In. List any real estate in Part 1.

37. Do you own or have any legal or equitable interest in any business-related property?

No. Go to Part 6. Yes. Go to line 38.

Current value of the portion you own? Do not deduct secured claims or exemptions.

38. Accounts receivable or commissions you already earned

No

Yes. Describe. ... \$

39. Office equipment, furnishings, and supplies

Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices

No

Yes. Describe. ... \$

40. Machinery, fixtures, equipment, supplies you use in business, and tools of your trade

No
Yes. Describe..... \$

41. Inventory

No
Yes. Describe..... \$

42. Interests in partnerships or joint ventures

No
Yes. Describe..... Name of entity: % of ownership: \$

43. Customer lists, mailing lists, or other compilations

No
Yes. Do your lists include personally identifiable information (as defined in 11 U.S.C. § 101(41A))?
No
Yes. Describe..... \$

44. Any business-related property you did not already list

No
Yes. Give specific information \$

45. Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here

\$

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In. If you own or have an interest in farmland, list it in Part 1.

46. Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?

No. Go to Part 7.
Yes. Go to line 47.

Current value of the portion you own? Do not deduct secured claims or exemptions.

47. Farm animals

Examples: Livestock, poultry, farm-raised fish

No
Yes..... \$

48. Crops—either growing or harvested

No
 Yes. Give specific information. _____ \$ _____

49. Farm and fishing equipment, implements, machinery, fixtures, and tools of trade

No
 Yes _____ \$ _____

50. Farm and fishing supplies, chemicals, and feed

No
 Yes _____ \$ _____

51. Any farm- and commercial fishing-related property you did not already list

No
 Yes. Give specific information. _____ \$ _____

52. Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here _____ → **\$ _____**

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. Do you have other property of any kind you did not already list?

Examples: Season tickets, country club membership

No
 Yes. Give specific information. _____ \$ _____
 \$ _____
 \$ _____

54. Add the dollar value of all of your entries from Part 7. Write that number here _____ → **\$ _____**

Part 8: List the Totals of Each Part of this Form

55. Part 1: Total real estate, line 2 _____ → **\$ _____**

56. Part 2: Total vehicles, line 5 \$ _____

57. Part 3: Total personal and household items, line 15 \$ _____

58. Part 4: Total financial assets, line 36 \$ _____

59. Part 5: Total business-related property, line 45 \$ _____

60. Part 6: Total farm- and fishing-related property, line 52 \$ _____

61. Part 7: Total other property not listed, line 54 + \$ _____

62. Total personal property. Add lines 56 through 61. _____ **\$ _____** Copy personal property total → **+ \$ _____**

63. Total of all property on Schedule A/B. Add line 55 + line 62. _____ **\$ _____**

Fill in this information to identify your case:

Debtor 1	_____	_____	_____
	First Name	Middle Name	Last Name
Debtor 2 (Spouse, if filing)	_____	_____	_____
	First Name	Middle Name	Last Name
United States Bankruptcy Court for the:	_____		District of _____
			(State)
Case number (if known)	_____		

Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** Check one only, even if your spouse is filing with you.

- You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
- You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on Schedule A/B that you claim as exempt, fill in the information below.**

Brief description of the property and line on Schedule A/B that lists this property	Current value of the portion you own	Amount of the exemption you claim	Specific laws that allow exemption
	Copy the value from Schedule A/B	Check only one box for each exemption.	
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____

3. **Are you claiming a homestead exemption of more than \$155,675?**
(Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.)

- No
- Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
 - No
 - Yes

Part 2: Additional Page

Brief description of the property and line on Schedule A/B that lists this property	Current value of the portion you own	Amount of the exemption you claim	Specific laws that allow exemption
	Copy the value from Schedule A/B	Check only one box for each exemption	
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____
Brief description: _____ Line from Schedule A/B: _____	\$ _____	<input type="checkbox"/> \$ _____ <input type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	_____ _____ _____

Fill in this information to identify your case:

Debtor 1 First Name Middle Name Last Name
Debtor 2 (Spouse, if filing) First Name Middle Name Last Name
United States Bankruptcy Court for the: District of (State)
Case number (If known)

Check if this is an amended filing

Official Form 106D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. Do any creditors have claims secured by your property?

- No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
Yes. Fill in all of the information below.

Part 1: List All Secured Claims

2. List all secured claims. If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor has a particular claim, list the other creditors in Part 2. As much as possible, list the claims in alphabetical order according to the creditor's name.

Table with 3 columns: Column A Amount of claim, Column B Value of collateral that supports this claim, Column C Unsecured portion If any

2.1 Describe the property that secures the claim:
Creditor's Name
Number Street
City State ZIP Code
Who owes the debt? Check one.
Date debt was incurred Last 4 digits of account number

2.2 Describe the property that secures the claim:
Creditor's Name
Number Street
City State ZIP Code
Who owes the debt? Check one.
Date debt was incurred Last 4 digits of account number

Add the dollar value of your entries in Column A on this page. Write that number here: \$

Part 1:	Additional Page	Column A	Column B	Column C
	After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.	Amount of claim Do not deduct the value of collateral.	Value of collateral that supports this claim	Unsecured portion If any

□	Describe the property that secures the claim: _____ \$ _____ \$ _____ \$ _____ Creditor's Name _____ Number _____ Street _____ _____ City _____ State _____ ZIP Code _____			
Who owes the debt? Check one. <input type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim relates to a community debt				
As of the date you file, the claim is: Check all that apply. <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed				
Nature of lien. Check all that apply. <input type="checkbox"/> An agreement you made (such as mortgage or secured car loan) <input type="checkbox"/> Statutory lien (such as tax lien, mechanic's lien) <input type="checkbox"/> Judgment lien from a lawsuit <input type="checkbox"/> Other (including a right to offset) _____				
Date debt was incurred _____ Last 4 digits of account number _____				

□	Describe the property that secures the claim: _____ \$ _____ \$ _____ \$ _____ Creditor's Name _____ Number _____ Street _____ _____ City _____ State _____ ZIP Code _____			
Who owes the debt? Check one. <input type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim relates to a community debt				
As of the date you file, the claim is: Check all that apply. <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed				
Nature of lien. Check all that apply. <input type="checkbox"/> An agreement you made (such as mortgage or secured car loan) <input type="checkbox"/> Statutory lien (such as tax lien, mechanic's lien) <input type="checkbox"/> Judgment lien from a lawsuit <input type="checkbox"/> Other (including a right to offset) _____				
Date debt was incurred _____ Last 4 digits of account number _____				

□	Describe the property that secures the claim: _____ \$ _____ \$ _____ \$ _____ Creditor's Name _____ Number _____ Street _____ _____ City _____ State _____ ZIP Code _____			
Who owes the debt? Check one. <input type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim relates to a community debt				
As of the date you file, the claim is: Check all that apply. <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed				
Nature of lien. Check all that apply. <input type="checkbox"/> An agreement you made (such as mortgage or secured car loan) <input type="checkbox"/> Statutory lien (such as tax lien, mechanic's lien) <input type="checkbox"/> Judgment lien from a lawsuit <input type="checkbox"/> Other (including a right to offset) _____				
Date debt was incurred _____ Last 4 digits of account number _____				

Add the dollar value of your entries in Column A on this page. Write that number here:	\$ _____
If this is the last page of your form, add the dollar value totals from all pages. Write that number here:	\$ _____

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified about your bankruptcy for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, and then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Part 1, list the additional creditors here. If you do not have additional persons to be notified for any debts in Part 1, do not fill out or submit this page.

<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	On which line in Part 1 did you enter the creditor? _____ Last 4 digits of account number _____

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is an amended filing

Official Form 106E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Property* (Official Form 106A/B) and on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G). Do not include any creditors with partially secured claims that are listed in *Schedule D: Creditors Who Hold Claims Secured by Property*. If more space is needed, copy the Part you need, fill it out, number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your PRIORITY Unsecured Claims

1. Do any creditors have priority unsecured claims against you?

- No. Go to Part 2.
- Yes.

2. List all of your priority unsecured claims. If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If a claim has both priority and nonpriority amounts, list that claim here and show both priority and nonpriority amounts. As much as possible, list the claims in alphabetical order according to the creditor's name. If you have more than two priority unsecured claims, fill out the Continuation Page of Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.

(For an explanation of each type of claim, see the instructions for this form in the instruction booklet.)

		Total claim	Priority amount	Nonpriority amount	
2.1	<p>Priority Creditor's Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Who incurred the debt? Check one.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim is for a community debt <p>Is the claim subject to offset?</p> <ul style="list-style-type: none"> <input type="checkbox"/> No <input type="checkbox"/> Yes 	<p>Last 4 digits of account number _____ \$ _____ \$ _____ \$ _____</p> <p>When was the debt incurred? _____</p> <p>As of the date you file, the claim is: Check all that apply.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed <p>Type of PRIORITY unsecured claim:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Domestic support obligations <input type="checkbox"/> Taxes and certain other debts you owe the government <input type="checkbox"/> Claims for death or personal injury while you were intoxicated <input type="checkbox"/> Other. Specify _____ 			
2.2	<p>Priority Creditor's Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Who incurred the debt? Check one.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim is for a community debt <p>Is the claim subject to offset?</p> <ul style="list-style-type: none"> <input type="checkbox"/> No <input type="checkbox"/> Yes 	<p>Last 4 digits of account number _____ \$ _____ \$ _____ \$ _____</p> <p>When was the debt incurred? _____</p> <p>As of the date you file, the claim is: Check all that apply.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed <p>Type of PRIORITY unsecured claim:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Domestic support obligations <input type="checkbox"/> Taxes and certain other debts you owe the government <input type="checkbox"/> Claims for death or personal injury while you were intoxicated <input type="checkbox"/> Other. Specify _____ 			

Part 1: Your PRIORITY Unsecured Claims – Continuation Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth. Total claim Priority amount Nonpriority amount

Form section 1: Includes fields for Priority Creditor's Name, Last 4 digits of account number, When was the debt incurred?, As of the date you file, the claim is: (Contingent, Unliquidated, Disputed, Liquidated), Who incurred the debt?, Type of PRIORITY unsecured claim: (Domestic support obligations, Taxes, Claims for death or personal injury, Other), Is the claim subject to offset?

Form section 2: Identical structure to section 1, for a second claim entry.

Form section 3: Identical structure to section 1, for a third claim entry.

Part 2: List All of Your NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- No. You have nothing to report in this part. Submit this form to the court with your other schedules.
 Yes

4. List all of your nonpriority unsecured claims in the alphabetical order of the creditor who holds each claim. If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. Do not list claims already included in Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3. If you have more than four priority unsecured claims fill out the Continuation Page of Part 2.

	Total claim
4.1	
Nonpriority Creditor's Name _____	\$ _____
Number _____ Street _____	When was the debt incurred? _____
City _____ State _____ ZIP Code _____	As of the date you file, the claim is: Check all that apply.
Who incurred the debt? Check one.	<input type="checkbox"/> Contingent
<input type="checkbox"/> Debtor 1 only	<input type="checkbox"/> Unliquidated
<input type="checkbox"/> Debtor 2 only	<input type="checkbox"/> Disputed
<input type="checkbox"/> Debtor 1 and Debtor 2 only	<input type="checkbox"/> Liquidated and neither contingent nor disputed
<input type="checkbox"/> At least one of the debtors and another	Type of NONPRIORITY unsecured claim:
<input type="checkbox"/> Check if this claim is for a community debt	<input type="checkbox"/> Student loans
Is the claim subject to offset?	<input type="checkbox"/> Obligations arising out of a separation agreement or divorce that you did not report as priority claims
<input type="checkbox"/> No	<input type="checkbox"/> Debts to pension or profit-sharing plans, and other similar debts
<input type="checkbox"/> Yes	<input type="checkbox"/> Other. Specify _____
4.2	
Nonpriority Creditor's Name _____	\$ _____
Number _____ Street _____	When was the debt incurred? _____
City _____ State _____ ZIP Code _____	As of the date you file, the claim is: Check all that apply.
Who incurred the debt? Check one.	<input type="checkbox"/> Contingent
<input type="checkbox"/> Debtor 1 only	<input type="checkbox"/> Unliquidated
<input type="checkbox"/> Debtor 2 only	<input type="checkbox"/> Disputed
<input type="checkbox"/> Debtor 1 and Debtor 2 only	<input type="checkbox"/> Liquidated and neither contingent nor disputed
<input type="checkbox"/> At least one of the debtors and another	Type of NONPRIORITY unsecured claim:
<input type="checkbox"/> Check if this claim is for a community debt	<input type="checkbox"/> Student loans
Is the claim subject to offset?	<input type="checkbox"/> Obligations arising out of a separation agreement or divorce that you did not report as priority claims
<input type="checkbox"/> No	<input type="checkbox"/> Debts to pension or profit-sharing plans, and other similar debts
<input type="checkbox"/> Yes	<input type="checkbox"/> Other. Specify _____
4.3	
Nonpriority Creditor's Name _____	\$ _____
Number _____ Street _____	When was the debt incurred? _____
City _____ State _____ ZIP Code _____	As of the date you file, the claim is: Check all that apply.
Who incurred the debt? Check one.	<input type="checkbox"/> Contingent
<input type="checkbox"/> Debtor 1 only	<input type="checkbox"/> Unliquidated
<input type="checkbox"/> Debtor 2 only	<input type="checkbox"/> Disputed
<input type="checkbox"/> Debtor 1 and Debtor 2 only	<input type="checkbox"/> Liquidated and neither contingent nor disputed
<input type="checkbox"/> At least one of the debtors and another	Type of NONPRIORITY unsecured claim:
<input type="checkbox"/> Check if this claim is for a community debt	<input type="checkbox"/> Student loans
Is the claim subject to offset?	<input type="checkbox"/> Obligations arising out of a separation agreement or divorce that you did not report as priority claims
<input type="checkbox"/> No	<input type="checkbox"/> Debts to pension or profit-sharing plans, and other similar debts
<input type="checkbox"/> Yes	<input type="checkbox"/> Other. Specify _____

Part 2: Your NONPRIORITY Unsecured Claims – Continuation Page

After listing any entries on this page, number them beginning with 4.5, followed by 4.6, and so forth.

Total claim

Nonpriority Creditor's Name _____

Number _____ Street _____

City _____ State _____ ZIP Code _____

Who incurred the debt? Check one.

Debtor 1 only

Debtor 2 only

Debtor 1 and Debtor 2 only

At least one of the debtors and another

Check if this claim is for a community debt

Is the claim subject to offset?

No

Yes

Last 4 digits of account number _____ \$ _____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- Student loans
- Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- Debts to pension or profit-sharing plans, and other similar debts
- Other. Specify _____

Nonpriority Creditor's Name _____

Number _____ Street _____

City _____ State _____ ZIP Code _____

Who incurred the debt? Check one.

Debtor 1 only

Debtor 2 only

Debtor 1 and Debtor 2 only

At least one of the debtors and another

Check if this claim is for a community debt

Is the claim subject to offset?

No

Yes

Last 4 digits of account number _____ \$ _____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- Student loans
- Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- Debts to pension or profit-sharing plans, and other similar debts
- Other. Specify _____

Nonpriority Creditor's Name _____

Number _____ Street _____

City _____ State _____ ZIP Code _____

Who incurred the debt? Check one.

Debtor 1 only

Debtor 2 only

Debtor 1 and Debtor 2 only

At least one of the debtors and another

Check if this claim is for a community debt

Is the claim subject to offset?

No

Yes

Last 4 digits of account number _____ \$ _____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- Student loans
- Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- Debts to pension or profit-sharing plans, and other similar debts
- Other. Specify _____

Part 3: List Others to Be Notified About a Debt That You Already Listed

5. Use this page only if you have others to be notified about your bankruptcy, for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Parts 1 or 2, then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Parts 1 or 2, list the additional creditors here. If you do not have additional persons to be notified for any debts in Parts 1 or 2, do not fill out or submit this page.

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name
Number Street
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

- Line ___ of (Check one): [] Part 1: Creditors with Priority Unsecured Claims
[] Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims. This information is for statistical reporting purposes only. 28 U.S.C. §159. Add the amounts for each type of unsecured claim.

Total claims from Part 1

6a. Domestic support obligations

6a. \$ _____

6b. Taxes and certain other debts you owe the government

6b. \$ _____

6c. Claims for death or personal injury while you were intoxicated

6c. \$ _____

6d. Other. Add all other priority unsecured claims. Write that amount here.

6d. + \$ _____

6e. Total. Add lines 6a through 6d.

6e. \$ _____

Total claim

Total claims from Part 2

6f. Student loans

6f. \$ _____

6g. Obligations arising out of a separation agreement or divorce that you did not report as priority claims

6g. \$ _____

6h. Debts to pension or profit-sharing plans, and other similar debts

6h. \$ _____

6i. Other. Add all other nonpriority unsecured claims. Write that amount here.

6i. + \$ _____

6j. Total. Add lines 6f through 6i.

6j. \$ _____

Total claim

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse If filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is an amended filing

Official Form 106G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. Do you have any executory contracts or unexpired leases?

- No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
- Yes. Fill in all of the information below even if the contracts or leases are listed on Schedule A/B: Property (Official Form 106A/B).

2. List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone). See the instructions for this form in the instruction booklet for more examples of executory contracts and unexpired leases.

Person or company with whom you have the contract or lease	State what the contract or lease is for
1 Name _____ Number Street _____ City State ZIP Code _____	
2 Name _____ Number Street _____ City State ZIP Code _____	
3 Name _____ Number Street _____ City State ZIP Code _____	
4 Name _____ Number Street _____ City State ZIP Code _____	
5 Name _____ Number Street _____ City State ZIP Code _____	

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	
<input type="checkbox"/> Name _____ Number Street _____ City State ZIP Code _____	

Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check if this is an amended filing

Official Form 106H

Schedule H: Your Codebtors

12/15

Codebtors are people or entities who are also liable for any debts you may have. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. Do you have any codebtors? (If you are filing a joint case, do not list either spouse as a codebtor.)

- No
- Yes

2. Within the last 8 years, have you lived in a community property state or territory? (Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

- No. Go to line 3.
- Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
 - No
 - Yes. In which community state or territory did you live? _____. Fill in the name and current address of that person.

 Name of your spouse, former spouse, or legal equivalent

 Number Street

 City State ZIP Code

3. In Column 1, list all of your codebtors. Do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 again as a codebtor only if that person is a guarantor or cosigner. Make sure you have listed the creditor on Schedule D (Official Form 106D), Schedule E/F (Official Form 106E/F), or Schedule G (Official Form 106G). Use Schedule D, Schedule E/F, or Schedule G to fill out Column 2.

Column 1: Your codebtor

Column 2: The creditor to whom you owe the debt

Check all schedules that apply:

3.1	_____ Name _____ Number Street _____ City State ZIP Code	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
3.2	_____ Name _____ Number Street _____ City State ZIP Code	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
3.3	_____ Name _____ Number Street _____ City State ZIP Code	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____

Additional Page to List More Codebtors

Column 1: Your codebtor

Column 2: The creditor to whom you owe the debt

Check all schedules that apply:

<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____
<input type="checkbox"/>	Name _____ Number Street _____ City State ZIP Code _____	<input type="checkbox"/> Schedule D, line _____ <input type="checkbox"/> Schedule E/F, line _____ <input type="checkbox"/> Schedule G, line _____

Fill in this information to identify your case:

Debtor 1	_____	_____	_____
	First Name	Middle Name	Last Name
Debtor 2 (Spouse, if filing)	_____	_____	_____
	First Name	Middle Name	Last Name
United States Bankruptcy Court for the:	_____		District of _____
			(State)
Case number	_____		
	(If known)		

Check if this is an amended filing

Official Form 106Sum

Summary of Your Assets and Liabilities and Certain Statistical Information 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

		Your assets
		Value of what you own
1. Schedule A/B: Property (Official Form 106A/B)		
1a. Copy line 55, Total real estate, from <i>Schedule A/B</i>		\$ _____
1b. Copy line 62, Total personal property, from <i>Schedule A/B</i>		\$ _____
1c. Copy line 63, Total of all property on <i>Schedule A/B</i>		\$ _____

Part 2: Summarize Your Liabilities

		Your liabilities
		Amount you owe
2. Schedule D: Creditors Who Have Claims Secured by Property (Official Form 106D)		
2a. Copy the total you listed in Column A, <i>Amount of claim</i> , at the bottom of the last page of Part 1 of <i>Schedule D</i>		\$ _____
3. Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F)		
3a. Copy the total claims from Part 1 (priority unsecured claims) from line 6e of <i>Schedule E/F</i>		\$ _____
3b. Copy the total claims from Part 2 (nonpriority unsecured claims) from line 6j of <i>Schedule E/F</i>		+ \$ _____
Your total liabilities		\$ _____

Part 3: Summarize Your Income and Expenses

4. Schedule I: Your Income (Official Form 106I)		
Copy your combined monthly income from line 12 of <i>Schedule I</i>		\$ _____
5. Schedule J: Your Expenses (Official Form 106J)		
Copy your monthly expenses from line 22, Column A, of <i>Schedule J</i>		\$ _____

Part 4: Answer These Questions for Administrative and Statistical Records

6. Are you filing for bankruptcy under Chapters 7, 11, or 13?

- No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
- Yes

7. What kind of debt do you have?

- Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.
- Your debts are not primarily consumer debts.** You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. From the *Statement of Your Current Monthly Income* (Official Form 108-1, 109, or 110-1):
Copy your total current monthly income from line 11.

\$ _____

9. Copy the following special categories of claims from Part 4, line 6 of *Schedule E/F*.

Total claim

From Part 4 on *Schedule E/F*, copy the following:

9a. Domestic support obligations (Copy line 6a.)	\$ _____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	\$ _____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	\$ _____
9d. Student loans. (Copy line 6f.)	\$ _____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	\$ _____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ \$ _____
9g. Total. Add lines 9a through 9f.	\$ _____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
 (If known)

Check if this is an amended filing

Official Form 106Dec

Declaration About an Individual Debtor's Schedules

12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out bankruptcy forms?

- No
- Yes. Name of person _____ . Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct.

X _____
Signature of Debtor 1

X _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

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COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered, starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106Sum, *Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross-references indicating the line numbers of specific schedules from which the summary information is to be gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 106A/B, *Schedule A/B: Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property*, and Official Form 6B, *Personal Property*, in cases of individual debtors. In addition to specific questions about the assets, the form also includes open text fields for providing additional information regarding particular assets when appropriate.

The layout and categories of property on Official Form 106A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. The new form categories and the examples provided

in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property. The debtor may describe generally items of minimal value (such as children's clothes) by adding the value of the items and reporting the total.

Although a particular item of property may fit into more than one category, the instructions for the form explain that it should be listed only once.

In addition, because property that falls within a particular category may not be specifically elicited by the particular line items on the form, the debtor is asked in Parts 3–6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the category.

In Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In*, the debtor is asked to state the “current value of the portion you own,” and to also state whether ownership is shared with someone else. In addition, the debtor is asked for the nature of the ownership interest, if known by the debtor. Furthermore, instead of asking for an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, timeshare, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, “Wearing apparel” is changed to “Clothes” and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been added to separately describe farm related property, Part 3 includes a category for “Non-farm animals.”

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets through several questions providing separate space, after each listed type of account or deposit, for the

institution or issuer name and the value of the debtor's interest in the asset. Two new categories of financial assets are added: "Bonds, mutual funds, or publicly traded stocks" and "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest In*, provides prompts for listing business-related property, such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In*, provides prompts for listing farm- or commercial fishing-related property, such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest in That You Did Not List Above*, is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of this Form*, tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that was reported on former Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that was reported on former Official Form 6B.

Official Form 106C, *Schedule C: The Property You Claim as Exempt*, replaces Official Form 6C, *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and it also asks for the line number where the property is listed on Schedule A/B. The second column asks for the value of the portion of the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly*, 560 U.S. 770 (2010). Entries in

the “amount of the exemption you claim” column may now be listed as either a dollar limited amount or as 100% of fair market value, up to any applicable statutory limit. For example, a debtor might claim 100% of fair market value for a home covered by an exemption capped at \$15,000, and that limit would be applicable. This choice would impose no dollar limit where the exemption is unlimited in dollar amount, such as some exemptions for health aids, certain governmental benefits, and tax-exempt retirement funds.

Official Form 106D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, in cases of individual debtors.

Part 1, *List Your Secured Claims*, now directs the debtor to list only the last four digits of the account number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic’s lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone about the bankruptcy filing other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E, *Creditors Holding Unsecured Priority Claims*, and Official Form 6F, *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and nonpriority unsecured claims are reported in Official Form 106E/F, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question “consideration for claim” and instructs debtors to list claims in the alphabetical order of creditors as much as possible.

Part 1, *List All of Your PRIORITY Unsecured Claims*, includes four checkboxes for identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or

personal injury while intoxicated; and “other.” The first three categories are required to be separately reported for statistical purposes. If the debtor selects “other,” the debtor must specify the basis of the priority, *e.g.*, wages or employee benefit plan contribution.

Part 2, *List All of Your NONPRIORITY Unsecured Claims*, contains four checkboxes, including three for types of claims that must be separately reported for statistical purposes: student loans; obligations arising out of a separation agreement or divorce not listed as priority claims; and debts to pension or profit-sharing plans and other similar debts. The remaining “other” checkbox treats claims not subject to separate reporting. If the debtor selects “other,” the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified About a Debt That You Already Listed*, is new. The debtor is instructed to use Part 3 only if there is a need to give notice of the bankruptcy to someone other than a creditor listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, requires the debtor to provide the total amounts of particular types of unsecured claims for statistical reporting purposes and the overall totals of the priority and nonpriority unsecured claims reported in this form.

Official Form 106G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the other party to the contract or lease, and to state what the contract or lease deals with. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill in the entry number.

Official Form 106H, *Schedule H: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebtors, and whether the debtor has lived with a spouse, former spouse, or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule D, Schedule E/F, or Schedule G, thereby eliminating the need to list the name and address of the creditor.

Official Form 106I, *Schedule I: Your Income*, replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106J, *Schedule J: Your Expenses*, replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106Dec, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's Schedules*, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BPP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BPP helped fill out the bankruptcy forms.

Because the form applies only to individual debtors, it no longer contains the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership. It also deletes from the declaration the phrase "to the best of my knowledge, information,

and belief” in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008.

Changes Made After Publication

Official Form 106A/B

The \$500 limitation for listing assets was removed from the instructions. In Part 1, Line 1, an instruction was added to describe the nature of the ownership interest, with examples. Vehicle leases were added to Part 2, Line 3, and the debtor is asked to provide the approximate mileage, rather than indicating a range of mileage. In Part 6, Line 48, “machinery, fixtures, and tools of trade” were added to the question. Other minor stylistic changes were made throughout the form.

Official Form 106D

In Part 1, Line 2, the instruction to list creditors in alphabetical order was revised to require that creditors be listed in alphabetical order as much as possible. The term “major” was deleted before “creditor.” “Community claim” was changed to “community debt.” The box labeled “none” was deleted as an option for describing the claim, replaced by “liquidated and neither contingent nor disputed.” In the category of “Nature of claim,” “offset” is added to the subcategory of “other.” Other stylistic changes were made throughout the form.

Official Form 106E/F

An instruction is added: “List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on Schedule A/B: Property (Official Form 106A/B) and on Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G).” In Part 1, Line 2, the instruction to list the creditors in alphabetical order was revised to require creditors to be listed in alphabetical order as much as possible. An instruction was added: “If a claim has both priority and nonpriority amounts, list that claim here and show both priority and nonpriority amounts.” A question was added to indicate whether the claim is subject to offset. The box labeled “none” was deleted as an option for describing the claim, replaced by “liquidated and neither contingent nor disputed.” Other stylistic changes were made throughout the form.

Official Form 106G

The form was revised to provide new examples in Line 2.

Official Form 106H

Language was added to the instructions to define “co-debtor.” In Part 1, Line 2, “Name of your spouse” was changed to “Name of your spouse, former spouse, or legal equivalent.” The definition of co-debtor was deleted from Line 3, and an instruction to list cross-references to Official Form 106G was added. Other stylistic changes were made throughout the form.

Official Form 106Sum

Minor stylistic changes were made throughout the form.

Official Form 106Dec

The warning language in the instruction was revised. In the signature line, “forms” was changed to “summary and schedules.”

Summary of Public Comment on Official Form 106Sum

13-BK-59 – National Conference of Bankruptcy Judges. The National Conference of Bankruptcy Judges (“NCBJ”) made stylistic suggestions.

Summary of Public Comment on Official Form 106A/B

13-BK-59 –NCBJ. The instructions for Form 106A/B are confusing as a result of the different terms the instructions use for what a debtor must list. In the space of a few lines, a debtor is told to list “property,” “items,” and “assets.” An effort should be made to arrive at a uniform term. Of the possibilities, “property” is preferable since that is the term that appears in section 541(a) of the Code, 11 U.S.C. § 541(a).

The first sentence of the instructions is inaccurate. A debtor is told to list and describe items “worth more than \$500”; however, the \$500 threshold is not explained and is inconsistent with section 541(a), which contains no dollar amount in defining the “property” that makes up the bankruptcy estate, as well as with Rules 1007(b)(1)(A) and 1007(h), which also contain no dollar limit.

13-BK-89 – William Doyle. Knowing a vehicle's actual mileage at the time of filing is important, because if you know the mileage on the vehicle at the time of filing, you can run an accurate NADA estimate of the value for that date of a vehicle in normal condition. You can also subtract the mileage on the vehicle at the time of the issuance of the certificate of title and determine the average miles per month the vehicle has been driven.

13-BK-116 – Stanley Kartchner. Concurs with the NCBJ's discussion and recommendations concerning the \$500 asset disclosure threshold. For each listed asset two data fields should be added that tie into the information contained in proposed Forms 106C and 106D, either by dollar amount if such is available (which is especially helpful with real property and personal property assets such as vehicles), or at least a check box to indicate that there is a lien or exemption affecting the particular asset.

13-BK-135 – William Pierce. Concurs with the comments, concerns and recommendations of NCBJ regarding the \$500 asset disclosure. It is very important to keep any asset showing a lien on Schedule D tied to Schedule A and B assets that have liens.

13-BK-151 – National Association of Bankruptcy Trustees (“NABT”). In scheduling real property interests, the form eliminates information regarding both the Nature of the Debtor's Interest and the Amount of Secured Claim as currently provided in Official Form B6A. This will make it harder for chapter 7 trustees to assess whether there is an asset to administer without reference to other Schedules or independent documents. Concurs with NCBJ about the direction to list items “worth more than \$500.” In Part 1 the listing of a property record card number should be made mandatory. In many areas of the country, an actual deed book and page is necessary in order to determine where the property is located. It would also be helpful to have available space for the debtor to indicate out how the current value was determined, including the valuation for vehicles in Part 1.

Part 3 of the form eliminated information regarding who is the owner of the property, which is provided in Part 1 and 2. This will make it harder for chapter 7 trustees to assess whether there is an asset to administer without reference to independent information. The inclusion of ownership is necessary in a jointly administered case.

In Part 4 the form should include under “Cash” additional language to address electronic or other forms of cryptocurrency or digital currency. As to the “Deposits of Money,” in addition to the

institutional name, it is necessary to have the identifying account number (the last 4 digits) to insure all bank statements that are provided to the trustee are accounted for.

The number of shares held of publicly held stocks would be helpful, when not part of a brokerage account, as well as the identifying account number (the last 4 digits). For interests in insurance policies, in addition to the institutional name, it is necessary to have the identifying account number (the last 4 digits) to initiate verification or inquiry.

The debtor should be required to provide the name of the counsel handling the claims against third parties and that counsel's contact information, including address and telephone number.

13-BK-153 – James M. Davis. Revise the “other information” field to add a prompt for the nature of the ownership interest, if known.

The secured claim information that is required on the current Schedule A should be retained, and it would also be helpful to carry over exemption information onto Schedule A/B, so that the Schedule would provide a straightforward statement of the non-exempt equity the debtor holds in property.

Summary of Public Comment on Official Form 106C

13-BK-42 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys. The new language attempting to resolve the issues raised by the Supreme Court's *Schwab v. Reilly* decision, 560 U.S. 770 (2010), fails to accomplish its goal. By limiting the claim of exemption to “100% of fair market value, up to the statutory limit,” the form does not provide the debtor finality. For every single asset subject to a monetary exemption limit, there is a possibility that a trustee could later claim that it exceeded the statutory limit. In asset cases, this possibility would exist until the case was closed, often a year or even several years. During that time, a debtor disposing of or otherwise dissipating an asset would be subject to possible sanctions or even a revocation of discharge if those assets were later claimed by the trustee. The only way for a debtor to avoid this outcome would be to file a motion for abandonment of the property, completely reversing the burdens of going forward and proof set forth in Rule 4003.

If debtors are allowed to claim 100% fmv without a limit, trustees will not have to object to every exemption. In districts where there is a firm deadline for objections on valuation issues, trustees object

only when there is a reasonable argument that the value of an asset exceeds the exemption limits.

Because the deadline for objecting to exemptions runs from the conclusion of the meeting of creditors, if a trustee wishes to investigate the value of an asset, the trustee can adjourn the meeting for that purpose, thus delaying the running of the deadline. The trustee also can seek an extension of the deadline from the court, which would routinely be granted for any reasonable cause.

Trustees have argued that debtors would just claim 100 percent of every asset as exempt, regardless of its value. This argument has no basis in past experience, makes assumptions about debtor honesty that are inconsistent with experience in the vast majority of cases, and ignores the fact that virtually every debtor with significant assets is represented by attorney bound by Rule 9011.

The schedule should list: 1) the value of the debtor's interest in the property on the petition date (see § 522(a)(2)); 2) the amount of that interest the debtor claims exempt, and 3) whether the debtor asserts that the value claimed exempt is 100 percent of the value of the debtor's interest in the asset.

13-BK-59 – NCBJ. The proposed form and its instructions conflict. The instructions better implement the spirit of *Schwab v. Reilly*. *Schwab* adopted a relatively straightforward “what-you-see-is-what-you-get” approach to a debtor's claimed exemptions. Under that approach, the debtor must express what he wants, leaving no room for interpretation.

Taken together, the instructions and the 2nd check box encourage debtors always to claim the “100% of FMV, up to any applicable statutory limit” option because the only negative consequence will be to scale back an excessive claim. Litigation is particularly likely in jurisdictions that allow people to exempt a broad category of property (such as tangible personal property) and place no dollar limit on specific types of property (such as motor vehicles) within that category.

To avoid these problems, a debtor should be required to state a particular dollar amount for an exemption that has a dollar limit, and the 100 percent of fair market value option should be restricted to exemptions that are unlimited. After the 2nd check box, the phrase “up to any applicable statutory limit” should be deleted and a parenthetical added, as follows: “100% of fair market value, up to any applicable statutory limit (for exemptions unlimited in

dollar amount). The instructions (in bold type, preceding part 1) should also be changed to delete the last sentence.

13-BK-106 – Annette Crawford, M.D. Louisiana, National Association of Chapter 13 Trustees. Form 106C does not include "totals" information needed in order to complete the required Final Account, which requires "total assets exempted".

13-BK-135 – William Pierce. 100 percent FMV should not be used on Form 106C. Trustees would be required to object to most if not all exemptions as debtors and debtors' attorneys do not put the real market value on the schedules most of the time.

13-BK-140 – Penelope Souhrada. Part 3 on page 1 asks about homestead exemptions of more than \$155,675. This applies only in jurisdictions that use the federal exemptions. Opt-out states each have different homestead exemptions, and using this number in this form will be extremely confusing for debtors.

13-BK-151 – NABT. Many of the same deficiencies with the use of a 100% FMV exemption checkbox as commented upon by NABT in 2011 still exist.

The information regarding who is the owner of the property, which is provided in Part 1 and 2 of Form 106A/B, has been eliminated from the rest of the form. This will make it harder for chapter 7 trustees to assess whether there is a proper exemption. The inclusion of ownership is necessary in a jointly administered case.

Parts 1 and 2 of the form provide two alternatives for the amount claimed as exempt. The first alternative is a dollar amount (\$_____) while the second is for "100% of fair market value, up to any applicable statutory limit." The form of the 100% FMV checkbox for dollar limited exemptions will only create confusion and increased litigation over exemptions as described in the NCBJ Comment.

The 30-day time limit in Bankruptcy Rule 4003 only applies to objections based on "three, and only three" entries on a debtor's claim of exemptions in Schedule C: (1) the description of the property claimed as exempt; (2) the Bankruptcy Code provisions governing the exemption claimed; and (3) the amount listed in the column titled "value of claimed exemption." Where the basis of the objection is on any other entry, such as the fair market value assigned to the exempt property by the debtor, the 30-day time limit does not apply.

Unless applicable federal or state law allows debtors to exempt their entire interest in an item itself regardless of value, they have no right to utilize language claiming an exemption equal to 100% of the fair market value.

Additional columns, which would clearly set forth what properties and values are subject to administration, should be added. A modified form would allow for quick verification, in summary fashion of the property, the exemption, and if there is an administrable asset, which would benefit debtors, their counsel, as well as the judiciary and chapter 7 trustees.

Summary of Official Comment on Official Form 106D

13-BK-59 – NCBJ. Part 1, line 2 requires a debtor to list secured claims in alphabetical order of “the major creditor” who holds each claim. The term “major” requires debtors to determine which creditors are “major” or “minor” and then apparently not disclose the “minor” ones. The word “major” should be deleted so that all creditors must be listed.

The meaning of the term “community claim” in line 2 is unclear. The term is not defined in the proposed form, in the instructions, in the Bankruptcy Code, or in the Bankruptcy Rules. The check box and accompanying text should either be clarified or deleted.

13-BK-5 – David S. Yen. Schedules D and E/F should not require that creditors be listed alphabetically. This will not be a problem for attorneys who use commercial software programs, but it will impose an unjustified burden on pro se debtors. They may have forgotten that a debt was owed, or mistakenly thought that a creditor did not have to be listed because the debtor does not believe that the debt is owed at all. To make the debtor redo the schedules just so that the creditors would appear in alphabetical order is a burden that is not justified by any possible benefit.

Schedules D and E/F should not require that creditors be listed repeatedly and account numbers should be optional. Many debtors receive separate bills from hospitals or other medical providers for every visit. Some creditors assign a different account number for each visit, even though they also have a unique patient identifier number. The burden of listing the creditor separately for each account number, and of sending separate notices for each account, is not justified by the benefit to creditors. Account numbers have a limited value for creditors and listing them should be optional.

Summary of Public Comment on Official Form E/F

13-BK-42 – Henry Sommer, NACBA. The instruction paragraph at the top of this schedule uses the word “priority” twice where the word “nonpriority” should be used. In addition, there is no need to list separate claims of the same creditor separately. The purpose of the schedule is to identify creditors and the amount owed to them. If a debtor has purchased several items from the same creditor, the identity of the creditor and the total debt should be sufficient for all parties. Likewise, the approach of the current forms, which makes including account number information an optional item should be retained.

13-BK-56 – Scott Ford, Bankruptcy Clerks Advisory Group. The language addressing what is needed for "statistical purposes" should be removed because this is an internal requirement for the judiciary, and it might create confusion on the part of the debtor.

13-BK-59 – NCBJ. The NCBJ’s comments on Form 106E/F, Parts 1 and 3, are identical to the its comments on proposed changes to Parts 1 and 2 of Proposed Form 106D. Also the term “community debts” is not a defined term.

Summary of Public Comments on Official Form 106G

13-BK-0059 – NCBJ – The parenthetical examples of possible contracts or leases in Line 2 are confusing, since no one contracts for or leases “rent” or a “vehicle lease.” The examples provided should be parallel, describing an item or premises contracted for or leased. The parenthetical phrase should be changed to: “an apartment, a car or truck, a cell phone.”

Summary of Public Comment on Official Form 106H

13-BK-59 – NCBJ. The proposed form would be clearer if the definition of “co-debtor” were moved from line 3 to become the first sentence in the form (before “Be as complete and accurate as possible”).

Summary of Public Comment on Official Form 106Dec

13-BK-59 – NCBJ. The third sentence misstates the criminal penalties for false statements and should be re-written.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is an amended filing

Official Form 107

Statement of Financial Affairs for Individuals Filing for Bankruptcy

12/15

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

Part 1: Give Details About Your Marital Status and Where You Lived Before

1. What is your current marital status?

- Married
- Not married

2. During the last 3 years, have you lived anywhere other than where you live now?

- No
- Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
		<input type="checkbox"/> Same as Debtor 1	<input type="checkbox"/> Same as Debtor 1
Number _____ Street _____	From _____ To _____	Number _____ Street _____	From _____ To _____
City _____ State _____ ZIP Code _____		City _____ State _____ ZIP Code _____	
		<input type="checkbox"/> Same as Debtor 1	<input type="checkbox"/> Same as Debtor 1
Number _____ Street _____	From _____ To _____	Number _____ Street _____	From _____ To _____
City _____ State _____ ZIP Code _____		City _____ State _____ ZIP Code _____	

3. Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory? (Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

- No
- Yes. Make sure you fill out *Schedule H: Your Codebtors* (Official Form 106H).

Part 2: Explain the Sources of Your Income

4. Did you have any income from employment or from operating a business during this year or the two previous calendar years?

Fill in the total amount of income you received from all jobs and all businesses, including part-time activities. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

- No
- Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	Gross income (before deductions and exclusions)	Sources of income Check all that apply.	Gross income (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____
For last calendar year: (January 1 to December 31, _____) YYYY	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____
For the calendar year before that: (January 1 to December 31, _____) YYYY	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____	<input type="checkbox"/> Wages, commissions, bonuses, tips <input type="checkbox"/> Operating a business	\$ _____

5. Did you receive any other income during this year or the two previous calendar years?

Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings. If you are filing a joint case and you have income that you received together, list it only once under Debtor 1.

List each source and the gross income from each source separately. Do not include income that you listed in line 4.

- No
- Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	Gross income from each source (before deductions and exclusions)	Sources of income Describe below.	Gross income from each source (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____
For last calendar year: (January 1 to December 31, _____) YYYY	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____
For the calendar year before that: (January 1 to December 31, _____) YYYY	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____
	_____	\$ _____	_____	\$ _____

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

6. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

No. Neither Debtor 1 nor Debtor 2 has primarily consumer debts. Consumer debts are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of \$6,225* or more?

No. Go to line 7.

Yes. List below each creditor to whom you paid a total of \$6,225* or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

* Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.

Yes. Debtor 1 or Debtor 2 or both have primarily consumer debts.

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of \$600 or more?

No. Go to line 7.

Yes. List below each creditor to whom you paid a total of \$600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

Table with 4 columns: Dates of payment, Total amount paid, Amount you still owe, Was this payment for... (Mortgage, Car, Credit card, Loan repayment, Suppliers or vendors, Other). It contains three rows of creditor information for reporting.

7. Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?

Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20% or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

- No
- Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____	\$ _____	\$ _____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____	\$ _____	\$ _____	

8. Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?

Include payments on debts guaranteed or cosigned by an insider.

- No
- Yes. List all payments that benefited an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____	\$ _____	\$ _____	Include creditor's name
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____	\$ _____	\$ _____	

Part 4: Identify Legal Actions, Repossessions, and Foreclosures

9. Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?

List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

- No
- Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title _____ _____		Court Name _____	<input type="checkbox"/> Pending
Case number _____		Number Street _____	<input type="checkbox"/> On appeal
		City State ZIP Code _____	<input type="checkbox"/> Concluded
Case title _____ _____		Court Name _____	<input type="checkbox"/> Pending
Case number _____		Number Street _____	<input type="checkbox"/> On appeal
		City State ZIP Code _____	<input type="checkbox"/> Concluded

10. Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?

Check all that apply and fill in the details below.

- No. Go to line 11.
- Yes. Fill in the information below.

	Describe the property	Date	Value of the property
Creditor's Name _____ Number Street _____ City State ZIP Code _____		_____	\$ _____
	Explain what happened		
	<input type="checkbox"/> Property was repossessed. <input type="checkbox"/> Property was foreclosed. <input type="checkbox"/> Property was garnished. <input type="checkbox"/> Property was attached, seized, or levied.		
Creditor's Name _____ Number Street _____ City State ZIP Code _____		_____	\$ _____
	Explain what happened		
	<input type="checkbox"/> Property was repossessed. <input type="checkbox"/> Property was foreclosed. <input type="checkbox"/> Property was garnished. <input type="checkbox"/> Property was attached, seized, or levied.		

11. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off any amounts from your accounts or refuse to make a payment because you owed a debt?

- No
Yes. Fill in the details.

Table with 3 columns: Describe the action the creditor took, Date action was taken, Amount. Includes fields for Creditor's Name, Number Street, City State ZIP Code, and Last 4 digits of account number.

12. Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, a custodian, or another official?

- No
Yes

Part 5: List Certain Gifts and Contributions

13. Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than \$600 per person?

- No
Yes. Fill in the details for each gift.

Table with 4 columns: Gifts with a total value of more than \$600 per person, Describe the gifts, Dates you gave the gifts, Value. Includes fields for Person to Whom You Gave the Gift, Number Street, City State ZIP Code, and Person's relationship to you.

Table with 4 columns: Gifts with a total value of more than \$600 per person, Describe the gifts, Dates you gave the gifts, Value. Includes fields for Person to Whom You Gave the Gift, Number Street, City State ZIP Code, and Person's relationship to you.

14. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than \$600 to any charity?

- No
- Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than \$600	Describe what you contributed	Date you contributed	Value
Charity's Name <hr/> <hr/> Number Street <hr/> City State ZIP Code <hr/>		_____	\$ _____
		_____	\$ _____

Part 6: List Certain Losses

15. Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?

- No
- Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss	Date of your loss	Value of property lost
	Include the amount that insurance has paid. List pending insurance claims on line 33 of <i>Schedule A/B: Property</i> .	_____	\$ _____

Part 7: List Certain Payments or Transfers

16. Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?

Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

- No
- Yes. Fill in the details.

Person Who Was Paid	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
Number Street <hr/> <hr/> City State ZIP Code <hr/> Email or website address <hr/> Person Who Made the Payment, if Not You <hr/>		_____	\$ _____
		_____	\$ _____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
Person Who Was Paid <hr/> Number Street <hr/> City State ZIP Code <hr/> Email or website address <hr/> Person Who Made the Payment, if Not You <hr/>	<div style="border: 1px solid black; height: 150px;"></div>	_____	\$ _____
		_____	\$ _____

17. Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors?
 Do not include any payment or transfer that you listed on line 16.

- No
- Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
Person Who Was Paid <hr/> Number Street <hr/> City State ZIP Code <hr/>	<div style="border: 1px solid black; height: 100px;"></div>	_____	\$ _____
		_____	\$ _____

18. Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?
 Include both outright transfers and transfers made as security (such as the granting of a security interest or mortgage on your property).
 Do not include gifts and transfers that you have already listed on this statement.

- No
- Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
Person Who Received Transfer <hr/> Number Street <hr/> City State ZIP Code <hr/> Person's relationship to you _____ <hr/>	<div style="border: 1px solid black; height: 150px;"></div>	<div style="border: 1px solid black; height: 150px;"></div>	_____
Person Who Received Transfer <hr/> Number Street <hr/> City State ZIP Code <hr/> Person's relationship to you _____ <hr/>			_____

19. Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary? (These are often called *asset-protection devices*.)

- No
- Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____ _____		_____

Part 8: List Certain Financial Accounts, Instruments, Safe Deposit Boxes, and Storage Units

20. Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?

- Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.
- No
 - Yes. Fill in the details.

	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
Name of Financial Institution _____ Number Street _____ City State ZIP Code _____	XXXX-____-____-____	<input type="checkbox"/> Checking <input type="checkbox"/> Savings <input type="checkbox"/> Money market <input type="checkbox"/> Brokerage <input type="checkbox"/> Other _____	_____	\$ _____
Name of Financial Institution _____ Number Street _____ City State ZIP Code _____	XXXX-____-____-____	<input type="checkbox"/> Checking <input type="checkbox"/> Savings <input type="checkbox"/> Money market <input type="checkbox"/> Brokerage <input type="checkbox"/> Other _____	_____	\$ _____

21. Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?

- No
- Yes. Fill in the details.

	Who else had access to it?	Describe the contents	Do you still have it?
Name of Financial Institution _____ Number Street _____ City State ZIP Code _____	Name _____ Number Street _____ City State ZIP Code _____		<input type="checkbox"/> No <input type="checkbox"/> Yes

22. Have you stored property in a storage unit or place other than your home within 1 year before you filed for bankruptcy?

- No
- Yes. Fill in the details.

Who else has or had access to it?		Describe the contents	Do you still have it?
Name of Storage Facility	Name		<input type="checkbox"/> No <input type="checkbox"/> Yes
Number Street	Number Street		
City State ZIP Code	City State ZIP Code		
City State ZIP Code			

Part 9: Identify Property You Hold or Control for Someone Else

23. Do you hold or control any property that someone else owns? Include any property you borrowed from, are storing for, or hold in trust for someone.

- No
- Yes. Fill in the details.

Where is the property?	Describe the property	Value
Owner's Name		\$ _____
Number Street		
City State ZIP Code		
City State ZIP Code		

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- **Environmental law** means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- **Site** means any location, facility, or property as defined under any environmental law, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- **Hazardous material** means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

24. Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?

- No
- Yes. Fill in the details.

Governmental unit	Environmental law, if you know it	Date of notice
Name of site		_____
Number Street		
City State ZIP Code		
City State ZIP Code		

25. Have you notified any governmental unit of any release of hazardous material?

- No
Yes. Fill in the details.

Form for question 25 with fields: Governmental unit, Environmental law, Date of notice, Name of site, Number Street, City State ZIP Code.

26. Have you been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.

- No
Yes. Fill in the details.

Form for question 26 with fields: Court or agency, Nature of the case, Status of the case, Case title, Court Name, Number Street, Case number, City State ZIP Code.

Part 11: Give Details About Your Business or Connections to Any Business

27. Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?

- A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
A member of a limited liability company (LLC) or limited liability partnership (LLP)
A partner in a partnership
An officer, director, or managing executive of a corporation
An owner of at least 5% of the voting or equity securities of a corporation
No. None of the above applies. Go to Part 12.
Yes. Check all that apply above and fill in the details below for each business.

Form for question 27 with fields: Business Name, Describe the nature of the business, Employer Identification number, Name of accountant or bookkeeper, Dates business existed, City State ZIP Code.

COMMITTEE NOTE

Official Form 107, *Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from former Official Form 7, *Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, previously found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated. This change was made because a non-filing spouse's general financial affairs are not relevant to the debtor's bankruptcy case.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses, as well as residences in a community property state, to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state since that information will be provided in Official Form 106F.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and it

eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of “other income.” The time period is clarified to indicate that the prior two years means two calendar years, plus the portion of the calendar year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding the nature of the debtor’s debts requires the debtor to use checkboxes to indicate whether or not they are primarily consumer debts. The form instructs debtors not to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment. Partnerships of which the debtor is a general partner have been added to the examples of “insiders.”

Part 4, *Identify Legal Actions, Repossessions, and Foreclosures*, consolidates questions regarding actions against the debtor’s property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirements that a debtor include any property levied on within a year of filing for bankruptcy and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to \$600 per person or charity and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses. It provides that the debtor must include on this form amounts of insurance that have been paid, but must list pending insurance claims on Official Form 106A/B.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the email or website address of the person who was paid, as well as the name of the person who made the payment if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help the debtor deal with creditors or make payments to creditors, reminding the debtor not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, made within two years of filing for bankruptcy, unless the transfer was made in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts adds an explanation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, requires the debtor to list the case title and nature of the case for any judicial or administrative proceeding under any environmental law and to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates instructions that apply only to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business, with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification number of the business, the dates the business existed, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Below*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

Changes Made After Publication

A question was added to Part 1 about the debtor's current marital status. In Part 3, Line 6, "Neither Debtor 1 nor Debtor 2" was substituted for "My debts are not" before "primarily consumer debts." Similarly, "Debtor 1 or Debtor 2 or both" was substituted for "My debts are" before "primarily consumer debts." The requirement to fill in details was eliminated from Part 4, Line 12 regarding whether there was an assignment for the benefit of creditors in the year prior to bankruptcy. In Part 7, Line 18, a security interest or mortgage on property was added as an example of types of property transfers made as security within the two years prior to bankruptcy. In Part 8, "Instruments" was added as a category for Line 20. In Line 22, the question was clarified to state that the debtor should list storage units other than their home. In Part 12, the declaration language was modified, and the warning language was revised. Other minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-35 – Chapter 13 Trustee Robert G. Drummond. Line 18 requests information regarding transfers to self-settled trusts within the ten years prior to the filing of the bankruptcy case. The

2005 changes to the Code added 11 U.S.C. § 522(o) which reduces the value of the homestead exemption to the extent that the value is attributable to property disposed by the debtor in the prior 10 years with the intent to hinder, delay, or defraud. An additional question about dispositions that increased equity in the homestead within the prior ten years would be helpful.

13-BK-59 – The National Conference of Bankruptcy Judges.

Line 10 limits the information a debtor must provide to instances where a set-off has occurred “without your permission.” In the interest of fuller disclosure, this limitation should be removed so that parties can evaluate whether the set off was improper or otherwise avoidable.

The sentence following Line 17 instructs: “Include both outright transfers and transfers made as security.” The phrase “made as security” may be unclear to lay people. A parenthetical example would lessen the likelihood of confusion.

Line 21 requires a debtor to list the location of storage units in which the debtor has stored property within 1 year of the bankruptcy filing and instructs the debtor to not include storage units that are part of the building in which the debtor lives. In the interest of fuller disclosure, the instruction should be removed.

Line 26 should be restructured to make the provision clearer. Part 12 requires the debtor’s signature; there should be an explicit warning about the consequences of making a false statement.

13-BK-105 – Annette Crawford, National Association of Chapter 13 Trustees. The requirement to give the name of a current or ex-spouse should not be removed because marital status is important when investigating the debtor's financial situation.

13-BK-0151 – The National Association of Bankruptcy Trustees –Line 5 fails to distinguish between Debtor 1 and Debtor 2 in a jointly administered case in which the responses could be different. Inclusion of ownership or designation as between debtors is necessary in a jointly administered case. Lines 6 and 7 should include the category of “insider” that the transferee comes within.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (if known)

Check if this is an amended filing

Official Form 112

Statement of Intention for Individuals Filing Under Chapter 7

12/15

If you are an individual filing under chapter 7, you must fill out this form if:

- creditors have claims secured by your property, or
- you have leased personal property and the lease has not expired.

You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also send copies to the creditors and lessors you list on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Hold Secured Claims

1. For any creditors that you listed in Part 1 of *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D), fill in the information below.

Identify the creditor and the property that is collateral	What do you intend to do with the property that secures a debt?	Did you claim the property as exempt on Schedule C?
Creditor's name: _____ Description of property securing debt: _____	<input type="checkbox"/> Surrender the property. <input type="checkbox"/> Retain the property and redeem it. <input type="checkbox"/> Retain the property and enter into a <i>Reaffirmation Agreement</i> . <input type="checkbox"/> Retain the property and [explain]: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Creditor's name: _____ Description of property securing debt: _____	<input type="checkbox"/> Surrender the property. <input type="checkbox"/> Retain the property and redeem it. <input type="checkbox"/> Retain the property and enter into a <i>Reaffirmation Agreement</i> . <input type="checkbox"/> Retain the property and [explain]: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Creditor's name: _____ Description of property securing debt: _____	<input type="checkbox"/> Surrender the property. <input type="checkbox"/> Retain the property and redeem it. <input type="checkbox"/> Retain the property and enter into a <i>Reaffirmation Agreement</i> . <input type="checkbox"/> Retain the property and [explain]: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Creditor's name: _____ Description of property securing debt: _____	<input type="checkbox"/> Surrender the property. <input type="checkbox"/> Retain the property and redeem it. <input type="checkbox"/> Retain the property and enter into a <i>Reaffirmation Agreement</i> . <input type="checkbox"/> Retain the property and [explain]: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property lease that you listed in *Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G)*, fill in the information below. Do not list real estate leases. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases	Will the lease be assumed?
---	-----------------------------------

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Lessor's name: _____	<input type="checkbox"/> No
	<input type="checkbox"/> Yes

Description of leased property: _____

Part 3: Sign Below

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

X _____
 Signature of Debtor 1

X _____
 Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 112, *Statement of Intention for Individuals Filing Under Chapter 7*, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 8, *Chapter 7 - Individual Debtor's Statement of Intention*. The new form uses language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to entering into a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

Changes Made After Publication

The instruction that chapter 7 individual debtors must fill out the form was moved to the first sentence of the instructions. Various wording changes were made to Part 1 in the section regarding the debtor's intention regarding secured property. The full names of Forms 106D and 106G were added. An instruction not to list real estate leases was added to Part 2. Minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. The 1st checkbox says “give the property to the creditor.” The word “give” should be changed to “surrender.” “Surrender” is the term used in the Code, see 11 U.S.C. § 521(a)(2)(A), and courts disagree on what constitutes the “surrender” of property.

13-BK-78 – Sheryl K. Ith of Cooksey, Toolen, Gage, Duffy & Woog. The Committee Note to Official Form 112, Statement of Intention for Individuals Filing Under Chapter 7, states that the form was revised to "make it easier to read" and "uses language likely to be understandable to non-lawyers." The Note goes on to say that Part 1 "refers to signing a 'Reaffirmation Agreement' rather than asking whether the debtor intends to 'reaffirm the debt.'" If a debtor does not understand what it means to reaffirm a debt, then that same debtor is not likely to understand what it means to sign a "Reaffirmation Agreement."

Further, the change in the form allowing a debtor to state his intent to "sign a Reaffirmation Agreement" infers that, by merely signing the agreement, the debtor will have complied with the duties set forth in 11 USC §§521 and 524. However, this is not the case according to Bankruptcy Code §§ 521(a)(2)(A), 521(a)(6), 524(c), and 524(d).

13-BK-155 – David S. Yen. The form should use the word “surrender,” not the word “give.” This form is required by section 521(a)(2) of the Code. That section requires that a debtor who has debts secured by property of the estate state his or her intention with respect to “retention or surrender” of such property. Use of the word “give” may also be misconstrued as requiring the debtor to take affirmative steps and incur expenses in doing so.

13-BK-0042 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys. The instructions for the Chapter 7 Statement of Intention are substantively inaccurate. They describe “surrender” as “You may give the property to the creditor.” Numerous courts have held that this is not required by the statute. In addition, the instructions diverge substantively from the language of section 365(p) regarding personal property leases. Also, it is not clear that the conditions can include cure of a default “before” the lease is assumed. The instructions should track the statute.

Fill in this information to identify the case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____ Chapter _____
 (If known)

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/15

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form every time they help prepare documents that are filed in the case. If more than one bankruptcy petition preparer helps with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined, imprisoned, or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

- whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- whether filing a case under chapter 7, 11, 12, or 13 is appropriate;
- whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;
- what tax consequences may arise because a case is filed under the Bankruptcy Code;
- whether any tax claims may be discharged;
- whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;
- how to characterize the nature of your interests in property or your debts; or
- what procedures and rights apply in a bankruptcy case.

**The bankruptcy petition preparer _____ has notified me of
 Name
 any maximum allowable fee before preparing any document for filing or accepting any fee.**

 Signature of Debtor 1 acknowledging receipt of this notice Date MM / DD / YYYY

 Signature of Debtor 2, acknowledging receipt of this notice Date MM / DD / YYYY

Part 2: Declaration and Signature of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

- I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;
- I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and
- if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

Printed name _____ Title, if any _____ Firm name, if it applies _____

Number _____ Street _____

City _____ State _____ ZIP Code _____ Contact phone _____

I or my firm prepared the documents checked below and the completed declaration is made a part of each document that I check:
(Check all that apply.)

- | | | |
|--|---|--|
| <input type="checkbox"/> Voluntary Petition (Form 101) | <input type="checkbox"/> Schedule I (Form 106I) | <input type="checkbox"/> Chapter 11 Statement of Your Current Monthly Income (Form 109) |
| <input type="checkbox"/> Statement About Your Social Security Numbers (Form 121) | <input type="checkbox"/> Schedule J (Form 106J) | <input type="checkbox"/> Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Form 110-1) |
| <input type="checkbox"/> Your Assets and Liabilities and Certain Statistical Information (Form 106Sum) | <input type="checkbox"/> Declaration About an Individual Debtor's Schedules (Form 106Dec) | <input type="checkbox"/> Chapter 13 Calculation of Your Disposable Income (Form 110-2) |
| <input type="checkbox"/> Schedule A/B (Form 106A/B) | <input type="checkbox"/> Statement of Financial Affairs (Form 107) | <input type="checkbox"/> Application to Pay Filing Fee in Installments (Form 103A) |
| <input type="checkbox"/> Schedule C (Form 106C) | <input type="checkbox"/> Statement of Intention for Individuals Filing Under Chapter 7 (Form 112) | <input type="checkbox"/> Application to Have Chapter 7 Filing Fee Waived (Form 103B) |
| <input type="checkbox"/> Schedule D (Form 106D) | <input type="checkbox"/> Chapter 7 Statement of Your Current Monthly Income (Form 108-1) | <input type="checkbox"/> A list of names and addresses of all creditors (<i>creditor or mailing matrix</i>) |
| <input type="checkbox"/> Schedule E/F (Form 106E/F) | <input type="checkbox"/> Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Form 108-1Sup) | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> Schedule G (Form 106G) | <input type="checkbox"/> Chapter 7 Means Test Calculation (Form 108-2) | |
| <input type="checkbox"/> Schedule H (Form 106H) | | |

Bankruptcy petition preparers must sign and give their Social Security numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security number of each preparer must be provided. 11 U.S.C. § 110.

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner _____ Social Security number of person who signed _____ Date _____ MM / DD / YYYY

Printed name _____

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner _____ Social Security number of person who signed _____ Date _____ MM / DD / YYYY

Printed name _____

COMMITTEE NOTE

Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 19, *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line of this part includes a statement that the debtor acknowledges receipt of the notice.

Part 2, *Declaration and Signature of the Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided for any additional documents. The signature line includes spaces for the bankruptcy petition preparer to enter a social security number, and language

regarding an officer, principal, responsible person, or partner of the bankruptcy petition preparer.

Changes Made After Publication

The warning language in the introductory paragraph of the form was changed to advise that a bankruptcy petition preparer who fails to comply with requirements of the Bankruptcy Code or Rules “may be fined, imprisoned, or both.” Part 2’s title was changed to “Declaration and Signature,” with checkboxes to indicate the documents that were prepared by the bankruptcy petition preparer and with the added language that the completed declaration is made a part of each document checked. Minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-0042 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys –The forms omit the sections that are to be signed by a non-attorney bankruptcy petition preparer. Section 110(b)(1) requires each document prepared by a petition preparer to be signed by the preparer, with the preparer’s name, address and corporate information, if any. The statute does not permit these separate signatures to be combined into one form.

13-BK-0059 – National Conference of Bankruptcy Judges –The introductory paragraph’s final sentence concerning potential penalties for non-compliance should be rewritten to make its structure consistent with the structure of similar sentences in other forms and to be accurate. The inaccuracy is in the warning that petition preparers who do not “comply with the provisions” of title 11 or the Bankruptcy Rules may be “fined and imprisoned.” Under 18 U.S.C. § 156(b), however, the offense is committed if a case or related proceeding is “dismissed” because of a petition preparer’s “knowing attempt” to disregard the Bankruptcy Code or Rules, and the penalty is a fine, imprisonment, or both.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (if known): _____

Draft March 14, 2014

Official Form 121

Statement About Your Social Security Numbers

12/15

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case.

Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Part 1: Tell the Court About Yourself and Your spouse if Your Spouse is Filing With You

For Debtor 1:

For Debtor 2 (Only If Spouse Is Filing):

1. Your name

First name _____
Middle name _____
Last name _____

First name _____
Middle name _____
Last name _____

Part 2: Tell the Court About all of Your Social Security or Federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used

____ - ____ - ____ - ____ - ____ - ____
____ - ____ - ____ - ____ - ____ - ____

____ - ____ - ____ - ____ - ____ - ____
____ - ____ - ____ - ____ - ____ - ____

You do not have a Social Security number.

You do not have a Social Security number.

3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used

9 ____ - ____ - ____ - ____ - ____ - ____
9 ____ - ____ - ____ - ____ - ____ - ____

9 ____ - ____ - ____ - ____ - ____ - ____
9 ____ - ____ - ____ - ____ - ____ - ____

You do not have an ITIN.

You do not have an ITIN.

Part 3: Sign Below

Under penalty of perjury, I declare that the information I have provided in this form is true and correct.

Under penalty of perjury, I declare that the information I have provided in this form is true and correct.

x _____
Signature of Debtor 1

x _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

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COMMITTEE NOTE

Official Form 121, *Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces former Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections, and directions on the form are simplified. The debtors' Employer Tax-Identification number (EIN) is eliminated from the form, and the debtor's name is moved from the caption to the body of the form.

Changes Made After Publication

The warning that full Social Security numbers may appear on some notices to creditors was deleted, and the language regarding making a false statement was revised. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-56 – Bankruptcy Clerks Advisory Group. Remove the sentence on the form regarding full Social Security numbers on some notices.

13-BK-89 – Scott W. Ford, Clerk of Court. The introductory language should be clarified to ensure that this form is not filed in paper but submitted in CM/ECF as a private entry available to internal court users only.

13-BK-140 – Penelope Souhrada. The instructions imply that it is legal to use more than one Social Security number.

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Information to identify the case:

Debtor 1 _____ Last 4 digits of Social Security number or ITIN _____
 First Name Middle Name Last Name
 EIN ____ - _____

Debtor 2 _____ Last 4 digits of Social Security number or ITIN _____
 (Spouse, if filing) First Name Middle Name Last Name
 EIN ____ - _____

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number: _____

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]
 [include all names used by each debtor, including trade names, within the 8 years prior to the filing of the petition]

 MM / DD / YYYY

By the court: _____
 United States Bankruptcy Judge

Explanation of Bankruptcy Discharge in a Chapter 7 Case

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement.
11 U.S.C. § 524(c), (f).

Creditors cannot collect discharged debts

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

Most debts are discharged

Most debts are covered by the discharge, but not all. Generally a discharge removes the debtors' personal liability for debts owed before the debtors' bankruptcy case was filed.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts owed before the conversion are discharged.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Some debts are not discharged

Examples of some debts that are not discharged are:

- debts that are domestic support obligations;
- debts for most student loans;
- debts for most taxes;
- debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;
- debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- some debts which the debtors did not properly list;
- debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and
- debts for death or personal injury caused by operating a vehicle while intoxicated.

Also, debts covered by a valid reaffirmation agreement are not discharged.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces former Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted.

Reaffirmed debts are explained more fully, and readers are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid lien. In addition, readers are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as a cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued. Any alternate names of the debtor or debtors appear in the order not in the information box at the top of the form.

Changes Made After Publication

The wording was changed to make clear that the form should be read by both debtors and creditors, and certain parts of the warning language were deleted. A requirement to list other names used by the debtor over the last eight years was added. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. The form number should be placed at the top of the form, and the distinction between information “to the creditors” and “to the debtor” is artificial. The revised format misleadingly suggests that debtors need only read the “Notice to the debtor” and creditors should only read the “Notice to the creditors.”

13-BK-0151 – National Association of Bankruptcy Trustees – The Order of Discharge should include an explanation that the trustee’s administration of the case can extend beyond the discharge date. Further, the form should include a warning that property, even with a lien, remains property of the estate until the case is closed or the property abandoned.

Fill in this information to identify the case:

Draft February 25, 2014

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual, you must take an approved course about personal financial management if:

- you filed for bankruptcy under chapter 7 or 13, or
- you filed for bankruptcy under chapter 11 and § 1141 (d)(3) does not apply.

In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does notify the court, you need not file this form. If the provider does not notify the court, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

- If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.
- If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

I completed an approved course in personal financial management:

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on (check one):

- Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.
- Active duty.** I am currently on active military duty in a military combat zone.
- Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

Signature of debtor named on certificate _____

Printed name of debtor _____

Date _____
MM / DD / YYYY

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COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces former Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

Changes Made After Publication

The instruction language was clarified regarding when an approved course about financial management must be completed, and an instruction was added that the debtor should file the certificate regarding completing the course if the provider does not file it. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-56 – Bankruptcy Clerks Advisory Group – The second paragraph to the introductory information to this form includes only a "does not" scenario. The Bankruptcy Clerks Advisory Group suggested adding a "does" scenario.

13-BK-59 – National Conference of Bankruptcy Judges – The National Conference of Bankruptcy Judges made stylistic suggestions.

Fill in this information to identify your case:

Draft March 31, 2014

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form 427
Cover Sheet for Reaffirmation Agreement

12/14

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?** _____
Name of the creditor

2. **How much is the debt?** On the date that the bankruptcy case is filed \$ _____
 To be paid under the reaffirmation agreement \$ _____
 \$ _____ per month for _____ months (if fixed interest rate)

3. **What is the Annual Percentage Rate (APR) of interest? (See Bankruptcy Code § 524(k)(3)(E).)**
 Before the bankruptcy case was filed _____ %
 Under the reaffirmation agreement _____ % Fixed rate
 Adjustable rate

4. **Does collateral secure the debt?** No
 Yes. Describe the collateral. _____
 Current market value \$ _____

5. **Does the creditor assert that the debt is nondischargeable?** No
 Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. Using information from Schedule G: Your Income (Official Form 106G) and Schedule H: Your Expenses (Official Form 106H), fill in the amounts.	Income and expenses reported on Schedules G and H	Income and expenses stated on the reaffirmation agreement
6a. Combined monthly income from line 12 of Schedule G	\$ _____	6e. Monthly income from all sources after payroll deductions \$ _____
6b. Monthly expenses from Column A, line 22 of Schedule H	— \$ _____	6f. Monthly expenses — \$ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule H	— \$ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses — \$ _____
6d. Scheduled net monthly income \$ _____ Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.		6h. Present net monthly income \$ _____ Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

7. Are the income amounts on lines 6a and 6e different? No Yes. Explain why they are different and complete line 10. _____

8. Are the expense amounts on lines 6b and 6f different? No Yes. Explain why they are different and complete line 10. _____

9. Is the net monthly income in line 6h less than 0? No Yes. A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10.

10. Debtor's certification about lines 7-9 I certify that each explanation on lines 7-9 is true and correct.

If any answer on lines 7-9 is Yes, the debtor must sign here.

_____ _____

If all the answers on lines 7-9 are No, go to line 11. Signature of Debtor 1 Signature of Debtor 2 (Spouse Only in a Joint Case)

11. Did an attorney represent the debtor in negotiating the reaffirmation agreement? No Yes. Has the attorney executed a declaration or an affidavit to support the reaffirmation agreement?

No Yes

Part 2: Sign Here

Whoever fills out this form must sign here. I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Cover Sheet for Reaffirmation Agreement.

_____ Date _____
Signature MM / DD / YYYY

Printed Name

Check one:
 Debtor or Debtor's Attorney
 Creditor or Creditor's Attorney

COMMITTEE NOTE

Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the “Annual Percentage Rate” to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement*, is revised and renumbered as part of the Forms Modernization Project. The form replaces former Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted, and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed, as well as the debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the "Annual Percentage Rate" to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

Changes Made After Publication

A statutory citation was added to line 3 of Part 1, and the term "counsel" was changed to "attorney" in line 11. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-0056 – Bankruptcy Clerks Advisory Group - The instructions before Part 1 of this form should be modified to remove "attach it to the reaffirmation agreement," and instead include "file it as one document with the reaffirmation agreement." Clarify which forms require the submission of this cover sheet.

12-BK-0059 – National Conference of Bankruptcy Judges - Use the statutory language in line 11 regarding attorney representation and the requirement of a declaration. In addition, split the inquiry in line 11 into two questions, one concerning the debtor's representation by an attorney, the other concerning the attorney's execution of the declaration.

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APPENDIX B

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APPENDIX B.1

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

For Publication for Public Comment

**Rule 1010. Service of Involuntary Petition and Summons; ~~Petition for
Recognition of a Foreign Nonmain Proceeding~~**

1 (a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS;
2 ~~SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN~~
3 ~~PROCEEDING.~~ On the filing of an involuntary petition ~~or a petition for~~
4 ~~recognition of a foreign nonmain proceeding,~~ the clerk shall forthwith issue a
5 summons for service. When an involuntary petition is filed, service shall be made
6 on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is~~
7 ~~filed, service shall be made on the debtor, any entity against whom provisional~~
8 ~~relief is sought under § 1519 of the Code, and on any other party as the court may~~
9 ~~direct.~~ The summons shall be served with a copy of the petition in the manner
10 provided for service of a summons and complaint by Rule 7004(a) or (b). If
11 service cannot be so made, the court may order that the summons and petition be
12 served by mailing copies to the party's last known address, and by at least one
13 publication in a manner and form directed by the court. The summons and
14 petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l)
15 F.R.Civ.P. apply when service is made or attempted under this rule.

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

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COMMITTEE NOTE

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

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Rule 1012. Responsive Pleading in Cross-Border Cases

1 (a) WHO MAY CONTEST PETITION. The debtor or any party in interest
2 may contest a petition for recognition of a foreign proceeding.

3 (b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections
4 and other responses to the petition shall be presented no later than seven days
5 before the date set for the hearing on the petition, unless the court prescribes some
6 other time or manner for responses.

7 (c) CORPORATE OWNERSHIP STATEMENT. If the entity responding
8 to the petition is a corporation, then the entity shall file a corporate ownership
9 statement containing the information described in Rule 7007.1 with its first
10 appearance, pleading, motion, response, or other request addressed to the court.

COMMITTEE NOTE

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

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Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

1 (a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST.

2 Except as provided in subdivisions (h), (i), (l), (p), and (q) of this rule, the clerk,
3 or some other person as the court may direct, shall give the debtor, the trustee, all
4 creditors and indenture trustees at least 21 days' notice by mail of:

5 * * * * *

6 (7) the time fixed for filing proofs of claims pursuant to Rule
7 3003(c); ~~and~~

8 (8) the time fixed for filing objections and the hearing to consider
9 confirmation of a chapter 12 plan; and

10 (9) the time fixed for filing objections to confirmation of a chapter
11 13 plan.

12 (b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST.

13 Except as provided in subdivision (l) of this rule, the clerk, or some other person
14 as the court may direct, shall give the debtor, the trustee, all creditors and
15 indenture trustees not less than 28 days' notice by mail of the time fixed

16 (1) for filing objections and the hearing to consider approval of a
17 disclosure statement or, under §1125(f), to make a final determination whether the
18 plan provides adequate information so that a separate disclosure statement is not
19 necessary; ~~and~~

20 (2) for filing objections and the hearing to consider confirmation of

21 a chapter 9, or chapter 11, or chapter 13 plan; and

22 (3) for the hearing to consider confirmation of a chapter 13 plan.

23 * * * * *

24 (q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN
25 PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH
26 FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

27 (1) *Notice of Petition for Recognition.* After the filing of a petition
28 for recognition of a foreign proceeding, the court shall promptly schedule and
29 hold a hearing on the petition. The clerk, or some other person as the court may
30 direct, shall forthwith give the debtor, all persons or bodies authorized to
31 administer foreign proceedings of the debtor, all entities against whom
32 provisional relief is being sought under §1519 of the Code, all parties to litigation
33 pending in the United States in which the debtor is a party at the time of the filing
34 of the petition, and such other entities as the court may direct, at least 21 days'
35 notice by mail of the hearing ~~on the petition for recognition of a foreign~~
36 ~~proceeding.~~ The notice shall state whether the petition seeks recognition as a
37 foreign main proceeding or foreign nonmain proceeding and shall include the
38 petition and any other document the court may require. If the court consolidates
39 the hearing on the petition with the hearing on a request for provisional relief, the
40 court may set a shorter notice period, with notice to the entities listed in this
41 subdivision.

COMMITTEE NOTE

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

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Rule 3002. Filing Proof of Claim or Interest

1 (a) NECESSITY FOR FILING. ~~As a~~ secured creditor, unsecured creditor,
2 or an equity security holder must file a proof of claim or interest for the claim or
3 interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.
4 A lien that secures a claim against the debtor is not void due only to the failure of
5 any entity to file a proof of claim.

6 (b) PLACE OF FILING. A proof of claim or interest shall be filed in
7 accordance with Rule 5005.

8 (c) TIME FOR FILING. In a voluntary chapter 7 ~~liquidation~~ case, chapter
9 12 ~~family farmer's debt adjustment~~ case, or chapter 13 ~~individual's debt~~
10 ~~adjustment~~ case, a proof of claim is timely filed if it is filed not later than ~~90~~ 60
11 days after the order for relief or the date of the order of conversion to a case under
12 chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is
13 timely filed if it is filed not later than 90 days after the order for relief is entered.
14 ~~the first date set for the meeting of creditors called under § 341(a) of the Code But~~
15 in all these cases, the following exceptions apply:

16 * * * * *

17 (6) ~~If notice of the time to file a proof of claim has been mailed to~~
18 ~~a creditor at a foreign address, o~~n motion filed by ~~the~~ a creditor before or after
19 the expiration of the time to file a proof of claim, the court may extend the time
20 by not more than 60 days from the date of the order granting the motion. The

21 motion may be granted if the court finds that the notice was insufficient under the
22 circumstances to give the creditor a reasonable time to file a proof of claim

23 (A) the notice was insufficient under the circumstances to
24 give the creditor a reasonable time to file a proof of claim because the debtor
25 failed to timely file the list of creditors' names and addresses required by Rule
26 1007(a); or

27 (B) the notice was insufficient under the circumstances to
28 give the creditor a reasonable time to file a proof of claim, and the notice was
29 mailed to the creditor at a foreign address.

30 (7) A proof of claim filed by the holder of a claim that is secured
31 by a security interest in the debtor's principal residence is timely filed if:

32 (A) the proof of claim, together with the attachments
33 required by Rule 3001(c)(2)(C), is filed not later than 60 days after the order for
34 relief is entered; and

35 (B) any attachments required by Rule 3001(c)(1) and (d)
36 are filed as a supplement to the holder's claim not later than 120 days after the
37 order for relief is entered.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The inclusion of language from § 506(d) is not intended to effect any change of law with respect to claims subject to setoff under § 553. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of

claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules 3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to any proof of claim.

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Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

1 (a) IN GENERAL. This rule applies in a chapter 13 case to claims (1)
2 that are ~~(1)~~ secured by a security interest in the debtor's principal residence, and
3 (2) for which the plan provides that either the trustee or the debtor will make
4 contractual installment payments provided for under § 1322(b)(5) of the Code in
5 the debtor's plan. Unless the court orders otherwise, the notice requirements of
6 this rule cease to apply when an order terminating or annulling the automatic stay
7 becomes effective with respect to the residence that secures the claim.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

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Rule 3007. Objections to Claims

1 (a) ~~OBJECTIONS TO CLAIMS~~ TIME AND MANNER OF
2 SERVICE. An objection to the allowance of a claim and a notice of
3 objection that substantially conforms to the appropriate Official Form shall
4 ~~be in writing and filed; and served at least 30 days before any scheduled~~
5 hearing on the objection or any deadline for the claimant to request a
6 hearing. A copy of the objection with notice of the hearing thereon shall be
7 ~~mailed or otherwise delivered to the claimant, the debtor or debtor in~~
8 ~~possession, and the trustee at least 30 days prior to the hearing. The~~
9 objection and notice shall be served as follows:

10 (1) on the claimant by first-class mail to the person most
11 recently designated on the claimant's original or amended proof of claim as
12 the person to receive notices, at the address so indicated; and

13 (A) if the objection is to a claim of the United States, or
14 any of its officers or agencies, in the manner provided for service of a
15 summons and complaint by Rule 7004(b)(4) or (5); or

16 (B) if the objection is to a claim of an insured depository
17 institution, in the manner provided by Rule 7004(h); and

18 (2) on the debtor or debtor in possession and on the trustee by
19 first-class mail or other permitted means.

COMMITTEE NOTE

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail addressed to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take. However, while a local rule may require the claimant to respond to the objection to a proof of claim, the court will still need to determine if the claim is valid, even if the claimant does not file a response to a claim objection or request a hearing.

Rule 3012. Valuation of Security Determining the Amount of Secured and Priority Claims

1 ~~The court may determine the value of a claim secured by a lien on~~
2 ~~property in which the estate has an interest on motion of any party in interest and~~
3 ~~after a hearing on notice to the holder of the secured claim and any other entity as~~
4 ~~the court may direct.~~

5 (a) DETERMINATION OF AMOUNT OF CLAIM. On request by a
6 party in interest and after notice—to the holder of the claim and any other entity
7 the court designates—and a hearing, the court may determine

8 (1) the amount of a secured claim under § 506(a) of the Code, or

9 (2) the amount of a claim entitled to priority under § 507 of the
10 Code.

11 (b) REQUEST FOR DETERMINATION; HOW MADE. Except as
12 provided in subdivision (c), a request to determine the amount of a secured claim
13 may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or
14 chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the
15 plan shall be served on the holder of the claim and any other entity the court
16 designates in the manner provided for service of a summons and complaint by
17 Rule 7004. A request to determine the amount of a claim entitled to priority may
18 be made only by motion after a claim is filed or in a claim objection.

19 (c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the
20 amount of a secured claim of a governmental unit may be made only by motion or
21 in a claim objection after the governmental unit files a proof of claim or after the
22 time for filing one under Rule 3002(c)(1) has expired.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. When the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made only by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

1 (a) FILING OF CHAPTER 12 PLAN. The debtor may file a chapter 12
2 plan with the petition. If a plan is not filed with the petition, it shall be filed
3 within the time prescribed by § 1221 of the Code.

4 (b) FILING OF CHAPTER 13 PLAN. The debtor may file a chapter 13
5 plan with the petition. If a plan is not filed with the petition, it shall be filed
6 within 14 days thereafter, and such time may not be further extended except for
7 cause shown and on notice as the court may direct. If a case is converted to
8 chapter 13, a plan shall be filed within 14 days thereafter, and such time may not
9 be further extended except for cause shown and on notice as the court may direct.

10 (c) ~~DATING~~. ~~Every proposed plan and any modification thereof shall be~~
11 ~~dated.~~ FORM OF CHAPTER 13 PLAN. If there is an Official Form for a plan
12 filed in a chapter 13 case, that form must be used. Provisions not otherwise
13 included in the Official Form or deviating from it are effective only if they are
14 included in a section of the Official Form designated for nonstandard provisions
15 and are also identified in accordance with any other requirements of the Official
16 Form.

17 (d) ~~NOTICE AND COPIES~~. If the plan ~~The plan or a summary of the plan~~
18 ~~shall be~~ is not included with the each notice of the hearing on confirmation mailed
19 pursuant to Rule 2002, the debtor shall serve the plan on the trustee and all
20 creditors when it is filed with the court. If required by the court, the debtor shall

21 ~~furnish a sufficient number of copies to enable the clerk to include a copy of the~~
22 ~~plan with the notice of the hearing.~~

23 (e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall
24 forthwith transmit to the United States trustee a copy of the plan and any
25 modification thereof filed pursuant to subdivision (a) or (b) of this rule.

26 (f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD
27 FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation
28 of a plan shall be filed and served on the debtor, the trustee, and any other entity
29 designated by the court, and shall be transmitted to the United States trustee,
30 ~~before confirmation of the plan~~ at least seven days before the date set for the
31 hearing on confirmation. An objection to confirmation is governed by Rule 9014.
32 If no objection is timely filed, the court may determine that the plan has been
33 proposed in good faith and not by any means forbidden by law without receiving
34 evidence on such issues.

35 (g) EFFECT OF CONFIRMATION. In a chapter 12 or chapter 13 case,
36 any determination made in accordance with Rule 3012 of the amount of a secured
37 claim under § 506(a) of the Code is binding on its holder, even if the holder files a
38 contrary proof of claim under Rule 3002 or the debtor schedules that claim under
39 § 521(a) of the Code, and regardless of whether an objection to the claim has been
40 filed under Rule 3007.

41 ~~(g)~~ (h) MODIFICATION OF PLAN AFTER CONFIRMATION. A
42 request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify
43 the proponent and shall be filed together with the proposed modification. The

44 clerk, or some other person as the court may direct, shall give the debtor, the
45 trustee, and all creditors not less than 21 days notice by mail of the time fixed for
46 filing objections and, if an objection is filed, the hearing to consider the proposed
47 modification, unless the court orders otherwise with respect to creditors who are
48 not affected by the proposed modification. A copy of the notice shall be
49 transmitted to the United States trustee. A copy of the proposed modification, or a
50 summary thereof, shall be included with the notice. ~~If required by the court, the~~
51 ~~proponent shall furnish a sufficient number of copies of the proposed~~
52 ~~modification, or a summary thereof, to enable the clerk to include a copy with~~
53 ~~each notice.~~ If a copy is not included with the notice and the proposed
54 modification is sought by the debtor, a copy shall be served on the trustee and all
55 creditors in the manner provided for service of the plan by subdivision (d) of this
56 rule. Any objection to the proposed modification shall be filed and served on the
57 debtor, the trustee, and any other entity designated by the court, and shall be
58 transmitted to the United States trustee. An objection to a proposed modification
59 is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule. The option to serve a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

Rule 4003. Exemptions

* * * * *

1 (d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT
2 PROPERTY. A proceeding under § 522(f) by the debtor to avoid a lien or other
3 transfer of property exempt under ~~§ 522(f)~~ of the Code shall be commenced by
4 motion in the manner provided by ~~in accordance with~~ Rule 9014, or by serving a
5 chapter 12 or chapter 13 plan on the affected creditors in the manner provided by
6 Rule 7004 for service of a summons and complaint. Notwithstanding the
7 provisions of subdivision (b), a creditor may object to a ~~motion filed request~~
8 under § 522(f) by challenging the validity of the exemption asserted to be
9 impaired by the lien.

COMMITTEE NOTE

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

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Rule 9006. Computing and Extending Time; Time for Motion Papers

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1 (f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE
2 5(b)(2)(D); ~~(E)~~; OR (F) F.R. CIV. P. When there is a right or requirement to act or
3 undertake some proceedings within a prescribed period after being served¹ and that
4 service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk); ~~(E)~~; or (F) (other
5 means consented to) F.R. Civ. P., three days are added after the prescribed period would
6 otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

¹ This wording anticipates adoption of the proposed amendment published in August 2013.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means” of delivery under subparagraph (F).

Rule 9009. Forms

1 (a) OFFICIAL FORMS. ~~Except as otherwise provided in Rule 3016(d);~~
2 ~~the~~ The Official Forms prescribed by the Judicial Conference of the United States
3 ~~shall be observed and used with alterations as may be appropriate without~~
4 alteration, except as otherwise provided in these rules, in a particular Official
5 Form, or in the national instructions for a particular Official Form. ~~Forms may be~~
6 ~~combined and their contents rearranged to permit economies in their use.~~ Official
7 Forms may be modified to permit minor changes not affecting wording or the
8 order of presenting information, including changes that

9 (1) expand the prescribed areas for responses in order to permit
10 complete responses;

11 (2) delete space not needed for responses; or

12 (3) delete items requiring detail in a question or category if the filer
13 indicates—either by checking “no” or “none” or by stating in words—that there is
14 nothing to report on that question or category.

15 (b) DIRECTOR’S FORMS. The Director of the Administrative Office of
16 the United States Courts may issue additional forms for use under the Code.

17 (c) CONSTRUCTION. The forms shall be construed to be consistent with
18 these rules and the Code.

COMMITTEE NOTE

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule, the Official Form itself, or the national instructions applicable to an Official Form permit alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability to make minor modifications to an Official Form that do not affect the wording or the order in which information is presented on a form. Permissible changes include those that merely expand or delete the space for responses as appropriate or delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. Similarly, varying the width or orientation of columnar data on a form for clarity of presentation would be a permissible minor change. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. Any changes that contravene the directions on an Official Form would be prohibited by this rule.

The creation of subdivision (b) and subdivision (c) is stylistic.

APPENDIX B.2

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United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter _____

GENERAL POWER OF ATTORNEY

[Abrogated]

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2015 COMMITTEE NOTE

The form is abrogated. Former Official Form 11A , although abrogated as an Official Form, continues to be available as a Director's Procedural Form.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

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United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter _____

SPECIAL POWER OF ATTORNEY

[Abrogated]

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2015 COMMITTEE NOTE

The form is abrogated. Former Official Form 11B , although abrogated as an Official Form, continues to be available as a Director’s Procedural Form.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director’s Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- An amended filing
- A supplement showing post-petition chapter 13 expenses as of the following date:

MM / DD / YYYY

Official Form 106J

Schedule J: Your Expenses

12/15

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

Part 1: Describe Your Household

1. Is this a joint case?

- No. Go to line 2.
- Yes. **Does Debtor 2 live in a separate household?**
 - No
 - Yes. Debtor 2 must file Official Forms 106J-2, *Expenses for Separate Household of Debtor 2*.

2. Do you have dependents?

Do not list Debtor 1 and Debtor 2.

Do not state the dependents' names.

- No
- Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 1 or Debtor 2

Dependent's age

Does dependent live with you?

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes

3. Do your expenses include expenses of people other than yourself and your dependents?

- No
- Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental Schedule J, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on Schedule I: Your Income (Official Form B 6I.)

4. The rental or home ownership expenses for your residence. Include first mortgage payments and any rent for the ground or lot.

Your expenses

4. \$ _____

If not included in line 4:

- 4a. Real estate taxes 4a. \$ _____
- 4b. Property, homeowner's, or renter's insurance 4b. \$ _____
- 4c. Home maintenance, repair, and upkeep expenses 4c. \$ _____
- 4d. Homeowner's association or condominium dues 4d. \$ _____

Your expenses

5. Additional mortgage payments for your residence, such as home equity loans

5. \$

6. Utilities:

6a. Electricity, heat, natural gas

6a. \$

6b. Water, sewer, garbage collection

6b. \$

6c. Telephone, cell phone, Internet, satellite, and cable services

6c. \$

6d. Other. Specify:

6d. \$

7. Food and housekeeping supplies

7. \$

8. Childcare and children's education costs

8. \$

9. Clothing, laundry, and dry cleaning

9. \$

10. Personal care products and services

10. \$

11. Medical and dental expenses

11. \$

12. Transportation. Include gas, maintenance, bus or train fare. Do not include car payments.

12. \$

13. Entertainment, clubs, recreation, newspapers, magazines, and books

13. \$

14. Charitable contributions and religious donations

14. \$

15. Insurance.

Do not include insurance deducted from your pay or included in lines 4 or 20.

15a. Life insurance

15a. \$

15b. Health insurance

15b. \$

15c. Vehicle insurance

15c. \$

15d. Other insurance. Specify:

15d. \$

16. Taxes. Do not include taxes deducted from your pay or included in lines 4 or 20. Specify:

16. \$

17. Installment or lease payments:

17a. Car payments for Vehicle 1

17a. \$

17b. Car payments for Vehicle 2

17b. \$

17c. Other. Specify:

17c. \$

17d. Other. Specify:

17d. \$

18. Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, Schedule I, Your Income (Official Form 6I).

18. \$

19. Other payments you make to support others who do not live with you.

Specify:

19. \$

20. Other real property expenses not included in lines 4 or 5 of this form or on Schedule I: Your Income.

20a. Mortgages on other property

20a. \$

20b. Real estate taxes

20b. \$

20c. Property, homeowner's, or renter's insurance

20c. \$

20d. Maintenance, repair, and upkeep expenses

20d. \$

20e. Homeowner's association or condominium dues

20e. \$

21. Other. Specify: _____

21. +\$ _____

22. Calculate your monthly expenses.

22a. Add lines 4 through 21.

22b. Copy line ____ (monthly expenses for Debtor 2), if any, from Official Form 106J-2

22c. Add line 22a and 22b. The result is your monthly expenses.

22. \$ _____
\$ _____
\$ _____

23. Calculate your monthly net income.

23a. Copy line 12 (your combined monthly income) from Schedule I.

23a. \$ _____

23b. Copy your monthly expenses from line 22 above.

23b. - \$ _____

23c. Subtract your monthly expenses from your monthly income.

The result is your *monthly net income*.

23c. \$ _____

24. Do you expect an increase or decrease in your expenses within the year after you file this form?

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

No.

Yes.

Explain here:

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- An amended filing
- A supplement showing post-petition chapter 13 expenses as of the following date:

MM / DD / YYYY

Official Form 106J-2

Schedule J-2: Expenses for Separate Household of Debtor 2

12/15

Use this form for Debtor 2's separate household expenses ONLY IF Debtor 1 and Debtor 2 maintain separate households. Answer the questions on this form with respect to Debtor 2 only. If Debtor 1 and Debtor 2 have one or more dependents in common, list the dependent on both Schedule J and Schedule J-2. Be as complete and accurate as possible. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

Do you and Debtor 1 maintain separate households? Yes
 No (Do not complete this form)

1. Do you have dependents?	Dependent's relationship to Debtor 2:	Dependent's age	Does dependent live with you?
<input type="checkbox"/> No <input type="checkbox"/> Yes. Fill out this information for each dependent.....	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Do not list Debtor 1 but list all other dependents of Debtor 2 regardless of whether listed as a dependent of Debtor 1 on Schedule J. Only list dependents Do not state the dependents' names.	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes
	_____	_____	<input type="checkbox"/> No <input type="checkbox"/> Yes

2. Do your expenses include expenses of people other than yourself, your dependents, and Debtor 1?
 No
 Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on Schedule I: Your Income (Official Form 106I.)

	Your expenses
3. The rental or home ownership expenses for your residence. Include first mortgage payments and any rent for the ground or lot. If not included in line 4:	4. \$ _____
4a. Real estate taxes	4a. \$ _____
4b. Property, homeowner's, or renter's insurance	4b. \$ _____
4c. Home maintenance, repair, and upkeep expenses	4c. \$ _____
4d. Homeowner's association or condominium dues	4d. \$ _____

Your expenses

4. Additional mortgage payments for your residence, such as home equity loans

5. \$

5. Utilities:

6a. Electricity, heat, natural gas

6a. \$

6b. Water, sewer, garbage collection

6b. \$

6c. Telephone, cell phone, Internet, satellite, and cable services

6c. \$

6d. Other. Specify:

6d. \$

6. Food and housekeeping supplies

7. \$

7. Childcare and children's education costs

8. \$

8. Clothing, laundry, and dry cleaning

9. \$

9. Personal care products and services

10. \$

10. Medical and dental expenses

11. \$

11. Transportation. Include gas, maintenance, bus or train fare. Do not include car payments.

12. \$

12. Entertainment, clubs, recreation, newspapers, magazines, and books

13. \$

13. Charitable contributions and religious donations

14. \$

14. Insurance.

Do not include insurance deducted from your pay or included in lines 4 or 20.

15a. Life insurance

15a. \$

15b. Health insurance

15b. \$

15c. Vehicle insurance

15c. \$

15d. Other insurance. Specify:

15d. \$

16. Taxes. Do not include taxes deducted from your pay or included in lines 4 or 20. Specify:

16. \$

17. Installment or lease payments:

17a. Car payments for Vehicle 1

17a. \$

17b. Car payments for Vehicle 2

17b. \$

17c. Other. Specify:

17c. \$

17d. Other. Specify:

17d. \$

18. Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, Schedule I, Your Income (Official Form 106I).

18. \$

19. Other payments you make to support others who do not live with you.

Specify:

19. \$

20. Other real property expenses not included in lines 4 or 5 of this form or on Schedule I: Your Income.

20a. Mortgages on other property

20a. \$

20b. Real estate taxes

20b. \$

20c. Property, homeowner's, or renter's insurance

20c. \$

20d. Maintenance, repair, and upkeep expenses

20d. \$

20e. Homeowner's association or condominium dues

20e. \$

21. **Other.** Specify: _____

21. **+\$** _____

22. **Your monthly expenses.** Add lines 4 through 21.
The result is the monthly expenses of Debtor 2. Copy the result to line 22b of Schedule J to calculate the total expenses for Debtor 1 and Debtor 2.

22. \$ _____

23. Line not used on this form.

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

No.

Yes.

Explain here:

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COMMITTEE NOTE

Schedule J: Your Expenses (Official Form 106J), formally Official Form 6J, has been revised to include references to new *Schedule J-2: Expenses for Separate Household of Debtor 2* (Official Form 106J-2) at line 1 and new line 22b. The revisions clarify how to calculate monthly net income in joint cases where Debtor 1 and Debtor 2 maintain separate households. Line 22b is added so Schedule J and Schedule J-2 are easily coordinated. Schedule J is also renumbered to conform to the three digit numbering system that was developed for official bankruptcy forms as part of the Forms Modernization Project.

Schedule J-2 is new. It is used to report the monthly expenses of Debtor 2 in a joint debtor case only if Debtor 1 and Debtor 2 maintain separate households.

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Debtor _____

United States Bankruptcy Court for the: _____
[Bankruptcy district]

Case number: _____

Check if this is an amended plan

Official Form 113

Chapter 13 Plan

12/16

Part 1: Notices

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. *In the following notice to creditors, you must check each box that applies.*

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.

You should read this plan carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance to you. **Boxes must be checked by debtor(s) if applicable.**

- The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.
- The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.
- The plan sets out nonstandard provisions in Part 9.

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

\$ _____ per _____ for _____ months
[and \$ _____ per _____ for _____ months.] *Insert additional lines if needed.*

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in Parts 3 through 6 of this plan.

2.2 Regular payments to the trustee will be made from future earnings in the following manner:

Check all that apply.

- Debtor(s) will make payments pursuant to a payroll deduction order.
- Debtor(s) will make payments directly to the trustee.
- Other (specify method of payment): _____.

2.3 Federal income tax refunds.

Check one.

- Debtor(s) will retain any federal tax refunds received during the plan term.
- Debtor(s) will supply the trustee with a copy of each federal tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all federal income tax refunds, other than earned income tax credits, received during the plan term.
- Debtor(s) will supply the trustee with federal tax returns filed during the plan term and will turn over to the trustee a portion of any federal income tax refunds received during the plan term as specified below.

2.4 Additional payments.

Check one.

- None.** If "None" is checked, the rest of § 2.4 need not be completed or reproduced.
- Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is \$ _____.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default.

Check one.

- None.** If "None" is checked, the rest of § 3.1 need not be completed or reproduced.
- The debtor(s) will maintain the contractual installment payments on the claims listed below, with any changes required by the applicable contract, and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Current installment payment (including escrow)	Amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage	Estimated total payments by trustee
_____	_____	\$ _____	\$ _____	_____ %	\$ _____	\$ _____
		Disbursed by:				
		<input type="checkbox"/> Trustee				
		<input type="checkbox"/> Debtor(s)				
_____	_____	\$ _____	\$ _____	_____ %	\$ _____	\$ _____
		Disbursed by:				
		<input type="checkbox"/> Trustee				
		<input type="checkbox"/> Debtor(s)				

Insert additional claims as needed.

3.2 Request for valuation of security and claim modification. Check one.

None. If "None" is checked, the rest of § 3.2 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as stated below in the column headed *Amount of secured claim*. For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with the Bankruptcy Rules control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

Name of creditor	Estimated amount of creditor's total claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	____%	\$ _____	\$ _____
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	____%	\$ _____	\$ _____
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	____%	\$ _____	\$ _____

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

None. If "None" is checked, the rest of § 3.3 need not be completed or reproduced.

The claims listed below were either:

- (1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or
- (2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____	_____	\$ _____	____%	\$ _____	\$ _____
				Disbursed by:	
				<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	
_____	_____	\$ _____	____%	\$ _____	\$ _____
				Disbursed by:	
				<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	

Insert additional claims as needed.

3.4 Lien avoidance.

Check one.

- None.** If "None" is checked, the rest of § 3.4 need not be completed or reproduced.
The remainder of this paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). *If more than one lien is to be avoided, provide the information separately for each lien.*

Information regarding judicial lien or security interest	Calculation of lien avoidance	Treatment of remaining secured claim
Name of creditor _____	a. Amount of lien \$ _____	Amount of secured claim after avoidance (line a minus line f) \$ _____
	b. Amount of all other liens \$ _____	
Collateral _____	c. Value of claimed exemptions + \$ _____	Interest rate (if applicable) _____ %
	d. Total of adding lines a, b, and c \$ _____	
Lien identification (such as judgment date, date of lien recording, book and page number) _____ _____	e. Value of debtor's interest in property - \$ _____	Monthly plan payment \$ _____
	f. Subtract line e from line d. \$ _____	
Extent of exemption impairment (Check applicable box):		
<input type="checkbox"/> Line f is equal to or greater than line a. The entire lien is avoided. (Do not complete the next column.)		
<input type="checkbox"/> Line f is less than line a. A portion of the lien is avoided. (Complete the next column.)		

Insert additional claims as needed.

3.5 Surrender of collateral.

Check one.

- None.** If "None" is checked, the rest of § 3.5 need not be completed or reproduced.
- The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
_____	_____
_____	_____

Insert additional claims as needed.

Part 4: Treatment of Trustee's Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims other than those treated in § 4.5 will be paid in full without interest.

4.2 Trustee's fees

Trustee's fees are estimated to be _____% of plan payments; and during the plan term, they are estimated to total \$_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be \$_____.

4.4 Priority claims other than attorney's fees and those treated in § 4.5.

Check one.

- None.** If "None" is checked, the rest of § 4.4 need not be completed or reproduced.
- The debtor estimates the total amount of other priority claims to be _____.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.

Check one.

- None.** If "None" is checked, the rest of § 4.5 need not be completed or reproduced.
- The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4), but not less than the amount that would have been paid on such claim if the estate of the debtor were liquidated under chapter 7, see 11 U.S.C. § 1325(a)(4).

a.	Name of creditor	Amount of claim to be paid
	_____	\$ _____
	_____	\$ _____

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 General

Nonpriority unsecured claims will be paid to the extent allowed as specified in this Part.

5.2 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

- The sum of \$_____.
- _____% of the total amount of these claims.
- The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately \$_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.3 Interest on allowed nonpriority unsecured claims not separately classified. Check one.

- None.** If "None" is checked, the rest of § 5.3 need not be completed or reproduced.
- Interest on allowed nonpriority unsecured claims that are not separately classified will be paid at an annual percentage rate of _____ % under 11 U.S.C. §1325(a)(4), and is estimated to total \$ _____.

5.4 Maintenance of payments and cure of any default on nonpriority unsecured claims. Check one.

- None.** If "None" is checked, the rest of § 5.4 need not be completed or reproduced.
- The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____
_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____

Insert additional claims as needed.

5.5 Other separately classified nonpriority unsecured claims. Check one.

- None.** If "None" is checked, the rest of § 5.5 need not be completed or reproduced.
- The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Amount to be paid on the claim	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	\$ _____	_____ %	\$ _____
_____	_____	\$ _____	_____ %	\$ _____

Insert additional claims as needed.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. Check one.

- None.** If "None" is checked, the rest of § 6.1 need not be completed or reproduced.
- Assumed items.** The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____
_____	_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____

Insert additional contracts or leases as needed.

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make the monthly payments required in Parts 3 through 6 in the following order, with payments other than those listed to be made in the order determined by the trustee:

- a. Trustee's fees
- b. _____
- c. _____ *Insert additional lines if needed.*

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revert in the debtor(s) upon

Check the applicable box:

- plan confirmation.
- closing of the case.
- other: _____.

Debtor _____

Case number _____

Part 9: Nonstandard Plan Provisions

None. If "None" is checked, the rest of Part 9 need not be completed or reproduced.

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below.

These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.

Part 10: Signatures

X _____ Date _____

Signature of Attorney for Debtor(s)

X _____ Date _____

X _____ Date _____

Signature(s) of Debtor(s) (required if not represented by an attorney; otherwise optional)

Chapter 13 Plan Exhibit: Estimated Amounts of Trustee Payments

The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

- a. **Maintenance and cure payments on secured claims** *(Part 3, Section 3.1 total):* \$ _____
- b. **Modified secured claims** *(Part 3, Section 3.2 total):* \$ _____
- c. **Secured claims excluded from 11 U.S.C. § 506** *(Part 3, Section 3.3 total):* \$ _____
- d. **Judicial liens or security interests partially avoided** *(Part 3, Section 3.4 total):* \$ _____
- e. **Administrative and other priority claims** *(Part 4 total):* \$ _____
- f. **Nonpriority unsecured claims** *(Part 5, Section 5.2 total):* \$ _____
- g. **Interest on allowed unsecured claims** *(Part 5, Section 5.3 total)* \$ _____
- h. **Maintenance and cure payments on unsecured claims** *(Part 5, Section 5.4 total)* \$ _____
- i. **Separately classified unsecured claims** *(Part 5, Section 5.5 total)* \$ _____
- j. **Arrearage payments on executory contracts and unexpired leases** *(Part 6, Section 6.1 total)* + \$ _____

Total of lines a through j.....

\$ _____

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COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as permitted by the form itself, must comply with Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced. Portions of the form provide multiple options for provisions of a debtor's plan, but some of those options may not be appropriate in a given debtor's situation or may not be allowed in the court presiding over the case. Debtors are advised to refer to applicable local rulings.

Part 1. This part sets out warnings to both debtors and creditors. For creditors, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, that nonstandard provision will be ineffective if the appropriate check box in Part 1 is not selected.

Part 2. This part states the proposed periodic plan payments, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments from each check, that should be indicated in § 2.1. If the debtor proposes to make payments according to different "steps," the amounts and intervals of those payments should also be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make regular payments to the trustee. If the debtor selects the option of making payments pursuant to a payroll deduction order, that selection serves as a request by the debtor for entry of the order. Whether to enter a payroll deduction order is determined by the court. See Code § 1325(c). If the debtor selects the option of making payments other than by direct payments to the trustee or by a payroll deduction order, the alternative method (*e.g.*, a designated third party electronic funds transfer program) must be specified.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code § 1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a non-governmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Bankruptcy Rule 3002 contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim. If appropriate, a claim may be treated under § 3.1 instead of § 3.3.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). This section includes space for the calculation of the amount of the judicial lien or security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of trustee's fees and claims entitled to priority status. Section 4.1 provides that trustee's fees and all allowed priority claims (other than those domestic support obligations treated in § 4.5) will be paid in full. In § 4.2, the plan lists an estimate of the trustee's fees. Although the estimate may indicate whether the plan will be feasible, it does not affect the trustee's entitlement to fees as determined by statute. In § 4.3, the form requests the balance of attorney's fees owed. Additional details about payments of attorney's fees, including information about their timing and approval, are left to the requirements of local practice. In § 4.4, the plan calls for an estimated amount of priority claims. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in § 4.4. In § 4.5, the plan

may propose to pay less than the full amount of a domestic support obligation that has been assigned to, or is owed to, a governmental unit, but not less than the amount that claim would have received in a chapter 7 liquidation.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.2, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid. In § 5.4, the plan may provide for the separate classification of nonpriority unsecured claims (such as co-debtor claims) as permitted under Code § 1322(b)(1).

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part. If the plan proposes neither to assume nor reject an executory contract or unexpired lease, that treatment would have to be set forth as a nonstandard provision in Part 9.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. The debtor may instead elect to have the trustee direct the order of distribution.

Part 8. This part defines when property of the estate will revert in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors. If the debtor or debtors are not represented by an attorney, they must sign the plan, but the signature of represented debtors is optional.

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United States Bankruptcy Court for the District of _____

Debtor(s): John and Mary Smith

Case No.: 14 B 12345

Date: December 2, 2016

Check if this is an amended plan

Official Form 113

Chapter 13 Plan

12/15

Part 1: Notices

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. In the following notice to creditors, you must check each box that applies.

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.

You should read this plan carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance to you. Boxes must be checked by debtor(s) if applicable.

- The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.
 The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.
 The plan sets out nonstandard provisions in Part 9.

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

\$ 2500 per month for 56 months

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in Parts 3 through 6 of this plan.

2.2 Regular payments to the trustee will be made from future earnings in the following manner: Check all that apply.

- Debtor(s) will make payments pursuant to a payroll deduction order.
 Debtor(s) will make payments directly to the trustee.
 Other (specify method of payment): _____

2.3 Federal income tax refunds. Check one.

- Debtor(s) will retain any federal tax refunds received during the plan term.
 Debtor(s) will supply the trustee with a copy of each federal tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all federal income tax refunds, other than earned income tax credits, received during the plan term.
 Debtor(s) will supply the trustee with federal tax returns filed during the plan term and will turn over to the trustee a portion of any federal income tax refunds received during the plan term as specified below.

2.4 Additional payments. Check one.

None If "None" is checked, the rest of § 2.4 need not be completed or reproduced.

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is \$ 140,000.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default. Check one.

None If "None" is checked, the rest of § 3.1 need not be completed or reproduced.

The debtor(s) will maintain the contractual installment payments on the claims listed below, with any changes required by the applicable contract, and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Current installment payment (including escrow)	Amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage	Estimated total payments by trustee
Mortgage Servicer, Inc.	Home at 123 Main St City, State	\$1,500 Disbursed by: <input checked="" type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$3,000		100	\$87,000

3.2 Request for valuation of security and claim modification. Check one.

None If "None" is checked, the rest of § 3.2 need not be completed or reproduced.

3.3 Secured claims excluded from 11 U.S.C. § 506. Check one.

None If "None" is checked, the rest of § 3.3 need not be completed or reproduced.

The claims listed below were either:

- (1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or
- (2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
Mortgage Servicer, Inc.	2012 Model Make Pickup Truck	\$8,400	3.0%	\$150 Disbursed by: <input type="checkbox"/> Trustee <input checked="" type="checkbox"/> Debtor(s)	\$400

3.4 Lien avoidance. Check one.

None If "None" is checked, the rest of Section § 3.4 need not be completed or reproduced.

3.5 Surrender of collateral. Check one.

None If "None" is checked, the rest of § 3.5 need not be completed or reproduced.

Part 4: Treatment of Trustee's Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims other than those treated in § 4.5 will be paid in full without interest.

4.2 Trustee's fees

Trustee's fees are estimated to be 10% of plan payments; and during the plan term, they are estimated to total \$ \$14,000.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be \$ 4,000.

4.4 Priority claims other than attorney's fees and those treated in § 4.5. Check one.

None If "None" is checked, the rest of § 4.4 need not be completed or reproduced.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount. Check one.

None If "None" is checked, the rest of § 4.5 need not be completed or reproduced.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 General

Nonpriority unsecured claims will be paid to the extent allowed as specified in this Part.

5.2 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. Check all that apply.

The sum of \$_____.

_____% of the total amount of these claims.

The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately \$_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.3 Interest on allowed nonpriority unsecured claims not separately classified. Check one.

None If "None" is checked, the rest of § 5.3 need not be completed or reproduced.

5.4 Maintenance of payments and cure of any default on nonpriority unsecured claims. Check one.

None If "None" is checked, the rest of § 5.4 need not be completed or reproduced.

5.5 Other separately classified nonpriority unsecured claims. Check one.

5.6 None If "None" is checked, the rest of § 5.5 need not be completed or reproduced.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. Check one.

None If checked, the rest of § 6.1 need not be completed or reproduced.

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make the monthly payments required in Parts 3 through 6 in the following order, with payments other than those listed to be made in the order determined by the trustee:

a. Trustee's fees

b. _____

c. _____ Insert additional lines if needed.

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revert in the debtor(s) upon (Check the applicable box):

- plan confirmation.
- closing of the case.
- other: _____.

Part 9: Nonstandard Plan Provisions

None If "None" is checked, the rest of Part 9 need not be completed or reproduced.

Part 10: Signatures

X _____ Date _____

Signature of Attorney for Debtor(s)

X _____ Date _____

X _____ Date _____

Signature(s) of Debtor(s) (required if not represented by an attorney; otherwise optional)

Chapter 13 Plan Exhibit: Estimated Amounts of Trustee Payments

The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a. Maintenance and cure payments on secured claims (Part 3, Section 3.1 total):	\$ 87,000
b. Modified secured claims (Part 3, Section 3.2 total):	0
c. Secured claims excluded from 11 U.S.C. § 506 (Part 3, Section 3.3 total):	400
d. Judicial liens or security interests partially avoided (Part 3, Section 3.4 total):	0
e. Administrative and other priority claims (Part 4 total):	18,000
f. Nonpriority unsecured claims (Part 5, Section 5.2 total):	34,600
g. Interest on allowed unsecured claims (Part 5, Section 5.3 total)	0
h. Maintenance and cure payments on unsecured claims (Part 5, Section 5.4 total)	0
i. Separately classified unsecured claims (Part 5, Section 5.5 total)	0
j. Arrearage payments on executory contracts and unexpired leases (Part 6, Section 6.1 total)	\$0
Total of lines a through j	\$140,000

Instructions

For Bankruptcy Forms for Non-Individuals

U.S. Bankruptcy Court

|

December 2015

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General Instructions

This document provides instructions for completing selected forms that entities other than individuals and municipalities filing for bankruptcy must submit to the U.S. Bankruptcy Court. All of the required forms can be downloaded without charge from:

<http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

The instructions are designed to accompany the forms and are intended to help in understanding what information is required to properly file. The representatives of the debtor working on the forms should review each form and any pertinent instructions before supplying the information for each form.

Although the forms often parallel how businesses commonly keep their financial records, it is not always possible to do so

because information needed in a bankruptcy case is often different from that prescribed under generally accepted accounting principles. These instructions highlight some of the differences between the bankruptcy documents and accounting records. The debtor must provide all information required.

These instructions are not a substitute for legal advice about bankruptcy and the required forms. Completing the forms is only a part of the bankruptcy process.

Non-individual debtors must have an attorney to file for bankruptcy. Although the attorney may prepare the forms using information supplied by the debtor, representatives of the debtor must ensure that the forms are accurate and complete and must sign the forms under penalty of perjury.

Read This Important Warning

Non-individual debtors must be represented by an attorney.

Bankruptcy can have serious long-term financial and legal consequences, including loss of property. Only an attorney can give legal advice regarding the possible consequences of filing for bankruptcy and the various options that are available.

Entities may not file bankruptcy if they are not eligible to file or do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Overview of the bankruptcy forms and filing bankruptcy

Use the forms in the 200 series if the debtor is a non-individual, such as a corporation, partnership, or limited liability company (LLC). Forms in the 100 series are used by individuals or married couples. Sole proprietors must use the forms in the 100 series.

When a bankruptcy petition is filed, the U.S. Bankruptcy Court opens a case. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person who gives false information in connection with a bankruptcy case could be charged with a federal crime, and the debtor may lose the benefits of filing for bankruptcy.

Filing a bankruptcy case is not private. Anyone has a right to see a debtor's bankruptcy forms after the debtor files them. In some circumstances, the bankruptcy court may issue a protective order to keep trade secrets or other confidential proprietary information from being disclosed to the public. 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Follow these privacy restrictions

- Do not list a minor child's full name on any form. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Bankruptcy Rules 1007(m) and 9037.
- Do not list a person's date of birth.
- Do not list anyone's full Social Security number on any form.

Understand the terms used in the forms

To understand terms used in the forms and the instructions, see the *Glossary* at the end of this document.

Things to remember when filling out and filing these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any pages added, write the debtor's name and case number, if known. Also identify the form and line number to which the additional information applies.
- Do not file these instructions with the bankruptcy forms that the debtor files with the court.
- For the debtor's records, be sure to keep a copy of the debtor's bankruptcy documents and all attachments that the debtor files.

Filing amended forms

Check the box on the top of the form to show that the debtor is submitting an amendment.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debt is from a credit card, fill in the month and year of the first and last transactions, if known.

About the Process for Filing a Bankruptcy Case for Non-Individuals

To file for bankruptcy, the debtor must give the court several forms and documents. Some must be filed at the time the debtor files the case. Others may be filed up to 14 days later.

When the debtor files its bankruptcy case

The debtor must pay the entire filing fee when the case is filed. The debtor must file the forms listed below on the date the debtor files its bankruptcy case. For copies of the forms listed here, go to <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

- ❑ *Voluntary Petition for Non-Individuals Filing for Bankruptcy* (Official Form 201). This form opens the case. Directions for completing it are included in the form itself.
- ❑ *A list of names and addresses of all of the debtor's creditors*, formatted as a mailing list according to instructions from the bankruptcy court in which the debtor files. (The bankruptcy court may call this a *creditor matrix* or *mailing matrix*.)
- ❑ *Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against Debtor and Are Not Insiders* (Official Form 204). Fill out this form only if the debtor files under chapter 11.
- ❑ *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A). This form is filed only by non-individual debtors who file under chapter 11 and who are required to file periodic reports (for example, Forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

When the debtor files its bankruptcy case or within 14 days after filing

The debtor must file the forms listed below with its *Voluntary Petition for Non-Individuals Filing for Bankruptcy* (Official Form 201) or within 14 days, or such additional time as the court may order, after filing. If the debtor does not do so, the case may be dismissed. Although it is possible to open a case by submitting only the documents listed under *When the debtor files its bankruptcy case*, the debtor should file the entire set of forms at one time to help its case proceed smoothly.

The debtor must fill out all of the forms completely even though some forms may ask similar questions.

The list below identifies the documents that all non-individuals must file as well as those that are specific to each chapter. For copies of the official forms, go to <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

All non-individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- ❑ *Schedules of Assets and Liabilities* (Official Form 206) which includes these forms:
 - ❑ *Schedule A/B: Real and Personal Property* (Official Form 206A/B)
 - ❑ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
 - ❑ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
 - ❑ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
 - ❑ *Schedule H: Codebtors* (Official Form 206H)
 - ❑ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum). This form gives an overview of the totals on the schedules.
- ❑ *Declaration Under Penalty of Perjury for Non-Individual Debtors* (Official Form 202–Declaration)
- ❑ *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207)
- ❑ *Disclosure of Compensation to Debtor’s Attorney* — Unless local rules provide otherwise, Director’s Form 2030 may be used.
- ❑ Statement of current income and current expenditures — Unless local rules provide otherwise, debtors may use *Schedule I/J: Monthly Receipts and Disbursements of Non-Individual Debtors Where Current Accounting Statements Are Unavailable* (Form 2060 I/J)

If a small business debtor files under chapter 11, the debtor must also file:

If the debtor files under chapter 11 and meets the criteria and debt limits outlined in 11 U.S.C. § 101(51D), the debtor qualifies as a small business debtor and must file with the petition its most recent

- ❑ balance sheet,
- ❑ statement of operations,
- ❑ cash-flow statement, and
- ❑ federal income tax return.

If the debtor does not have these documents, the debtor must file a statement made under penalty of perjury that the debtor has not prepared either a balance sheet, statement of operations, or cash-flow statement or the debtor has not filed a federal tax return.

Instructions for Selected Forms

Schedule A/B: Real and Personal Property (Official Form 206A/B)

Schedule A/B: Assets – Real and Personal Property (Official Form 206A/B) requires debtors to list most of the property interests that are involved in a bankruptcy case. All debtors filing for bankruptcy must honestly list everything they own or in which they have a legal, equitable, or future interest. *Legal, equitable, or future interest* are broad terms and include all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by asset category and, in general, follows the layout and order of liquidity found in a balance sheet. Examples are included for some items and are meant to give debtors an idea of what to include in the categories. The examples are not intended to be complete lists of everything within that category.

An authorized representative of the debtor must verify under penalty of perjury that the information provided is true and correct. Bankruptcy Rule 1008.

If the debtor makes a false statement or conceals property, the debtor may lose the property, be fined up to \$500,000, or be imprisoned for up to 20 years or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Understand the terms used in this form

Current value

In this form, the debtor must report the *current value of the debtor's interest* in any property that it owns in each category. *Current value* is sometimes called *fair market value* and, for this form, it is the fair market value as of the date of filing the bankruptcy petition. *Current value* is how much the property is currently worth, which may be more or less than the amount the debtor paid for the property or the book value of the property.

Valuation method used for current value

In certain asset categories, the debtor must also provide the valuation method used to calculate the current value. Select a reasonable method that provides an accurate estimation of current value.

Examples of valuation methods may include:

- **Appraisal** (provide the date the appraisal was conducted);
- **Comparable sales** (for example, blue-book values or comparable sales provided by a broker);
- **Revenue-based** (for example, present value of revenue streams calculated for a hotel or apartment complex based on rents and available rooms);

- **Liquidation value** (for example, the price of the property when it is not allowed sufficient time to sell in the open market—this figure is typically provided by a professional);
- **Expert** (for example, an accountant or advisor who has special expertise with regard to the property);
- **Replacement value** (the cost of replacing the property);
- **Tax records** (for example, the value assessed on the property by the county appraisal);
- **Recent cost-based valuations** (for example, first-in first-out inventory valuation method).

Net book value of debtor’s interest (where available)

If the debtor does not prepare a balance sheet for its financial records or for its tax returns, then it does not need to provide information in this column.

If the debtor prepares a balance sheet for its financial records or for its tax returns, then it must also provide the *net book value of debtor’s interest* for certain types of property. For purposes of this form, use the book value reported on the most recent balance sheet prepared before filing this case.

Net book value is the carrying value of an asset on the debtor’s books or financial records and is generally calculated by taking the original cost of the property and subtracting depreciation or amortization expenses (if any).

Depreciation and amortization expenses are calculated using accounting procedures that allocate the cost of certain property over its useful life. It represents the decline in value over time due to wear and tear, obsolescence, or other factors.

How to list items on this form

- List items only once on this form; do not list an item in more than one category. If an item could fit into more than one category, select the category the debtor thinks is the most suitable and list the item there. For example, a car dealership may report vehicles under *Part 4: Inventory* instead of under *Part 8: Machinery, equipment, and vehicles*.
- List property held for resale in *Part 4: Inventory*. If the debtor separates manufactured items into raw materials, work in progress, and finished goods, report those items in the categories provided as appropriate. If the debtor only purchases items and holds them for resale and does not do any manufacturing, then report the items under finished goods, not as raw materials or work in progress.
- The values reported on this form must match the values reported on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- In Schedule A/B, list any executory contracts or unexpired lease contracts that have a net value (for example, an unexpired lease for a building, a real estate listing agreement, or leases for machinery or equipment). Also list them on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G).

Schedule D: Creditors Who Have Claims Secured by Property (Official Form 206D)

The people or organizations to whom the debtor owes money are called its *creditors*. A *claim* is a creditor's right to payment.

Creditors may have different types of claims:

- **Secured claims.** Report these on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- **Unsecured claims.** Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F).

Creditors with secured claims may be able to get paid from specific property in which that creditor has a security interest, such as a mortgage or a lien. That property is sometimes called *collateral* for the debt. Creditors with unsecured claims do not have rights against specific property.

Claims may be contingent, unliquidated, or disputed

Many claims have a specific amount which the debtor clearly owes. But some claims are uncertain or become due only after the bankruptcy petition is filed. All claims must be listed in the schedules, even if they are contingent, unliquidated, or disputed.

A claim is *contingent* if the debtor is not obligated to pay it unless a particular event occurs after the bankruptcy petition is filed.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount of the claim has not been determined.

A claim is *disputed* if the debtor disagrees that it owes all or a portion of the debt.

A single claim can have one, more than one, or none of these characteristics.

Do not omit any secured creditors

In alphabetical order, list all creditors that have judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and purchase money security interests or other consensual liens against property of the debtor. These categories can be used to describe the lien.

The form is divided into parts. List a debt in Part 1 only once and list any other entities that should be notified about that debt in Part 2. For example, if an attorney is trying to collect a debt that the debtor owes to someone else, list the person to whom the debtor owes the debt in Part 1 and list the attorney in Part 2. If the case is a chapter 11 case and the amount of the creditor's unsecured claim in Column C makes it one of the 20 largest unsecured creditors, the creditor must also be included on *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Who Are Not Insiders* (Official Form B204).

Determine the amount of each secured creditor’s claim or claims

To determine the amount of a secured claim, compare the amount of the claim to the value of the debtor’s interest in the property that is collateral for the claim. If that value is greater than the amount of the claim, then the entire amount of the claim is *secured*.

If the value of the property that is collateral for the claim is less than the amount of the claim, the difference is *unsecured*.

For example, if the outstanding balance due on an equipment loan is \$100,000 and the equipment is worth \$80,000, the lender has a secured claim of \$80,000 and an unsecured claim of \$20,000. In that situation, list the creditor only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D). Do not list the creditor again on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F). In addition, if the case is a chapter 11 case and the creditor’s unsecured claim makes it one of the 20 largest unsecured creditors, the creditor must also be included on *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Who Are Not Insiders* (Official Form 204).

List a creditor in Schedule D even if it appears that no value exists to support that creditor’s secured claim, as long as the creditor has a security interest in some property owned by the debtor. If the claim is secured only by property owned by a non-debtor, list the claim in Schedule E/F.

If there is more than one secured claim against the same property, the amount of the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim.

For example, if a building worth \$300,000 has a first mortgage of \$200,000 and a second mortgage of \$150,000, the first mortgage would be fully secured, and there would be \$100,000 of property value for the second mortgage, and the claim secured by the second mortgage would have an unsecured portion of \$50,000.

\$300,000	value of a building
- \$200,000	first mortgage
\$100,000	remaining property value
\$150,000	second mortgage
- \$100,000	remaining property value
\$ 50,000	unsecured portion of second mortgage claim

Show the amount of any unsecured portion of a secured claim on Schedule D in Column C.

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 206E/F)

The people or organizations to whom the debtor owes money are called its *creditors*. A claim is a creditor's right to payment.

Creditors may have different types of claims:

- **Secured claims.** Report these on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- **Unsecured claims.** Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F).

Creditors with unsecured claims typically do not have liens on or other security interests in the debtor's property.

Use *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F) to identify everyone who holds an unsecured claim against the debtor as of the date the bankruptcy petition is filed unless that creditor is already listed on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).

Creditors with secured claims have a right to take property from the debtor if the debtor does not pay them. They should be listed on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).

If a secured creditor's full claim exceeds the value of the property securing that claim, the creditor may have a secured claim for the value of the property and an unsecured claim for the deficiency. In that situation, list the creditor only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D). Do not list the creditor again on

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 206E/F).

List a creditor in Schedule D even if it appears that no value exists to support that creditor's secured claim.

Claims may be contingent, unliquidated, or disputed

Many claims have a specific amount which the debtor clearly owes. But some claims are uncertain or become due only after the date the bankruptcy petition is filed. All claims, whether they are certain or uncertain as of the date of the filing, must be listed in the schedules, even if the claims are contingent, unliquidated, or disputed.

A claim is *contingent* if the debtor is not obligated to pay it unless a particular event occurs after the petition is filed.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount of the claim has not been set.

A claim is *disputed* if the debtor disagrees that it owes all or a portion of the debt.

A single claim can have one, more than one, or none of these characteristics.

Unsecured claims may be either priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain tax debts. Priority unsecured claims include those the debtor owes for:

- **Taxes and certain other debts owed to the government**—If the debtor owes certain federal, state, or local government taxes, customs duties, or penalties.
11 U.S.C. § 507(a)(8).
- **Wages, salaries, and commissions**—If the debtor owes wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before the bankruptcy petition was filed or the debtor ceased business. In either instance, only the first \$12,475 per claim is a priority claim.*
11 U.S.C. § 507(a)(4).
- **Contributions to employee benefit plans**—If the debtor owes contributions to an employee benefit plan for services an employee rendered within 180 days before the bankruptcy petition was filed, or within 180 days before the debtor ceased business. Only the first \$12,475 per employee, less any amounts owed for wages, salaries, and commissions, is a priority claim.*
11 U.S.C. § 507(a)(5).
- **Certain claims of farmers and fishermen**—Only the first \$6,150 per farmer or fisherman is a priority claim.* 11 U.S.C. § 507(a)(6).

* Subject to adjustment on 4/1/16, and every 3 years after that for cases begun on or after the date of adjustment.

- **Deposits by individuals** — If the debtor obtained from an individual a deposit for the purchase, lease, or rental of property or services for the individual or the individual's family, the deposit may be a priority claim. Unredeemed gift certificates are deposits. The priority is limited to \$2,775.*
11 U.S.C. § 507(a)(7).

Other categories exist.

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are trade debts, bank loans, contract obligations, and fees for professional services.

In Part 2, list every creditor owed money by the debtor not listed before, regardless of the amount and even if the debtor plans to pay a particular debt.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 1 and show both priority and nonpriority amounts. Do not list it again in Part 2.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debtor has a line of credit with multiple draws, fill in the month and year of the first and last transactions, if known.

Schedule G: Executory Contracts and Unexpired Leases (Official Form 206G)

Use *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G) to identify the debtor's ongoing leases and certain contracts. List all of the debtor's executory contracts and unexpired leases.

Executory contracts are contracts between the debtor and another party in which neither party has performed all of the requirements by the time the debtor files for bankruptcy. *Unexpired leases* are leases that are still in effect.

The debtor must list all agreements that may be executory contracts or unexpired leases, even if they are listed on *Schedule A/B: Property* (Official Form 206A/B) or *Schedule E/F: Creditors Who Have Unsecured Claims*, (Official Form 206 E/F) including the following:

- Equipment leases;
- Vehicle leases;
- Leases for business or investment property (for example, office or warehouse space);
- Contracts to sell a building, land, or other real property;

- Service provider agreements (for example, maintenance contracts for office equipment, and contracts for cell phones, personal electronic devices, internet, and cable);
- Sales contracts;
- Supplier or service contracts;
- Leases or timeshare contracts;
- Employment contracts;
- Real estate listing agreements;
- Intellectual property license agreements (such as copyright, patent, trademark, and industrial rights);
- Development contracts; and
- Insurance contracts.

State the contract number of any government contract.

Glossary

Definitions Used in the Forms for Non-Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for non-individuals who are filing for bankruptcy. See *Bankruptcy Basics* (<http://www.uscourts.gov/FederalCourts>) for more information about filing for bankruptcy and other important terms.

Affiliate — As used in the Bankruptcy Code and Rules, an affiliate of the debtor is:

- (a) an entity that directly or indirectly owns, controls, or holds with power to vote at least 20% of the outstanding voting securities of the debtor (excluding entities that hold such securities in a fiduciary or agency capacity without sole discretionary power to vote such securities or solely to secure a debt, if the entity has not in fact exercised such power to vote);
- (b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor (again excluding entities that hold such securities in a fiduciary or agency capacity without sole discretionary power to vote such securities or solely to secure a debt, if the entity has not in fact exercised such power to vote);
- (c) a person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or
- (d) an entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Amortization — 1. A non-cash accounting method that allocates the cost of an intangible asset over its useful life. 2. Paying off a liability in regular installments over a period of time.

Amortization schedule — A report that contains a listing of intangible assets and the amount of amortization and accumulated amortization that has been allocated over the life of those assets. These reports are typically maintained for purposes of calculating tax deductions and preparing tax returns.

Annuity — A contract for the periodic payment of money, either for the life of the recipient or for a fixed number of years.

Book value or **net book value** — The carrying value of an asset on the debtor's books or financial records. This amount is generally calculated by taking the original cost of the property and subtracting depreciation or amortization expenses (if any).

Causes of action — Claims where the debtor is entitled to money or other relief from a third party or where a third party is entitled to money or other relief from the debtor.

Claim — A creditor’s right to payment, even if contingent, disputed, unliquidated, or unmatured.

Codebtor — A person or entity that may also be responsible for paying a claim against the debtor.

Collateral — Property that secures a debt.

Contingent claim — Debt that is only payable if certain events occur.

Creditor matrix or mailing matrix — A list of names and addresses of all of the debtor’s creditors, formatted as a mailing list according to instructions from the bankruptcy court in which the debtor files the case.

Creditor — The person or organization to whom the debtor owes money.

Current value or fair market value — how much the property is worth, which may be more or less than the purchase price or the book value. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date the debtor completes the form, or some other date.

Debt — Liability on a claim.

Depreciation — A non-cash accounting method that allocates the cost of a tangible asset over its useful life.

Depreciation schedule — A report that contains a listing of tangible assets and the amount of depreciation and accumulated depreciation that has been allocated over the life of those assets. These reports are typically maintained for purposes of calculating tax deductions and preparing tax returns.

Discharge — A discharge in bankruptcy relieves a debtor from having to pay certain debts. For non-individuals, it applies only in certain chapter 11 and chapter 12 cases.

Disputed claim — A claim about which there is a disagreement. A claim is disputed if the debtor disagrees about either the validity or amount of the claim.

Doubtful or uncollectible accounts — Receivables that the debtor has little or no expectation of collecting. This amount is deducted from total receivables to calculate the amount that the debtor reasonably expects will be collected on its receivables.

Executory contract — Contract between the debtor and another party as to which neither the debtor nor the other party has performed all of the requirements by the time the bankruptcy case is filed.

Goodwill — Amount of a purchase price that exceeds the net tangible assets. It can also be the value of an intangible asset that has a quantifiable value in business. Examples include a strong brand or reputation or, in an acquisition, goodwill.

Gross income — A company's gross revenue minus cost of goods sold.

Gross revenue — Amount generated by all of a company's operations before deductions for expenses.

Insider — Insiders include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of a debtor and insiders of such affiliates, and any managing agent of a debtor.
11 U.S.C. § 101.

Intangible assets — Types of property that are not physical in nature and cannot be touched, seen, or held. Examples include intellectual property and name recognition.

Intellectual property — An intangible asset that consists of human knowledge and ideas. Examples include patents, copyrights, trademarks, and software.

Legal or equitable interest — Any interest of the debtor in both tangible and intangible property, whether or not anyone other than the debtor also has an interest in that property.

Lien — A charge against or interest in property to secure a debt.

Nature of claim — The legal type of a claim, not the factual basis for it. Examples include breach of contract, personal injury, malpractice, and fraud.

Negotiable instrument — A written and signed unconditional promise or order to pay a specified sum of money on demand or at a definite time payable to order or bearer. Negotiable instruments include government bonds, corporate bonds, personal checks, cashiers' checks, promissory notes, and money orders.

Net operating loss (NOL) — Occurs when allowable tax deductions exceed taxable income, resulting in negative taxable income. NOLs can generally be used to recover past tax payments (*carry-back*) or reduce future tax payments (*carry-forward*).

Non-individual debtor — A non-individual entity such as a corporation, partnership, or limited liability company (LLC), on whose behalf or against whom a bankruptcy case is filed.

Non-negotiable instrument — Financial instrument of the debtor that cannot be transferred to another party by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. Examples include amounts due for products purchased, professional services, and utilities.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. Examples include certain income tax debts and certain employee wage claims.

Secured claim — A claim that may be satisfied in whole or in part either

- through collateral,
- through a charge against or an interest in the debtor's property, or
- through a right of setoff.

Setoff — Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor. The Bankruptcy Code gives the trustee power to avoid some but not all setoffs that are made pre-petition.

Sole proprietorship — A business that a debtor owns as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC. Sole proprietors must use the bankruptcy forms in the 100 series.

Tangible asset — Types of property that have physical form and can be seen, touched, or held. Examples include cash, machinery, buildings, and land.

Unexpired lease — Lease that is in effect at the time the bankruptcy petition is filed.

Unliquidated claim — A debt for which the amount cannot be readily determined, such as by referring to an agreement or by a simple computation. For instance, an unliquidated claim would arise from the debtor's sale of a defective product if the amount of damage it caused has not been determined.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter _____

Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. Debtor's name

2. All other names debtor used in the last 8 years

Include any assumed names, trade names and *doing business* as names

3. Debtor's federal Employer Identification Number (EIN)

_____ - _____

4. Debtor's address

Principal place of business

Mailing address, if different from principal place of business

Number Street _____

Number Street _____

P.O. Box _____

City State ZIP Code _____

City State ZIP Code _____

Location of principal assets, if different from principal place of business

County _____

Number Street _____

City State ZIP Code _____

5. Debtor's website (URL)

6. Type of debtor

- Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- Partnership (excluding LLP)
- Other. Specify: _____

7. Describe debtor's business

A. Check one:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Railroad (as defined in 11 U.S.C. §101(44))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- Clearing Bank (as defined in 11 U.S.C. §781(3))
- None of the above

B. Check all that apply:

- Tax-exempt entity (as described in 26 U.S.C. §501)
- Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 6-digit code that best describes debtor.
See www.naics.com/search.htm.

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- Chapter 7
- Chapter 9
- Chapter 11. Check all that apply:
 - Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,490,925 (amount subject to adjustment on 4/01/16 and every 3 years after that).
 - The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B).
 - A plan is being filed with this petition.
 - Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
 - The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A) with this form.
 - The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

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

If more than 2 cases, attach a separate list.

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

No

Yes. Debtor _____ Relationship _____

District _____ When _____
MM / DD / YYYY

Case number, if known _____

List all cases. If more than 1, attach a separate list.

11. Why is venue proper in this district?

Check all that apply:

Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

No

Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (Check all that apply.)

It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____

It needs to be physically secured or protected from the weather.

It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

Other _____

Where is the property? _____

Number Street

City State ZIP Code

Is the property insured?

No

Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

Funds will be available for distribution to unsecured creditors.

After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

1-49

1,000-5,000

25,001-50,000

50-99

5,001-10,000

50,001-100,000

100-199

10,001-25,000

More than 100,000

200-999

Debtor _____
Name

Case number (if known) _____

- 15. Estimated assets**
- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

- 16. Estimated liabilities**
- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X

Signature of authorized representative of debtor

Printed name

Title

18. Signature of attorney

X

Signature of attorney for debtor

Date _____
MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone

Email address

Bar number

State

COMMITTEE NOTE

Official Form 201, *Voluntary Petition for Non-Individuals Filing for Bankruptcy*, replaces Official Form 1, *Voluntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 201 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 201 has been substantially reformatted and reorganized. References to Exhibits B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to non-individual debtors. Official Form 201A, *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11*, has replaced Exhibit A. The debtor is instructed to file Official Form 201A if the debtor is filing under chapter 11 and is required to file periodic reports with the Securities and Exchange Commission. A checkbox has been added to the form to indicate whether it is an amended filing.

In Question 2, *All other names debtor used in the last 8 years*, instructions pertaining only to individuals have been deleted, and an instruction to include *doing business as* names and assumed names has been added. In Question 3, *Debtor's federal Employee Identification Number (EIN)*, references to social security numbers and individual taxpayer I.D. numbers have been deleted. In Question 4, *Debtor's address*, the order of listing the various addresses for the debtor has been rearranged, and an address for the location of principal assets is required if different from the principal place of business. Also, the form has been revised to include a space for listing the debtor's website in Question 5.

In Question 6, *Type of Debtor*, options pertaining only to individual debtors have been deleted, and an instruction that the "partnership" option does not include LLPs has been added. Question 7, *Describe debtor's business*, is revised to include a statutory citation for each business type, to add an option for "none of the above," and to delete the option for "other." A new instruction requires the debtor to indicate if the debtor is an investment company, including a hedge fund or pooled investment vehicle; an investment advisor; or a tax exempt entity. The definition of "tax exempt entity" has been removed and replaced with a statutory citation. Additionally, an instruction has been added to require the debtor to list its North American Industry Classification System 6-digit code. A hyperlink is provided for information on finding the correct code.

In Question 8, *Under which chapter of the Bankruptcy Code is the debtor filing*, several separate boxes have been combined, and the options for Chapter 13 and Chapter 15 have been deleted. More detailed options have been added for Chapter 11. The question regarding the nature of the debtor's debts has been removed.

Question 9, *Were prior bankruptcy cases filed by or against the debtor within the last 8 years*, has been revised to instruct the debtor to include prior bankruptcy cases filed against the debtor and to list the district rather than location of the prior filings. In Question 10, *Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor*, the reference to

spouse and the requirement to list the judge in any other cases have been removed.

Question 11, *Why is venue proper in this district*, has been revised to delete references that pertain only to individuals.

Question 12, *Does the debtor own or have possession of any real property or personal property that needs immediate attention*, replaces Exhibit C from Official Form 1. The category of “property that needs immediate attention” has been added, as well as options to indicate why the property needs immediate attention. Additionally, the form has been revised to require the debtor to list the location of the property and whether or not the property is insured and, if so, the insurance details.

Statistical and administrative information has been moved to immediately above the signature line, and the reference to exempt property has been removed. The maximum values for “Estimated Assets” and “Estimated Liabilities” have been increased from “more than \$1 billion” to “more than \$50 billion.” *Request for Relief, Declaration, and Signatures* has been reformatted and the signature lines for individual debtors and non-attorney bankruptcy petition preparers have been removed.

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Fill in this information to identify the case and this filing:

Debtor Name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number (If known): _____

Official Form 202**Declaration Under Penalty of Perjury for Non-Individual Debtors****12/15**

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- Schedule A/B: Assets—Real and Personal Property* (Official Form 206A/B)
- Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- Schedule H: Codebtors* (Official Form 206H)
- A Summary of Assets and Liabilities for Non-Individuals* (Official Form 206—Summary)
- Amended *Schedule* _____
- Other document that requires a declaration _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
 MM / DD / YYYY

X

 Signature of individual signing on behalf of debtor

 Printed name

 Position or relationship to debtor

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COMMITTEE NOTE

Official Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors*, replaces Official Form 2, *Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership*, and the section of Official Form 6 Declaration, *Declaration Concerning Debtor's Schedules* containing a corporation's or partnership's declaration. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 202 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

Official Form 202 has been substantially reformatted and reorganized with elements from both Official Form 2 and the section of Official Form 6 for a corporation or partnership. Instructions have been added, along with warning language regarding bankruptcy fraud. Checkboxes are provided so the declaration will indicate the schedules included with the declaration or, if the declaration accompanies another document, a description of the attached document. The phrase "to the best of my information and belief" has been deleted from the declaration in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. The form, however, includes a statement that the person signing the declaration has examined the information in the documents subject to the declaration and has "a reasonable belief that the information is true and correct." Finally, the person signing the declaration must indicate his or her position or relationship to the debtor.

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Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (If known): _____

Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an *insider*, as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
1							
2							
3							
4							
5							
6							
7							
8							

Debtor _____
Name

Case number *(if known)* _____

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim <small>If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.</small>		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							

COMMITTEE NOTE

Official Form 204, *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders*, replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 204 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 204 has been reformatted and reorganized. The instructions have been shortened and revised to include a full cite to the definition of “insider” and a revised explanation of when to include a secured creditor’s unsecured claim. The warning regarding the disclosure of a minor child’s name has been deleted as a caution has been added to the general instructions for all forms regarding listing a minor child’s name.

The heading of the second column of the form has been revised to require the “name, telephone number, and email address of creditor contact,” eliminating the need to provide a complete

mailing address for the creditor contact. Additional examples of “nature of claim” have been provided in the third column. In the fourth column, “subject to setoff” has been removed as an option.

The fifth column has been revised to include three separate potential entries to be used to list the value of the unsecured claim: the total claim, if partially secured; the deduction for value of collateral or setoff; and unsecured claim. The new instructions for the fifth column contain an explanation that if a claim is a fully unsecured claim, only the final sub-column needs to be completed, and that all of the columns must be completed if a claim is partially secured.

The signature line and the instruction to include a declaration have been deleted from the form.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number *(if known)*: _____ Chapter _____

Check if this is an amended filing

Official Form 205

Involuntary Petition Against a Non-Individual

12/15

Use this form to begin a bankruptcy case against a non-individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against an individual, use the *Involuntary Petition Against an Individual* (Official Form 105). Be as complete and accurate as possible. If more space is needed, attach any additional sheets to this form. On the top of any additional pages, write debtor's name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

- Chapter 7
- Chapter 11

Part 2: Identify the Debtor

2. Debtor's name _____

3. Other names you know the debtor has used in the last 8 years

Include any assumed names, trade names, or *doing business as* names.

4. Debtor's federal Employer Identification Number (EIN)

Unknown

____ - ____ - _____
 EIN

5. Debtor's address

Principal place of business

Number Street _____

City State ZIP Code _____

County _____

Mailing address, if different

Number Street _____

P.O. Box _____

City State ZIP Code _____

Location of principal assets, if different from principal place of business

Number Street _____

City State ZIP Code _____

6. Debtor's website (URL) _____

7. Type of debtor
- Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
 - Partnership (excluding LLP)
 - Other type of debtor. Specify: _____

8. Type of debtor's business
- Check one:*
- Health Care Business (as defined in 11 U.S.C. § 101(27A))
 - Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
 - Railroad (as defined in 11 U.S.C. §101(44))
 - Stockbroker (as defined in 11 U.S.C. § 101(53A))
 - Commodity Broker (as defined in 11 U.S.C. § 101(6))
 - Clearing Bank (as defined in 11 U.S.C. §781(3))
 - None of the types of business listed.
 - Unknown type of business.

9. To the best of your knowledge, are any bankruptcy cases pending by or against any partner or affiliate of this debtor?
- No
 - Yes. Debtor _____ Relationship _____
District _____ Date filed _____ Case number, if known _____
MM / DD / YYYY

Debtor _____ Relationship _____
District _____ Date filed _____ Case number, if known _____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue
- Check one:*
- Over the last 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place of business, or principal assets in this district longer than in any other district.
 - A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.

11. Allegations
- Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).
The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).
- At least one box must be checked.*
- The debtor is generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
 - Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?
- No
 - Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

Debtor _____
Name

Case number (if known) _____

13. Each petitioner's claim

Name of petitioner

Nature of petitioner's claim

Amount of the claim above the value of any lien

_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
Total of petitioners' claims		\$ _____

If more space is needed to list petitioners, attach additional sheets. Write the alleged debtor's name and the case number, if known, at the top of each sheet. Following the format of this form, set out the information required in Parts 3 and 4 of the form for each additional petitioning creditor, the petitioner's claim, the petitioner's representative, and the petitioner's attorney. Include the statement under penalty of perjury set out in Part 4 of the form, followed by each additional petitioner's (or representative's) signature, along with the signature of the petitioner's attorney.

Part 4: Request for Relief

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Petitioners request that an order for relief be entered against the debtor under the chapter of 11 U.S.C. specified in this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, attach a certified copy of the order of the court granting recognition.

I have examined the information in this document and have a reasonable belief that the information is true and correct.

Petitioners or Petitioners' Representative

Name and mailing address of petitioner

Name

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X _____
Signature of petitioner or representative, including representative's title

Attorneys

Printed name

Firm name, if any

Number Street

City State ZIP Code

Contact phone _____ Email _____
Bar number _____
State _____

X _____
Signature of attorney

Date signed _____
MM / DD / YYYY

Debtor _____
Name

Case number (if known) _____

Name and mailing address of petitioner

Name

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X _____
Signature of petitioner or representative, including representative's title

Printed name

Firm name, if any

Number Street

City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

X _____
Signature of attorney

Date signed _____
MM / DD / YYYY

Name and mailing address of petitioner

Name

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X _____
Signature of petitioner or representative, including representative's title

Printed name

Firm name, if any

Number Street

City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

X _____
Signature of attorney

Date signed _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 205, *Involuntary Petition Against a Non-Individual*, replaces Official Form 5, *Involuntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 205 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, has been moved to the beginning of the form.

In Part 2, *Identify the Debtor*, instructions pertaining only to individuals have been deleted, and an instruction to include doing-business-as names and assumed names has been added. The references to social security numbers and individual taxpayer I.D. numbers have been deleted. The order of listing the various addresses for the debtor have been rearranged in Line 5, and an address for the location of principal assets is required if different from the principal place of business. The form has been revised to include a space for listing the debtor's website in Line 6.

Also in Part 2, the options for type of debtor that pertained only to individuals have been deleted, and an instruction that the “partnership” option does not include LLPs has been added. The options regarding the type of debtor’s business have been revised to include a statutory citation for each business type, to add an option for “none of the above,” and to delete the option for “other.” The question regarding pending bankruptcy cases has been revised to remove the reference to spouse and the requirement to list the judge in any other cases.

In Part 3, *Report About the Case*, the question regarding venue has been revised in Line 10 to read “[o]ver the past 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place or business, or principal assets in this district longer than in any other district.” In the question for Allegations, “each” has been added to the first allegation, the exact citation to the Bankruptcy Code has been provided for the second allegation, and checkboxes have been provided for the last allegation. Also, in Line 12, petitioners must check “yes” or “no” to answer whether there has been any transfer of any claim against the debtor by or to a petitioner.

The information regarding the petitioner’s claims has been moved to Part 3, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request Relief*, has been amended to include a warning about making a false statement, and the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. See Rule 1008. A statement has been added that each petitioner, or the petitioner’s representative, has reviewed the information in the petition and has “a reasonable belief that the information is true and correct.” A requirement has been added for each petitioner’s mailing address. Also, petitioners’ attorneys must provide their email addresses, bar number, and state of bar membership.

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (if known): _____

Check if this is an amended filing

Official Form 206A/B

Schedule A/B: Assets — Real and Personal Property

12/15

Disclose all property, real and personal, which the debtor owns or in which the debtor has any other legal, equitable, or future interest. Include all property in which the debtor holds rights and powers exercisable for the debtor's own benefit. Also include assets and properties which have no book value, such as fully depreciated assets or assets that were not capitalized. In Schedule A/B, list any executory contracts or unexpired leases with a net value. Also list them on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G).

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. At the top of any pages added, write the debtor's name and case number (if known). Also identify the form and line number to which the additional information applies. If an additional sheet is attached, include the amounts from the attachment in the total for the pertinent part.

For Part 1 through Part 11, list each asset under the appropriate category or attach separate supporting schedules, such as a fixed asset schedule or depreciation schedule, that gives the details for each asset in a particular category. List each asset only once. In valuing the debtor's interest, do not deduct the value of secured claims. See the instructions to understand the terms used in this form.

Part 1: Cash and cash equivalents

1. Does the debtor have any cash or cash equivalents?

- No. Go to Part 2.
- Yes. Fill in the information below.

All cash or cash equivalents owned or controlled by the debtor

Current value of debtor's interest

2. Cash on hand

\$ _____

3. Checking, savings, money market, or financial brokerage accounts (Identify all)

Name of institution (bank or brokerage firm) Type of account Last 4 digits of account number

3.1. _____ _____ _____ \$ _____

3.2. _____ _____ _____ \$ _____

4. Other cash equivalents (Identify all)

4.1. _____ \$ _____

4.2. _____ \$ _____

5. Total of Part 1

\$ _____

Add lines 2 through 4 (including amounts on any additional sheets). Copy the total to line 80.

Part 2: Deposits and prepayments

6. Does the debtor have any deposits or prepayments?

- No. Go to Part 3.
- Yes. Fill in the information below.

Current value of debtor's interest

7. Deposits, including security deposits and utility deposits

Description, including name of holder of deposit

7.1. _____ \$ _____

7.2. _____ \$ _____

Part 5: Inventory, excluding agriculture assets

18. Does the debtor own any inventory (excluding agriculture assets)?

- No. Go to Part 6.
 Yes. Fill in the information below.

General description	Date of the last physical inventory	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
19. Raw materials				
_____	MM / DD / YYYY	\$ _____	_____	\$ _____
20. Work in progress				
_____	MM / DD / YYYY	\$ _____	_____	\$ _____
21. Finished goods, including goods held for resale				
_____	MM / DD / YYYY	\$ _____	_____	\$ _____
22. Other inventory or supplies				
_____	MM / DD / YYYY	\$ _____	_____	\$ _____
23. Total of Part 5				\$ _____
Add lines 19 through 22. Copy the total to line 84.				

24. Is any of the property listed in Part 5 perishable?

- No
 Yes. Is any of the property listed in Part 5 subject to or part of a possible PACA claim?
 No
 Yes

25. Has any of the property listed in Part 5 been purchased within 20 days before the bankruptcy was filed?

- No
 Yes. Book value _____ Valuation method _____ Current value _____

26. Has any of the property listed in Part 5 been appraised by a professional within the last year?

- No
 Yes

Part 6: Agricultural assets (other than titled motor vehicles and land)

27. Does the debtor own any agricultural assets (other than titled motor vehicles and land)?

- No. Go to Part 7.
 Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
28. Crops—either planted or harvested			
_____	\$ _____	_____	\$ _____
29. Farm animals <i>Examples: Livestock, poultry, farm-raised fish</i>			
_____	\$ _____	_____	\$ _____

30. **Farm machinery and equipment** (Other than titled motor vehicles)
 _____ \$ _____ \$ _____

31. **Farm and fishing supplies, chemicals, and feed**
 _____ \$ _____ \$ _____

32. **Other farm-related property not already listed in Part 5.**
 _____ \$ _____ \$ _____

33. **Total of Part 6.**
 Add lines 28 through 32. Copy the total to line 85. \$ _____

34. **Is the debtor a member of an agricultural cooperative?**
 No
 Yes. Is any of the debtor's property stored at the cooperative?
 No
 Yes

35. **Has any of the property listed in Part 6 been purchased within 20 days before the bankruptcy was filed?**
 No
 Yes. Book value \$ _____ Valuation method _____ Current value \$ _____

36. **Is a depreciation schedule available for any of the property listed in Part 6?**
 No
 Yes

37. **Has any of the property listed in Part 6 been appraised by a professional within the last year?**
 No
 Yes

Part 7: Office furniture, fixtures, and equipment; and collectibles

38. **Does the debtor own any office furniture, fixtures, equipment, or collectibles?**
 No. Go to Part 8.
 Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
39. Office furniture _____	\$ _____	_____	\$ _____
40. Office fixtures _____	\$ _____	_____	\$ _____
41. Office equipment, including all computer equipment and communication systems equipment and software _____	\$ _____	_____	\$ _____
42. Collectibles <i>Examples:</i> Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; china and crystal; stamp, coin, or baseball card collections; other collections, memorabilia, or collectibles			
42.1 _____	\$ _____	_____	\$ _____
42.2 _____	\$ _____	_____	\$ _____
42.3 _____	\$ _____	_____	\$ _____
43. Total of Part 7. Add lines 39 through 42. Copy the total to line 86. \$ _____			

44. Is a depreciation schedule available for any of the property listed in Part 7?

- No
 Yes

45. Has any of the property listed in Part 7 been appraised by a professional within the last year?

- No
 Yes

Part 8: Machinery, equipment, and vehicles

46. Does the debtor own any machinery, equipment, or vehicles?

- No. Go to Part 9.
 Yes. Fill in the information below.

General description	Net book value of debtor's interest	Valuation method used for current value	Current value of debtor's interest
Include year, make, model, and identification numbers (i.e., VIN, HIN, or N-number)	(Where available)		

47. Automobiles, vans, trucks, motorcycles, trailers, and titled farm vehicles

47.1 _____	\$ _____	_____	\$ _____
47.2 _____	\$ _____	_____	\$ _____
47.3 _____	\$ _____	_____	\$ _____
47.4 _____	\$ _____	_____	\$ _____

48. Watercraft, trailers, motors, and related accessories Examples: Boats, trailers, motors, floating homes, personal watercraft, and fishing vessels

48.1 _____	\$ _____	_____	\$ _____
48.2 _____	\$ _____	_____	\$ _____

49. Aircraft and accessories

49.1 _____	\$ _____	_____	\$ _____
49.2 _____	\$ _____	_____	\$ _____

50. Other machinery, fixtures, and equipment (excluding farm machinery and equipment)

_____	\$ _____	_____	\$ _____
-------	----------	-------	----------

51. Total of Part 8.

Add lines 47 through 50. Copy the total to line 87.

\$ _____

52. Is a depreciation schedule available for any of the property listed in Part 8?

- No
 Yes

53. Has any of the property listed in Part 8 been appraised by a professional within the last year?

- No
 Yes

Part 9: Real property

54. Does the debtor own any real property?

- No. Go to Part 10.
 Yes. Fill in the information below.

55. Any building, other improved real estate, or land which the debtor owns or in which the debtor has an interest

Description and location of property Include street address or other description such as Assessor Parcel Number (APN), and type of property (for example, acreage, factory, warehouse, apartment or office building), if available.	Nature and extent of debtor's interest in property	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
55.1 _____	_____	\$ _____	_____	\$ _____
55.2 _____	_____	\$ _____	_____	\$ _____
55.3 _____	_____	\$ _____	_____	\$ _____
55.4 _____	_____	\$ _____	_____	\$ _____
55.5 _____	_____	\$ _____	_____	\$ _____
55.6 _____	_____	\$ _____	_____	\$ _____

56. Total of Part 9.

Add the current value on lines 55.1 through 55.6 and entries from any additional sheets. Copy the total to line 88.

\$ _____

57. Is a depreciation schedule available for any of the property listed in Part 9?

- No
 Yes

58. Has any of the property listed in Part 9 been appraised by a professional within the last year?

- No
 Yes

Part 10: Intangibles and Intellectual Property

59. Does the debtor have any interests in intangibles or intellectual property?

- No. Go to Part 11.
 Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
60. Patents, copyrights, trademarks, and trade secrets _____	\$ _____	_____	\$ _____
61. Internet domain names and websites _____	\$ _____	_____	\$ _____
62. Licenses, franchises, and royalties _____	\$ _____	_____	\$ _____
63. Customer lists, mailing lists, or other compilations _____	\$ _____	_____	\$ _____
64. Other intangibles, or intellectual property _____	\$ _____	_____	\$ _____
65. Goodwill _____	\$ _____	_____	\$ _____

66. Total of Part 10.

Add lines 60 through 65. Copy the total to line 89.

\$ _____

67. Do your lists or records include personally identifiable information of customers (as defined in 11 U.S.C. §§ 101(41A) and 107)?

- No
- Yes

68. Is there an amortization or other similar schedule available for any of the property listed in Part 10?

- No
- Yes

69. Has any of the property listed in Part 10 been appraised by a professional within the last year?

- No
- Yes

Part 11: All other assets

70. Does the debtor own any other assets that have not yet been reported on this form?

- No. Go to Part 12.
- Yes. Fill in the information below.

Current value of debtor's interest

71. Notes receivable

Description (include name of obligor)

	—		= →	
	Total face amount	doubtful or uncollectible amount		\$ _____

72. Tax refunds and unused net operating losses (NOLs)

Describe (for example, federal, state, local)

	Tax year		\$ _____
	Tax year		\$ _____
	Tax year		\$ _____

73. Interests in insurance policies or annuities

_____ \$ _____

74. Causes of action against third parties (whether or not a lawsuit has been filed)

_____ \$ _____

Nature of claim _____

Amount requested \$ _____

75. Other contingent and unliquidated claims or causes of action of every nature, including counterclaims of the debtor and rights to set off claims

_____ \$ _____

Nature of claim _____

Amount requested \$ _____

76. Trusts, equitable or future interests in property

_____ \$ _____

77. Other property of any kind not already listed *Examples:* Season tickets, country club membership

_____ \$ _____

_____ \$ _____

78. Total of Part 11.

Add lines 71 through 77. Copy the total to line 90.

\$ _____

79. Has any of the property listed in Part 11 been appraised by a professional within the last year?

- No
- Yes

Part 12: Summary

In Part 12 copy all of the totals from the earlier parts of the form.

Type of property	Current value of personal property	Current value of real property
80. Cash, cash equivalents, and financial assets. <i>Copy line 45, Part 1.</i>	\$ _____	
81. Deposits and prepayments. <i>Copy line 9, Part 2.</i>	\$ _____	
82. Accounts receivable. <i>Copy line 12, Part 3.</i>	\$ _____	
83. Investments. <i>Copy line 17, Part 4.</i>	\$ _____	
84. Inventory. <i>Copy line 23, Part 5.</i>	\$ _____	
85. Agricultural assets. <i>Copy line 33, Part 6.</i>	\$ _____	
86. Office furniture, fixtures, and equipment, and collectibles. <i>Copy line 43, Part 7.</i>	\$ _____	
87. Machinery, equipment, and vehicles. <i>Copy line 51, Part 8.</i>	\$ _____	
88. Real property. <i>Copy line 56, Part 9.</i>	→	\$ _____
89. Intangibles and intellectual property. <i>Copy line 66, Part 10.</i>	\$ _____	
90. All other assets. <i>Copy line 78, Part 11.</i>	+ \$ _____	
91. Total. Add lines 80 through 90 for each column.....91a.	\$ _____	+ 91b. \$ _____
92. Total of all property on Schedule A/B. Lines 91a + 91b = 92.	\$ _____	

Fill in this information to identify the case:

Debtor name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number (if known): _____

Check if this is an amended filing

Official Form 206D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible.

1. Do any creditors have claims secured by debtor's property?

- No. Check this box and submit page 1 of this form to the court with debtor's other schedules. Debtor has nothing else to report on this form.
- Yes. Fill in all of the information below.

Part 1: List Creditors Who Have Secured Claims

2. List in alphabetical order all creditors who have secured claims. If a creditor has more than one secured claim, list the creditor separately for each claim.

Column A Amount of claim Do not deduct the value of lien.	Column B Value of debtor's property that secures this claim
---	--

2.1 Creditor's name

Describe debtor's property that is subject to a lien

_____ \$ _____ \$ _____

Creditor's mailing address

Describe the lien

Creditor's email address, if known

Is the creditor an insider or related party?

- No
- Yes

Date debt was incurred _____

Is anyone else liable on this claim?

Last 4 digits of account number _____

- No
- Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

Do multiple creditors have an interest in the same property?

As of the petition filing date, the claim is:
Check all that apply.

- No
- Yes. Specify each creditor, including this creditor, and its relative priority.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

2.2 Creditor's name

Describe debtor's property that is subject to a lien

_____ \$ _____ \$ _____

Creditor's mailing address

Describe the lien

Creditor's email address, if known

Is the creditor an insider or related party?

- No
- Yes

Date debt was incurred _____

Is anyone else liable on this claim?

Last 4 digits of account number _____

- No
- Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

Do multiple creditors have an interest in the same property?

As of the petition filing date, the claim is:
Check all that apply.

- No
- Yes. Have you already specified the relative priority?
 - No. Specify each creditor, including this creditor, and its relative priority.

 - Yes. The relative priority of creditors is specified on lines _____

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

3. Total of the dollar amounts from Part 1, Column A, including the amounts from the Additional Page, if any.

\$ _____

Part 1: Additional Page

Column A	Column B
Amount of claim Do not deduct the value of lien.	Value of debtor's property that secures this claim

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

2. Creditor's name _____ Describe debtor's property that is subject to a lien _____ \$ _____ \$ _____

Creditor's mailing address _____

Creditor's email address, if known _____

Date debt was incurred _____

Last 4 digits of account number _____

Do multiple creditors have an interest in the same property?
 No
 Yes. Have you already specified the relative priority?
 No. Specify each creditor, including this creditor, and its relative priority.

 Yes. The relative priority of creditors is specified on lines _____

Describe the lien _____

Is the creditor an insider or related party?
 No
 Yes

Is anyone else liable on this claim?
 No
 Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.
 Contingent
 Unliquidated
 Disputed
 Liquidated and neither contingent nor disputed

2. Creditor's name _____ Describe debtor's property that is subject to a lien _____ \$ _____ \$ _____

Creditor's mailing address _____

Creditor's email address, if known _____

Date debt was incurred _____

Last 4 digits of account number _____

Do multiple creditors have an interest in the same property?
 No
 Yes. Have you already specified the relative priority?
 No. Specify each creditor, including this creditor, and its relative priority.

 Yes. The relative priority of creditors is specified on lines _____

Describe the lien _____

Is the creditor an insider or related party?
 No
 Yes

Is anyone else liable on this claim?
 No
 Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.
 Contingent
 Unliquidated
 Disputed
 Liquidated and neither contingent nor disputed

Part 2: List Others to Be Notified for a Debt Already Listed in Part 1

List in alphabetical order any others who must be notified for a debt already listed in Part 1. Examples of entities that may be listed are collection agencies, assignees of claims listed above, and attorneys for secured creditors.

If no others need to be notified for the debts listed in Part 1, do not fill out or submit this page. If additional pages are needed, copy this page.

Name and address	On which line in Part 1 did you enter the related creditor?	Last 4 digits of account number for this entity
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _
_____ _____ _____	Line 2. __	__ _ _ _

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Fill in this information to identify the case:

Debtor _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number _____
 (If known)

Check if this is an amended filing

Official Form 206E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY unsecured claims and Part 2 for creditors with NONPRIORITY unsecured claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Real and Personal Property (Official Form 206A/B)* and on *Schedule G: Executory Contracts and Unexpired Leases (Official Form 206G)*. Number the entries in Parts 1 and 2 in the boxes on the left. If more space is needed for Part 1 or Part 2, fill out and attach the Additional Page of that Part included in this form.

Part 1: List All Creditors with PRIORITY Unsecured Claims

1. Do any creditors have priority unsecured claims? (See 11 U.S.C. § 507).

- No. Go to Part 2.
- Yes. Go to line 2.

2. List in alphabetical order all creditors who have unsecured claims that are at least partially entitled to priority. If the debtor has more than 3 creditors with priority unsecured claims, fill out and attach the Additional Page of Part 1.

		Total claim	Priority amount
<p>2.1 Priority creditor's name and mailing address</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Date or dates debt was incurred _____</p> <p>Last 4 digits of account number _____</p> <p>Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)</p>	<p>As of the petition filing date, the claim is: _____</p> <p><i>Check all that apply.</i></p> <p><input type="checkbox"/> Contingent</p> <p><input type="checkbox"/> Unliquidated</p> <p><input type="checkbox"/> Disputed</p> <p><input type="checkbox"/> Liquidated and neither contingent nor disputed</p> <p>Basis for the claim: _____</p> <p>Is the claim subject to offset?</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p>	\$ _____	\$ _____
<p>2.2 Priority creditor's name and mailing address</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Date or dates debt was incurred _____</p> <p>Last 4 digits of account number _____</p> <p>Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)</p>	<p>As of the petition filing date, the claim is: _____</p> <p><i>Check all that apply.</i></p> <p><input type="checkbox"/> Contingent</p> <p><input type="checkbox"/> Unliquidated</p> <p><input type="checkbox"/> Disputed</p> <p><input type="checkbox"/> Liquidated and neither contingent nor disputed</p> <p>Basis for the claim: _____</p> <p>Is the claim subject to offset?</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p>	\$ _____	\$ _____
<p>2.3 Priority creditor's name and mailing address</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Date or dates debt was incurred _____</p> <p>Last 4 digits of account number _____</p> <p>Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)</p>	<p>As of the petition filing date, the claim is: _____</p> <p><i>Check all that apply.</i></p> <p><input type="checkbox"/> Contingent</p> <p><input type="checkbox"/> Unliquidated</p> <p><input type="checkbox"/> Disputed</p> <p><input type="checkbox"/> Liquidated and neither contingent nor disputed</p> <p>Basis for the claim: _____</p> <p>Is the claim subject to offset?</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p>	\$ _____	\$ _____

Part 1. Additional Page

Copy this page if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional PRIORITY creditors exist, do not fill out or submit this page.

Total claim

Priority amount

2. Priority creditor's name and mailing address

Date or dates debt was incurred

Last 4 digits of account number _____

Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)

As of the petition filing date, the claim is: \$ _____ \$ _____

Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Basis for the claim:

Is the claim subject to offset?

- No
- Yes

2. Priority creditor's name and mailing address

Date or dates debt was incurred

Last 4 digits of account number _____

Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)

As of the petition filing date, the claim is: \$ _____ \$ _____

Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Basis for the claim:

Is the claim subject to offset?

- No
- Yes

2. Priority creditor's name and mailing address

Date or dates debt was incurred

Last 4 digits of account number _____

Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)

As of the petition filing date, the claim is: \$ _____ \$ _____

Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Basis for the claim:

Is the claim subject to offset?

- No
- Yes

2. Priority creditor's name and mailing address

Date or dates debt was incurred

Last 4 digits of account number _____

Specify Code subsection of PRIORITY unsecured claim: 11 U.S.C. § 507(a) (____)

As of the petition filing date, the claim is: \$ _____ \$ _____

Check all that apply.

- Contingent
- Unliquidated
- Disputed
- Liquidated and neither contingent nor disputed

Basis for the claim:

Is the claim subject to offset?

- No
- Yes

Part 2: List All Creditors with NONPRIORITY Unsecured Claims

3. Do any creditors have unsecured claims not listed on Part 1 of this form or on Schedule G?

- No. Go to Part 3.
- Yes. Go to line 4.

4. List in alphabetical order all of the creditors with nonpriority unsecured claims. If the debtor has more than 4 creditors with nonpriority unsecured claims, fill out and attach the Additional Page of Part 2.

Amount of claim

4.1	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____	Basis for the claim: _____	
	Last 4 digits of account number _____	Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.2	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____	Basis for the claim: _____	
	Last 4 digits of account number _____	Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.3	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____	Basis for the claim: _____	
	Last 4 digits of account number _____	Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.4	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____	Basis for the claim: _____	
	Last 4 digits of account number _____	Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.5	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> None of the above	\$ _____
	Date or dates debt was incurred _____	Basis for the claim: _____	
	Last 4 digits of account number _____	Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

Part 2: Additional Page

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional NONPRIORITY creditors exist, do not fill out or submit this page.

Amount of claim

4.____	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____ Last 4 digits of account number _____	Basis for the claim: _____ Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.____	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____ Last 4 digits of account number _____	Basis for the claim: _____ Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.____	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____ Last 4 digits of account number _____	Basis for the claim: _____ Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.____	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____ Last 4 digits of account number _____	Basis for the claim: _____ Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

4.____	Nonpriority creditor's name and mailing address _____ _____ _____	As of the petition filing date, the claim is: <i>Check all that apply.</i> <input type="checkbox"/> Contingent <input type="checkbox"/> Unliquidated <input type="checkbox"/> Disputed <input type="checkbox"/> Liquidated and neither contingent nor disputed	\$ _____
	Date or dates debt was incurred _____ Last 4 digits of account number _____	Basis for the claim: _____ Is the claim subject to offset? <input type="checkbox"/> No <input type="checkbox"/> Yes	

Part 3: List Others to Be Notified About Unsecured Claims

5. Does the debtor want to notify additional parties about the claims listed in Parts 1 and 2 or for some other reason?

Examples of entities that may be listed are collection agencies, assignors or assignees of claims listed above, and attorneys for unsecured creditors.

- No. If no others are to be notified of the debtor's unsecured debts, go to Part 4.
- Yes. Fill in the information below.

Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
5.1. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.2. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.3. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.4. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.1. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.5. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.6. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.7. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.8. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.9. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.10. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5.11. _____ _____ _____	Line ____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____

Part 3:

Additional Page for Others to Be Notified About Unsecured Claims

Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____
5. _____ _____ _____	Line _____ <input type="checkbox"/> Not listed. Explain _____ _____	____ - ____ - ____ - ____

Part 4:

Total Amounts of the Priority and Nonpriority Unsecured Claims

6. Add the amounts of priority and nonpriority unsecured claims.

Total of claim amounts

6a. **Total claims from Part 1** 6a. \$ _____

6b. **Total claims from Part 2** 6b. + \$ _____

6c. **Total of Parts 1 and 2** 6c. \$ _____
Lines 6a + 6b = 6c.

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Fill in this information to identify the case:

Debtor name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number (if known): _____ Chapter _____

Check if this is an amended filing

Official Form 206G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If more space is needed, copy and attach the additional page, numbering the entries consecutively.

1. Does the debtor have any executory contracts or unexpired leases?

- No. Check this box and file this form with the court with the debtor's other schedules. There is nothing else to report on this form.
- Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Real and Personal Property* (Official Form 206A/B).

2. List all contracts and unexpired leases

State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease

2.1	State what the contract or lease is for and the nature of the debtor's interest _____ _____ State the term remaining _____ List the contract number of any government contract _____	_____ _____ _____ _____
2.2	State what the contract or lease is for and the nature of the debtor's interest _____ _____ State the term remaining _____ List the contract number of any government contract _____	_____ _____ _____ _____
2.3	State what the contract or lease is for and the nature of the debtor's interest _____ _____ State the term remaining _____ List the contract number of any government contract _____	_____ _____ _____ _____
2.4	State what the contract or lease is for and the nature of the debtor's interest _____ _____ State the term remaining _____ List the contract number of any government contract _____	_____ _____ _____ _____
2.5	State what the contract or lease is for and the nature of the debtor's interest _____ _____ State the term remaining _____ List the contract number of any government contract _____	_____ _____ _____ _____

Additional Page if Debtor Has More Executory Contracts or Unexpired Leases

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

List all contracts and unexpired leases

State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

2._

State what the contract or lease is for and the nature of the debtor's interest

State the term remaining

List the contract number of any government contract

Fill in this information to identify the case:

Debtor name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number (If known): _____

Check if this is an amended filing

Official Form 206H

Schedule H: Codebtors

12/15

Be as complete and accurate as possible. If more space is needed, copy the Additional Page, numbering the entries consecutively. Attach the Additional Page to this page.

1. Does the debtor have any codebtors?

- No. Check this box and submit this form to the court with the debtor's other schedules. Nothing else needs to be reported on this form.
- Yes

2. In Column 1, list as codebtors all of the people or entities who are also liable for any debts listed by the debtor in the schedules of creditors, Schedules D-G. Include all guarantors and co-obligors. In Column 2, identify the creditor to whom the debt is owed and each schedule on which the creditor is listed. If the codebtor is liable on a debt to more than one creditor, list each creditor separately in Column 2.

Column 1: Codebtor		Column 2: Creditor	
Name	Mailing address	Name	Check all schedules that apply:
2.1 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.2 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.3 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.4 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.5 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.6 _____	Street _____ _____ City _____ State _____ ZIP Code _____	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G

Additional Page if Debtor Has More Codebtors

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

Column 1: Codebtor		Column 2: Creditor	
Name	Mailing address	Name	Check all schedules that apply:
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G
2.____ _____	_____ Street _____ _____ City State ZIP Code	_____	<input type="checkbox"/> D <input type="checkbox"/> E/F <input type="checkbox"/> G

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (if known): _____

Check if this is an amended filing

Official Form 206Sum
Summary of Assets and Liabilities for Non-Individuals

12/15

Part 1: Summary of Assets

1. **Schedule A/B: Assets—Real and Personal Property** (Official Form 206A/B)

1a. **Real property:**

Copy line 88 from *Schedule A/B*

\$ _____

1b. **Total personal property:**

Copy line 91A from *Schedule A/B*

\$ _____

1c. **Total of all property:**

Copy line 92 from *Schedule A/B*

\$ _____

Part 2: Summary of Liabilities

2. **Schedule D: Creditors Who Hold Claims Secured by Property** (Official Form 206D)

Copy the total dollar amount listed in Column A, *Amount of claim*, at the bottom of page 1 of *Schedule D*

\$ _____

3. **Schedule E/F: Creditors Who Have Unsecured Claims** (Official Form 206E/F)

3a. **Total claim amounts of priority unsecured claims:**

Copy the total claims from Part 1 from line 6a of *Schedule E/F*

\$ _____

3b. **Total amount of claims of non-priority amount of unsecured claims:**

Copy the total of the amount of claims from Part 2 from line 6b of *Schedule E/F*

+ \$ _____

4. **Total liabilities**

Lines 2 + 3a + 3b

\$ _____

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COMMITTEE NOTE

The schedules to be used in cases of non-individual debtors have been revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals eliminate questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records. The non-individual debtor schedules are also renumbered, starting with the number 206 and followed by the letter or name of the schedule to distinguish them from the versions to be used in individual cases. Each form includes a checkbox to indicate whether it is an amended filing.

Official Form 206Sum, *Summary of Assets and Liabilities for Non-Individuals*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of non-individual debtors. The form is reformatted and updated with cross-references indicating the line numbers from specific schedules from which the summary information is to be gathered, and the Statistical Summary is deleted because it only applies to individual debtors. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 206A/B, *Schedule A/B: Assets – Real and Personal Property*, consolidates information about a non-

individual debtor's real and personal property into a single form and replaces Official Form 6A - *Real Property* and Official Form 6B - *Personal Property*, in cases of non-individual debtors. The layout and categories of property on Official Form 206A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses eleven categories of property types. For each part, the specific items are broken out and debtors are instructed to total the part and list the total on a specific line later in the form.

Part 1: *Cash and cash equivalents*, includes cash and cash equivalents and a shortened list of examples. All financial assets other than cash or cash equivalents are moved to Part 4: *Investments*. In the section to list checking, savings, money market, or financial brokerage accounts, debtors are instructed to include the name of the institution and the last 4-digits of any account number.

In Part 2: *Deposits and prepayments*, adds prepayments and examples. A requirement has been added to include the name of the holder of any deposit.

Part 3: *Accounts receivable*, has been revised to divide accounts receivable into two categories depending on age and asks for separate values for the two categories.

Part 4: *Investments*, has been expanded and includes more detail.

Part 5: *Inventory, excluding agricultural assets*, has been amended to separate non-agricultural from agricultural assets, and has been expanded to include more detail. Categories of inventory are listed, and debtors must include the last date of physical inventory, the net book value of debtor's interest (if available), the valuation method used for current value, and the current value of debtor's interest. The form has been further amended to require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

In Part 6: *Agricultural assets (other than titled motor vehicles and land)*, the form has been amended to require more detailed responses and to require the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. A requirement to list fishing supplies has been added. The form has been further amended to require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, whether a depreciation schedule is available for any of the property listed, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

Part 7: *Office furniture, fixtures, and equipment; and collectibles*, has been amended to combine several categories of assets and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. Examples of collectibles are provided. The form has been further amended to require the debtor to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 8: *Machinery, equipment, and vehicles*, has been amended to combine several categories of property and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. More examples are provided for each property type. The form has been further amended to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 9: *Real property*, includes the elements of Official Form 6A, *Real Property*, and has been amended to expand the required information to include the net book value of the debtor's interest and the valuation method used for current value. Also, an instruction has been added for the description and location of the property. The form has been further amended to indicate whether

a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 10: *Intangibles and intellectual property*, includes amendments to combine several categories of property and to include more property types. The debtor is required to list the net book value of the debtor's interest and the valuation method used for current value. The question regarding personally identifiable information has been revised, and the form has been amended to require the debtor to indicate if there is an amortization schedule or similar schedule available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 11: *All other assets*, includes a new category for notes receivable, which requires a description, including the name of the obligor, the face amount, and any uncollectible amount. In addition, the form has been amended to combine tax refunds and net operating losses into a single question and to require more detail, to delete the requirement to list the insurance company name for any interests in insurance policies, to expand the question regarding contingent and unliquidated claims, and to include examples of other property. The form has been further amended to include a question regarding whether the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 12, *Summary*, has been amended to list relevant line numbers for each type of property.

Official Form 206D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, for non-individual debtors and has been revised to eliminate instructions that pertain only to individuals. The form has been further amended to instruct debtors that if a creditor has more than one secured claim, to list the creditor separately for each claim; to list the creditor's email address, if known; to indicate if multiple creditors have an interest in the same collateral; to list the order of each creditor's priority interest in the collateral; and to indicate whether the creditor is an insider or

related party. The debtor is also instructed to describe the lien and to fill out *Schedule H: Codebtors*, if anyone else is liable on the claim. A new category for describing claims has been added—“unliquidated and neither contingent nor disputed”. Finally, the form has been amended to require the debtor to list the value of the debtor’s property that secures the claim.

A new Part 2: *List Others to be Notified for a Debt Already Listed in Part 1* has been added, with instructions to list any others who must be notified about the bankruptcy for a debt listed in Part 1 of the form. Examples are provided. The debtor must include the relevant line from Part 1 and the last 4 digits of the account number for the entity.

A new Part 3: *Total Amounts of Claims and the Unsecured Portion of Claims*, has been added.

Official Form 206E/F, *Schedule E/F: Creditors Who Hold Unsecured Claims*, has been amended to combine Official Form 6E, *Schedule E – Creditors Holding Unsecured Priority Claims* and Official Form 6F, *Schedule F – Creditors Holding Unsecured Nonpriority Claims* for non-individual debtors. Priority unsecured claims are listed in Part 1, and nonpriority unsecured claims are listed in Part 2. The instructions have been revised to require the debtor to list the other party to any executory contract or unexpired lease on this schedule and on *Schedule A/B Real and Personal Property* and *Schedule G: Executory Contracts and Unexpired Leases* (Official Forms 206A/B and 206G).

Part 1, *List All Creditors with PRIORITY Unsecured Claims*, has been revised to delete the requirement to list the amount not entitled to priority and to add requirements to specify the Code section for the priority unsecured claim and whether the claim is subject to offset. A new category of “liquidated and neither contingent nor disputed” has been added to Part 2, *List All Creditors with NONPRIORITY Unsecured Claims*, along with the requirement to indicate if the claim is subject to offset. The instructions have also been significantly shortened. Part 3, *List Others to be Notified About Unsecured Claims*, has been added, with instructions to list any others that the debtor wants to notify about claims listed in Parts 1 and 2. Examples are given. The

debtor must include the relevant line from Part 1 or 2 and the last 4 digits of the account number for the entity. A new Part 4: *Total Amounts of the Priority and Nonpriority Unsecured Claims* has been added.

Official Form 206G, Schedule G: Executory Contracts and Unexpired Leases, replaces Official Form 6G - *Executory Contracts and Unexpired Leases* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general instructions for all forms regarding listing a minor child's name. A new requirement has been added to state the remaining term for any contract or lease listed.

Official Form 206H, Schedule H: Codebtors, replaces Official Form 6H – *Codebtors* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general instructions for all forms regarding listing a minor child's name. A new requirement is added to indicate by checkbox what schedule applies to each co-debtor.

Schedules C, Exemptions, I, Income and J, Expenses. There are no Official Forms for Schedules C, I, and J in non-individual debtor cases. There is no need for an Official Form 206C for non-individual debtors because exemptions are inapplicable to non-individual debtors. And, although section 521(a) of the Bankruptcy Code requires all debtors, including non-individual debtors, to provide schedules of income and expenses, uncertainty about the state of the debtor's business on the petition date – whether it is operating or not, for example – makes it difficult to create standard income and expense forms for non-individual debtors. Some bankruptcy courts have adopted local rules and forms for reporting the income and expenses of non-individual debtors, and Director's Procedural Forms 2060I and 2060J, can be used and modified as appropriate if there are no applicable local rules and forms.

Declaration. There is no Official Form 206, Declaration. The portion of Official Form 6 Declaration for a declaration on behalf of a corporation or partnership has been replaced by Official

Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors*. Official Form 202 includes checkboxes for the schedules included in Official Form 206.

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Fill in this information to identify the case:

Debtor name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number (if known): _____

Check if this is an amended filing

Official Form 207

Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy 12/15

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. Gross revenue from business

None

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year		Sources of revenue Check all that apply	Gross revenue (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ to Filing date MM / DD / YYYY	<input type="checkbox"/> Operating a business <input type="checkbox"/> Other _____	\$ _____
For prior year:	From _____ to _____ MM / DD / YYYY MM / DD / YYYY	<input type="checkbox"/> Operating a business <input type="checkbox"/> Other _____	\$ _____
For the year before that:	From _____ to _____ MM / DD / YYYY MM / DD / YYYY	<input type="checkbox"/> Operating a business <input type="checkbox"/> Other _____	\$ _____

2. Non-business revenue

Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

None

		Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ to Filing date MM / DD / YYYY	_____	\$ _____
For prior year:	From _____ to _____ MM / DD / YYYY MM / DD / YYYY	_____	\$ _____
For the year before that:	From _____ to _____ MM / DD / YYYY MM / DD / YYYY	_____	\$ _____

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

3. Certain payments or transfers to creditors within 90 days before filing this case

List payments or transfers—including expense reimbursements—to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than \$6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

None

Creditor's name and address	Dates	Total amount or value	Reasons for payment or transfer <i>Check all that apply</i>
3.1. _____ Creditor's name _____ Street _____ City State ZIP Code	_____ _____ _____	\$ _____	<input type="checkbox"/> Secured debt <input type="checkbox"/> Unsecured loan repayments <input type="checkbox"/> Suppliers or vendors <input type="checkbox"/> Services <input type="checkbox"/> Other _____
3.2. _____ Creditor's name _____ Street _____ City State ZIP Code	_____ _____ _____	\$ _____	<input type="checkbox"/> Secured debt <input type="checkbox"/> Unsecured loan repayments <input type="checkbox"/> Suppliers or vendors <input type="checkbox"/> Services <input type="checkbox"/> Other _____

4. Payments or other transfers of property made within 1 year before filing this case that benefited any insider

List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or co-signed by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than \$6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

None

Insider's name and address	Dates	Total amount or value	Reasons for payment or transfer
4.1. _____ Insider's name _____ Street _____ City State ZIP Code	_____ _____ _____	\$ _____	_____
Relationship to debtor _____			
4.2. _____ Insider's name _____ Street _____ City State ZIP Code	_____ _____ _____	\$ _____	_____
Relationship to debtor _____			

5. Repossessions, foreclosures, and returns

List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

None

Creditor's name and address	Description of the property	Date	Value of property
5.1. Creditor's name _____ Street _____ City _____ State _____ ZIP Code _____	_____	_____	\$ _____
5.1. Creditor's name _____ Street _____ City _____ State _____ ZIP Code _____	_____	_____	\$ _____

6. Setoffs

List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount
Creditor's name _____ Street _____ City _____ State _____ ZIP Code _____	_____	_____	\$ _____
Last 4 digits of account number: XXXX- _____			

Part 3: Legal Actions or Assignments

7. Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits

List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

None

Case title	Nature of case	Court or agency's name and address	Status of case
7.1. Case number _____	_____	Name _____ Street _____ City _____ State _____ ZIP Code _____	<input type="checkbox"/> Pending <input type="checkbox"/> On appeal <input type="checkbox"/> Concluded
7.2. Case title _____ Case number _____	_____	Court or agency's name and address Name _____ Street _____ City _____ State _____ ZIP Code _____	<input type="checkbox"/> Pending <input type="checkbox"/> On appeal <input type="checkbox"/> Concluded

Part 6: Certain Payments or Transfers

11. Payments related to bankruptcy

List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

None

Who was paid or who received the transfer?	If not money, describe any property transferred	Dates	Total amount or value
--	---	-------	-----------------------

11.1. _____ \$ _____

Address

Street

City State ZIP Code

Email or website address

Who made the payment, if not debtor?

Who was paid or who received the transfer?	If not money, describe any property transferred	Dates	Total amount or value
--	---	-------	-----------------------

11.2. _____ \$ _____

Address

Street

City State ZIP Code

Email or website address

Who made the payment, if not debtor?

12. Self-settled trusts of which the debtor is a beneficiary

List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.

Do not include transfers already listed on this statement.

None

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value
-------------------------	-----------------------------------	---------------------------	-----------------------

_____ \$ _____

Trustee

13. Transfers not already listed on this statement

List any transfers of money or other property—by sale, trade, or any other means—made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

None

Who received transfer?	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value
------------------------	--	------------------------	-----------------------

13.1. _____ \$ _____

Address

Street _____

City _____ State _____ ZIP Code _____

Relationship to debtor

Who received transfer?

13.2. _____ \$ _____

Address

Street _____

City _____ State _____ ZIP Code _____

Relationship to debtor

Part 7: Previous Locations

14. Previous addresses

List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

Does not apply

Address	Dates of occupancy	
---------	--------------------	--

14.1. _____ From _____ To _____
Street

City _____ State _____ ZIP Code _____

14.2. _____ From _____ To _____
Street

City _____ State _____ ZIP Code _____

Part 8: Healthcare Bankruptcies

15. Healthcare bankruptcies

Is the debtor primarily engaged in offering services and facilities for:

- diagnosing or treating injury, deformity, or disease, or
- providing any surgical, psychiatric, drug treatment, or obstetric care?

- No. Go to Part 9.
 Yes. Fill in the information below.

Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
---------------------------	--	---

15.1. _____
 Facility name _____

 Street _____

 City _____ State _____ ZIP Code _____

Location where patient records are maintained (if different from facility address). If electronic, identify any service provider. _____

How are records kept?

Check all that apply:

Electronically
 Paper

Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
---------------------------	--	---

15.2. _____
 Facility name _____

 Street _____

 City _____ State _____ ZIP Code _____

Location where patient records are maintained (if different from facility address). If electronic, identify any service provider. _____

How are records kept?

Check all that apply:

Electronically
 Paper

Part 9: Personally Identifiable Information

16. Does the debtor collect and retain personally identifiable information of customers?

- No.
 Yes. State the nature of the information collected and retained. _____
- Does the debtor have a privacy policy about that information?
- No
 Yes

17. Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b) or other pension or profit-sharing plan made available by the debtor as an employee benefit?

- No. Go to Part 10.
 Yes. Does the debtor serve as plan administrator?
- No. Go to Part 10.
 Yes. Fill in below:

Name of plan	Employer identification number of the plan
_____	EIN: _____ - _____

- Has the plan been terminated?
- No
 Yes

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. Closed financial accounts

Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?

Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses, cooperatives, associations, and other financial institutions.

None

	Financial institution name and address	Last 4 digits of account number	Type of account	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
18.1.	_____ Name _____ Street _____ City State ZIP Code	XXXX-____-____-____	<input type="checkbox"/> Checking <input type="checkbox"/> Savings <input type="checkbox"/> Money market <input type="checkbox"/> Brokerage <input type="checkbox"/> Other _____	_____	\$ _____
18.2.	_____ Name _____ Street _____ City State ZIP Code	XXXX-____-____-____	<input type="checkbox"/> Checking <input type="checkbox"/> Savings <input type="checkbox"/> Money market <input type="checkbox"/> Brokerage <input type="checkbox"/> Other _____	_____	\$ _____

19. Safe deposit boxes

List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

None

Depository institution name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
_____ Name _____ Street _____ City State ZIP Code	_____ _____ _____	_____ _____ _____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Address			
_____ _____			

20. Off-premises storage

List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

None

Facility name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
_____ Name _____ Street _____ City State ZIP Code	_____ _____ _____	_____ _____ _____	<input type="checkbox"/> No <input type="checkbox"/> Yes
Address			
_____ _____			

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. Property held for another

List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

None

Owner's name and address	Location of the property	Description of the property	Value
Name _____ Street _____ _____ City _____ State _____ ZIP Code _____	_____ _____ _____	_____ _____ _____	\$ _____

Part 12: Details About Environmental Information

For the purpose of Part 12, the following definitions apply:

- *Environmental law* means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium)
- *Site* means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.
- *Hazardous material* means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. Has the debtor been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.

- No
 Yes. Provide details below.

Case title	Court or agency name and address	Nature of the case	Status of case
_____ Case number _____ _____	Name _____ Street _____ _____ City _____ State _____ ZIP Code _____	_____ _____ _____	<input type="checkbox"/> Pending <input type="checkbox"/> On appeal <input type="checkbox"/> Concluded

23. Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?

- No
 Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
Name _____ Street _____ _____ City _____ State _____ ZIP Code _____	Name _____ Street _____ _____ City _____ State _____ ZIP Code _____	_____ _____ _____	_____

24. Has the debtor notified any governmental unit of any release of hazardous material?

- No
 Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
Name _____ Street _____ City _____ State _____ ZIP Code _____	Name _____ Street _____ City _____ State _____ ZIP Code _____	_____	_____

Part 13: Details About the Debtor's Business or Connections to Any Business

25. Other businesses in which the debtor has or has had an interest

List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

- None

	Business name and address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
25.1.	Name _____ Street _____ City _____ State _____ ZIP Code _____	_____	EIN: _____ - _____ Dates business existed From _____ To _____
25.2.	Name _____ Street _____ City _____ State _____ ZIP Code _____	_____	EIN: _____ - _____ Dates business existed From _____ To _____
25.3.	Name _____ Street _____ City _____ State _____ ZIP Code _____	_____	EIN: _____ - _____ Dates business existed From _____ To _____

26. Books, records, and financial statements

26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.

None

Name and address		Dates of service	
26a.1.	_____ Name	From _____	To _____
	_____ Street		
	_____ City	_____ State	_____ ZIP Code

Name and address		Dates of service	
26a.2.	_____ Name	From _____	To _____
	_____ Street		
	_____ City	_____ State	_____ ZIP Code

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

None

Name and address		Dates of service	
26b.1.	_____ Name	From _____	To _____
	_____ Street		
	_____ City	_____ State	_____ ZIP Code

Name and address		Dates of service	
26b.2.	_____ Name	From _____	To _____
	_____ Street		
	_____ City	_____ State	_____ ZIP Code

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

None

Name and address		If any books of account and records are unavailable, explain why
26c.1.	_____ Name	_____
	_____ Street	_____
	_____ City	_____
	_____ State	
	_____ ZIP Code	

Name and address

If any books of account and records are unavailable, explain why

26c.2.

Name

Street

City State ZIP Code

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

None

Name and address

26d.2.

Name

Street

City State ZIP Code

Name and address

26d.2.

Name

Street

City State ZIP Code

27. Inventories

Have any inventories of the debtor's property been taken within 2 years before filing this case?

- No
 Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory

Date of inventory

The dollar amount and basis (cost, market, or other basis) of each inventory

\$ _____

Name and address of the person who has possession of inventory records

27.1.

Name

Street

City State ZIP Code

Name of the person who supervised the taking of the inventory

Date of inventory

The dollar amount and basis (cost, market, or other basis) of each inventory

_____ \$ _____

Name and address of the person who has possession of inventory records

27.2.

Name _____
Street _____
City _____ State _____ ZIP Code _____

28. List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.

Name	Address	Position and nature of any interest	% of interest, if any
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

29. Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?

- No
- Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
_____	_____	_____	From ____ To ____
_____	_____	_____	From ____ To ____
_____	_____	_____	From ____ To ____
_____	_____	_____	From ____ To ____

30. Payments, distributions, or withdrawals credited or given to insiders

Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

- No
- Yes. Identify below.

Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value
30.1. _____ Name _____ Street _____ City _____ State _____ ZIP Code _____	_____	_____	_____
Relationship to debtor _____	_____	_____	_____

Debtor _____
Name

Case number (if known) _____

Name and address of recipient

Name

Street

City

State

ZIP Code

Relationship to debtor

31. Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?

- No
- Yes. Identify below.

Name of the parent corporation

Employer Identification number of the parent corporation

EIN: ____ - ____ - ____

32. Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?

- No
- Yes. Identify below.

Name of the pension fund

Employer Identification number of the pension fund

EIN: ____ - ____ - ____

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X

Signature of individual signing on behalf of the debtor

Printed name _____

Position or relationship to debtor _____

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?

- No
- Yes

COMMITTEE NOTE

Official Form 207, *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy*, replaces Official Form 7, *Statement of Financial Affairs*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 207 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

The form is derived from Official Form 7, *Statement of Financial Affairs*, and has been substantially reorganized. The form is divided into 14 sections grouping similar questions together. Many of the instructions have been shortened, and questions and instructions pertaining to individual debtors have been deleted. The instructions at the beginning of the form have been shortened, and the definitions deleted or moved to other parts of the form.

In Part 1, *Income*, the questions regarding gross revenue from business and non-business revenue have been consolidated, and checkboxes have been added to indicate the source of revenue.

A definition of gross revenue has been added. Also, the debtor is instructed to include revenue only once.

In Part 2, *List Certain Transfers Made Before Filing for Bankruptcy*, information that pertains only to individuals has been eliminated, and the questions related to payments made in the 90 days prior to bankruptcy, payments made to insiders within one year prior to bankruptcy, repossessions, and setoffs have been consolidated. Instructions have been added to include expense reimbursements in answer to the questions regarding payments and to exclude regular employee compensation from the question regarding payments within 90 days. A dollar limitation has been added to the instructions for the question regarding payments to insiders. Checkboxes have been added to both questions to provide a reason for the payment, and the explanation that the dollar limitation changes every three years has been moved to the instructions from the footnotes. “Amount still owing” has been removed, and a definition of “insider” has been added along with a statutory citation to the question regarding insiders. Partnerships have been added to examples of “insiders.” The question regarding setoffs includes a revised definition and has been revised to require that the debtor provide a description of the creditor’s actions and the last four digits of any account number.

In Part 3, *Legal Actions or Assignments*, several questions have been consolidated, instructions pertaining only to individuals have been removed, and additional examples have been added. Checkboxes have been added to indicate the status of the legal action. The requirement to list the terms of any assignment or settlement has been removed.

In Part 4, *Certain Gifts and Charitable Contributions*, instructions pertaining only to individuals have been removed, and the reporting threshold has been changed to \$1,000 per recipient. The look-back period has been increased from one to two years.

Part 5, *Certain Losses*, has been revised to expand the types of payments for losses, and an instruction has been added to list unpaid claims on Official Form 206A/B (*Schedule A/B – Property*). Portions of the instructions that pertain only to

individuals have been removed. Losses due to gambling have been excluded from this part.

In Part 6, *Certain Payments or Transfers*, the questions regarding payments related to bankruptcy, payments to self-settled trusts, and other payments or transfers have been consolidated. Instructions and questions that relate only to individuals have been eliminated. An instruction has been added to include payments related to restructuring, and the email or website of the person who received the money or transfer is added as a requirement. In response to the question regarding self-settled trusts and other transfers not already listed, debtors are instructed to include payments or transfers of property made by a person acting on behalf of the debtor. A requirement has been added to the question regarding self-settled trusts to list the name of the trustee. The relationship to the debtor must be included for all transfers not already listed, as well as any debts paid in exchange. There is a reminder added not to include transfers already listed.

Part 7, *Previous Locations*, has been revised in the instructions, and information pertaining only to individuals has been deleted.

Part 8, *Healthcare Bankruptcies*, is new. Part 8 requires additional information if the debtor is primarily engaged in offering services and facilities for diagnosing or treating injury, deformity, or disease or providing any surgical, psychiatric, drug treatment or obstetric care. This part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Part 9, *Personally Identifiable Information*, is also new and includes questions about pension and profit sharing plans and adds a question about whether the debtor collects and retains personally identifiable information of customers. Questions are added about whether the debtor is the plan administrator of any pension or profit sharing plan and if any such plan is terminated. Similar to Part 8, this part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

In Part 10, *Certain Financial Accounts, Safe Deposit Boxes, and Storage Units*, money market accounts have been added to the examples provided for the question regarding financial accounts, and checkboxes have been added to indicate the type of account. The requirement of the date of surrender of any safe deposit box has been removed. A question has been added about whether the debtor has property kept in storage units or warehouses within one year of filing, and the debtor must provide the facility name and address, the name and address of anyone with access to the facility, the description of the contents, and whether the debtor still has the storage unit or warehouse. Facilities that are in a part of a building in which the debtor does business are excluded.

In Part 11, *Property the Debtor Holds or Controls That the Debtor Does Not Own*, an instruction has been added to include any property borrowed from, being stored for, or held in trust, and to exclude leased or rented property.

Part 12, *Details About Environmental Information*, has been revised to include new definitions of “Environmental law,” “Site,” and “Hazardous materials.” An instruction to report all notices, releases, and proceedings known, regardless of when they occurred, has been added.

In Part 13, *Details About the Debtor’s Business or Connections to Any Business*, questions regarding various business issues have been consolidated, and instructions that pertain only to individuals have been eliminated. The five-percent ownership limitation has been eliminated. The phrase “kept or supervised the keeping of books or account and records” has been replaced with “maintained the debtor’s books and records.” The instructions for the question regarding auditing or preparation of financial records have been revised to add compiling and reviewing the debtor’s books of account and records. A requirement has been added to explain if the debtor’s books of account and records are unavailable. The questions regarding current and former officers, directors, managing members, general partners, members in control, or controlling shareholders have combined the formerly separate corporate and partnership questions. The question regarding former officers and partners has been changed to add the

requirement of indicating the start and end dates for each listing. The instruction for withdrawals from a partnership or distribution by a corporation has been changed to add salary, other compensation, and draws to the list of examples.

In Part 14, *Signature and Declaration*, the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. See Rule 1008. A statement has been added that the individual signing on behalf of the debtor has reviewed the information in the Statement of Financial Affairs and any attachments and has “a reasonable belief that the information is true and correct.” The signature boxes for bankruptcy petition preparers have been eliminated, and checkboxes for the debtor to indicate whether additional pages are attached to the form have been added.

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Information to identify the case:	
Debtor 1 First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
Debtor 2 (Spouse, if filing) First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 7 _____ MM / DD / YYYY] OR [Date case filed in chapter _____ MM / DD / YYYY] Date case converted to chapter 7 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309A (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline 12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

6. Bankruptcy clerk's office

Documents in this case may be filed at this address.
You may inspect all records filed in this case at this office or online at www.pacer.com.

Hours open _____

Contact phone _____

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.
Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Presumption of abuse

If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.

[The presumption of abuse does not arise.]

[The presumption of abuse arises.]

[Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]

9. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

Filing deadline: _____

You must file a complaint:

if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7),
or

if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

You must file a motion if you assert that the discharge should be denied under § 727(a)(8) or (9).

Deadline to object to exemptions:Filing deadline: 30 days after the *conclusion* of the meeting of creditors

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

10. Proof of claim

Please do not file a proof of claim unless you receive a notice to do so.

No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.

11. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.

Information to identify the case:	
Debtor 1 _____ <small>First Name Middle Name Last Name</small>	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
Debtor 2 (Spouse, if filing) _____ <small>First Name Middle Name Last Name</small>	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
United States Bankruptcy Court for the: _____ District of _____ <small>(State)</small>	[Date case filed for chapter 7 _____] OR [Date case filed in chapter _____] OR Date case converted to chapter 7 _____ <small>MM / DD / YYYY</small>
Case number: _____	<small>MM / DD / YYYY</small>

Official Form 309B (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set 12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

<p>6. Bankruptcy clerk's office</p> <p>Documents in this case may be filed at this address.</p> <p>You may inspect all records filed in this case at this office or online at www.pacer.com.</p>	<p>Hours open _____</p> <p>Contact phone _____</p>
<p>7. Meeting of creditors</p> <p>Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.</p> <p>Creditors may attend, but are not required to do so.</p>	<p>_____ at _____</p> <p>Date Time Location:</p> <p>The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.</p>
<p>8. Presumption of abuse</p> <p>If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.</p>	<p>[The presumption of abuse does not arise.]</p> <p>[The presumption of abuse arises.]</p> <p>[Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]</p>
<p>9. Deadlines</p> <p>The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.</p>	<p>File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:</p> <p>Filing deadline: _____</p> <p>You must file a complaint:</p> <ul style="list-style-type: none"> <input type="checkbox"/> if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or <input type="checkbox"/> if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). <p>You must file a motion if you assert that</p> <ul style="list-style-type: none"> <input type="checkbox"/> the discharge should be denied under § 727(a)(8) or (9). <p>Deadline for all creditors to file a proof of claim (except governmental units):</p> <p>Filing deadline: _____</p> <p>Deadline for governmental units to file a proof of claim:</p> <p>Filing deadline: _____</p> <p>Deadlines for filing proof of claim:</p> <p>A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.</p> <p>Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.</p> <p>Deadline to object to exemptions:</p> <p>The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.</p> <p>Filing deadline: 30 days after the <i>conclusion</i> of the meeting of creditors</p>
<p>10. Creditors with a foreign address</p>	<p>If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.</p>
<p>11. Liquidation of the debtor's property and payment of creditors' claims</p>	<p>The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim as described above.</p>
<p>12. Exempt property</p>	<p>The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.</p>

Information to identify the case:	
Debtor _____ Name	EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 7 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 7 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309C (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline **12/15**

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____
7. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time Location: The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.
8. Proof of claim Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.
9. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

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Information to identify the case:	
Debtor _____ Name	EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 7 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 7 _____] MM / DD / YYYY
Case number: _____	

Official Form 309D (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set 12/15

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____
7. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time Location: The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

For more information, see page 2 ►

8. Deadlines

The bankruptcy clerk's office must receive proofs of claim by the following deadlines.

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

9. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Liquidation of the debtor's property and payment of creditors' claims

The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim, as described above.

Information to identify the case:	
Debtor 1 First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
Debtor 2 (Spouse, if filing) First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____ - _____ - _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed in chapter 11 _____ MM / DD / YYYY] OR
Case number: _____	[Date case filed in chapter _____ MM / DD / YYYY]
	Date case converted to chapter 11 _____ MM / DD / YYYY

Official Form 309E (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____

For more information, see page 2 ►

6. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location:

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

7. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or
[date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the conclusion of the meeting of creditors

8. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

9. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.

10. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

11. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.

Information to identify the case:			
Debtor _____ Name	EIN _____		
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed in chapter 11	_____	MM / DD / YYYY OR
Case number: _____	[Date case filed in chapter _____	_____	MM / DD / YYYY
	Date case converted to chapter 11	_____	MM / DD / YYYY

Official Form 309F (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____
6. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time Location: The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

For more information, see page 2 ►

7. Proof of claim deadline**Deadline for filing proof of claim:**

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A).

Deadline for filing the complaint: _____**9. Creditors with a foreign address**

If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.

11. Discharge of debts

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

Information to identify the case:	
Debtor 1 First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____
Debtor 2 (Spouse, if filing) First Name _____ Middle Name _____ Last Name _____	Last 4 digits of Social Security number or ITIN _____ EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 12 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 12 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309G (For Individuals or Joint Debtors)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, from the debtors' property, or from certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in a discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____

For more information, see page 2 ►

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint to challenge dischargeability of certain debts:

Filing deadline: _____

You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

Deadlines for filing proof of claim:

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office.

If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

Filing deadline: 30 days after the conclusion of the meeting of creditors

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

9. Filing of plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location: _____
Date Time]

Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]

10. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

11. Filing a Chapter 12 bankruptcy case

Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business unless the court orders otherwise.

12. Discharge of debts

Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the clerk's office by the deadline.

13. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Information to identify the case:			
Debtor _____ Name	EIN _____		
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 12 _____ MM / DD / YYYY OR		
Case number: _____	[Date case filed in chapter _____ MM / DD / YYYY		
	Date case converted to chapter 12 _____ MM / DD / YYYY		

Official Form 309H (For Corporations or Partnerships)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor, the debtor's property, or certain codebtors. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in the discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .	Hours open _____ Contact phone _____
6. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

7. Meeting of creditors

The debtor's representative must attend the meeting to be questioned under oath.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

Deadline for filing the complaint: _____

9. Filing of plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location: _____
Date Time]

Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]

10. Deadlines

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office.

If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

11. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

12. Filing a chapter 12 bankruptcy case

Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business.

13. Discharge of debts

Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan.

If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Information to identify the case:		
Debtor 1 _____ <small>First Name Middle Name Last Name</small>	Last 4 digits of Social Security number or ITIN _____ EIN _____	
Debtor 2 _____ (Spouse, if filing) <small>First Name Middle Name Last Name</small>	Last 4 digits of Social Security number or ITIN _____ EIN _____	
United States Bankruptcy Court for the: _____ District of _____ <small>(State)</small>	[Date case filed for chapter 13 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 13 _____ MM / DD / YYYY]	
Case number: _____		

Official Form 309I

Notice of Chapter 13 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 13 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, the debtors' property, and certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 13 plan may result in a discharge. Creditors who assert that the debtors are not entitled to a discharge under 11 U.S.C. § 1328(f) must file a motion objecting to discharge in the bankruptcy clerk's office within the deadline specified in this notice. Creditors who want to have their debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office by the same deadline. (See line 14 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name		
2. All other names used in the last 8 years		
3. Address		If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address		Contact phone _____ Email _____
5. Bankruptcy trustee Name and address		Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com .		Hours open _____ Contact phone _____

For more information, see page 2 ►

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint to challenge dischargeability of certain debts:

Filing deadline: _____

You must file:

a motion if you assert that the debtors are not entitled to receive a discharge under U.S.C. § 1328(f), or
a complaint if you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4).

Deadline for all creditors to file a proof of claim (except governmental units):

Filing deadline: _____

Deadline for governmental units to file a proof of claim:

Filing deadline: _____

Deadlines for filing proof of claim:

A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim.

Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

Filing deadline: 30 days after the conclusion of the meeting of creditors

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

9. Filing of plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location: _____
Date Time]

Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]

Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]

10. Creditors with a foreign address

If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadline in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

11. Filing a chapter 13 bankruptcy case

Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts according to a plan. A plan is not effective unless the court confirms it. You may object to confirmation of the plan and appear at the confirmation hearing. A copy of the plan [is included with this notice] or [will be sent to you later], and [the confirmation hearing will be held on the date shown in line 9 of this notice] or [the court will send you a notice of the confirmation hearing]. The debtor will remain in possession of the property and may continue to operate the business, if any, unless the court orders otherwise.

12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that debtors claimed, you may file an objection by the deadline.

13. Discharge of debts

Confirmation of a chapter 13 plan may result in a discharge of debts, which may include all or part of a debt. However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

COMMITTEE NOTE

Official Forms 309A-I, collectively the Bankruptcy Case Commencement Notices, have been revised as part of the Forms Modernization Project to make them easier to read and understand. The notices, derived from Official Forms 9A-I are renumbered and stylistic changes have been made.

References to the limitations on the automatic stay imposed by 11 U.S.C. § 362(c)(3) and (4) in some repeat bankruptcy filings by individuals have been deleted from the three versions of the notice for cases filed by corporations and partnerships. Email addresses for the debtor's attorney and the trustee have been added to the form.

The parties are informed that they may review papers filed in the case through the judiciary's PACER system (Public Access to Court Electronic Records) as well as at the bankruptcy clerk's office.

The lettering scheme for the versions of Official Form 309 track the versions of Official Form 9 used in different types of bankruptcy cases with following exceptions. Official Forms 9E(Alt.) and 9F(Alt.) have been eliminated by including alternative language in Official Forms 309E and 309F to be used if the court sets a deadline for filing claims at the start of the chapter 11 case. In addition, the B and C versions have been reversed in order. That is, Official Form 9C has been designated 309B and Official Form 9B as 309C. This groups together the notices for chapter 7 individual debtors and for non-individual debtors. Finally, as a result of the reformatting, Official Form 309C has been reduced to a single page.

The four versions of the form for chapter 7 cases have been renamed to state whether the notice specifies a deadline for filing proofs of claim, rather than whether the case is an "asset" or "no-asset" case.

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[Caption as in 416A]

Order and Notice for Hearing on Disclosure Statement

To the debtor, its creditors, and other parties in interest:

A disclosure statement and a plan under chapter 11 [or chapter 9] of the Bankruptcy Code having been filed by _____ on _____,

IT IS ORDERED and notice is hereby given, that:

1. The hearing to consider the approval of the disclosure statement shall be held at:

_____,
on _____, at _____ o'clock __.m.

2. _____ is fixed as the last day for filing and serving in accordance with Fed. R. Bankr. P. 3017(a) written objections to the disclosure statement.

3. Within _____ days after entry of this order, the disclosure statement and plan shall be distributed in accordance with Fed. R. Bankr. P. 3017(a).

4. Requests for copies of the disclosure statement and plan shall be mailed to the debtor in possession [or trustee or debtor or _____] at the following mailing address:

[_____].

MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

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COMMITTEE NOTE

Official Form 312, *Order and Notice for Hearing on Disclosure Statement* replaces Official Form 12, *Order and Notice for Hearing on Disclosure Statement*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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[Caption as in 416A]

Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof

A disclosure statement under chapter 11 of the Bankruptcy Code having been filed by _____ on _____ [if appropriate, and by _____, on _____], referring to a plan under chapter 11 of the Code filed by _____, on _____ [if appropriate, and by _____, on _____ respectively] [if appropriate, as modified by a modification filed on _____]; and

It having been determined after hearing on notice that the disclosure statement [or statements] contain[s] adequate information:

IT IS ORDERED, and notice is hereby given, that:

- A. The disclosure statement filed by _____ dated _____ [if appropriate, and by _____, dated _____] is [are] approved.
- B. _____ is fixed as the last day for filing written acceptances or rejections of the plan [or plans] referred to above.
- C. Within _____ days after the entry of this order, the plan [or plans] or a summary or summaries thereof approved by the court, [and [if appropriate] a summary approved by the court of its opinion, if any, dated _____, approving the disclosure statement [or statements]], the disclosure statement [or statements], and a ballot conforming to *Ballot for Accepting or Rejecting Plan of Reorganization* (Official Form 314) shall be mailed to creditors, equity security holders, and other parties in interest, and shall be transmitted to the United States trustee, as provided in Fed. R. Bankr. P. 3017(d).
- D. If acceptances are filed for more than one plan, preferences among the plans so accepted may be indicated.
- E. [If appropriate] _____ is fixed for the hearing on confirmation of the plan [or plans].
- F. [If appropriate] _____ is fixed as the last day for filing and serving pursuant to Fed. R. Bankr. P. 3020(b)(1) written objections to confirmation of the plan.

MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

[If the court directs that a copy of the opinion should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this order.]

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COMMITTEE NOTE

Official Form 313, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof* replaces Official Form 13, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 314
(12/15)

[Caption as in 416A]

Class [] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the *Plan*) for the Debtor in this case. The Court has [conditionally] approved a disclosure statement with respect to the Plan (the *Disclosure Statement*). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]

Court approval of the disclosure statement does not indicate approval of the Plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives:]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [] claim against the Debtor in the unpaid amount of Dollars (\$)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [] claim against the Debtor, consisting of Dollars (\$) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor Official Form 14 continued (12/03)

[In each case, the following language should be included:]

Check one box only

Accepts the plan

Rejects the plan

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

COMMITTEE NOTE

Official Form 314, *Ballot for Accepting or Rejecting Plan* replaces Official Form 14, *Ballot for Accepting or Rejecting Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 315
(12/15)

[Caption as in 416A]

Order Confirming Plan

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [if applicable, as modified by a modification filed on _____], or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [or, if appropriate, 11 U.S.C. § 1129(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____, [If appropriate, include dates and any other pertinent details of modifications to the plan] is confirmed. [If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020.]

A copy of the confirmed plan is attached.

MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

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COMMITTEE NOTE

Official Form 315, *Order Confirming Plan* replaces Official Form 15, *Order Confirming Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter 15

Check if this is an amended filing

Official Form 401

Chapter 15 Petition for Recognition of a Foreign Proceeding

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write debtor's name and case number (if known).

1. Debtor's name _____

2. Debtor's unique identifier

For non-individual debtors:

Federal Employer Identification Number (EIN) ____ - ____ - ____ - ____

Other _____. Describe identifier _____.

For individual debtors:

Social Security number: xxx - xx- ____ - ____ - ____

Individual Taxpayer Identification number (ITIN): 9 xx - xx - ____ - ____ - ____

Other _____. Describe identifier _____.

3. Name of foreign representative(s) _____

4. Foreign proceeding in which appointment of the foreign representative(s) occurred _____

5. Nature of the foreign proceeding

Check one:

Foreign main proceeding

Foreign nonmain proceeding

Foreign main proceeding, or in the alternative foreign nonmain proceeding

6. Evidence of the foreign proceeding

A certified copy, translated into English, of the decision commencing the foreign proceeding and appointing the foreign representative is attached.

A certificate, translated into English, from the foreign court, affirming the existence of the foreign proceeding and of the appointment of the foreign representative, is attached.

Other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative is described below, and relevant documentation, translated into English, is attached.

7. Is this the only foreign proceeding with respect to the debtor known to the foreign representative(s)?

No. (Attach a statement identifying each country in which a foreign proceeding by, regarding, or against the debtor is pending.)

Yes

8. Others entitled to notice

Attach a list containing the names and addresses of:

- (i) all persons or bodies authorized to administer foreign proceedings of the debtor,
- (ii) all parties to litigation pending in the United States in which the debtor is a party at the time of filing of this petition, and
- (iii) all entities against whom provisional relief is being sought under § 1519 of the Bankruptcy Code.

9. Addresses

Country where the debtor has the center of its main interests:

Debtor's registered office:

Number Street _____

P.O. Box _____

City State/Province/Region ZIP/Postal Code _____

Country _____

Individual debtor's habitual residence:

Number Street _____

P.O. Box _____

City State/Province/Region ZIP/Postal Code _____

Country _____

Address of foreign representative(s):

Number Street _____

P.O. Box _____

City State/Province/Region ZIP/Postal Code _____

Country _____

10. Debtor's website (URL)

11. Type of debtor

Check one:

- Non-individual (check one):
 - Corporation. Attach a corporate ownership statement containing the information described in Fed. R. Bankr. P. 7007.1.
 - Partnership
 - Other. Specify: _____
- Individual

12. Why is venue proper in this district?

Check one:

- Debtor's principal place of business or principal assets in the United States are in this district.
- Debtor does not have a place of business or assets in the United States, but the following action or proceeding in a federal or state court is pending against the debtor in this district:

- If neither box is checked, venue is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative, because:

13. Signature of foreign representative(s)

I request relief in accordance with chapter 15 of title 11, United States Code.

I am the foreign representative of a debtor in a foreign proceeding, the debtor is eligible for the relief sought in this petition, and I am authorized to file this petition.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct,

X

Signature of foreign representative

Printed name

Executed on _____

MM / DD / YYYY

X

Signature of foreign representative

Printed name

Executed on _____

MM / DD / YYYY

14. Signature of attorney

X

Signature of Attorney for foreign representative

Date

MM / DD / YYYY

Printed name

Firm name

Number Street

City

State

ZIP Code

Contact phone

Email address

Bar number

State

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COMMITTEE NOTE

Official Form 401 is required for any petition seeking recognition of a foreign proceeding under chapter 15 of the Bankruptcy Code. The form, which applies to foreign proceedings involving individual and non-individual debtors, consolidates information formerly included on Official Form 1 (Voluntary Petition). The petition must be signed by the foreign representative, under penalty of perjury, and by the foreign representative's attorney.

The petition requires disclosure of the foreign proceeding in which the foreign representative has been appointed (Line 4) and whether it is a foreign main proceeding or foreign nonmain proceeding (Line 5). If the foreign representative seeks recognition of the foreign proceeding as a foreign main proceeding or, in the alternative, a foreign nonmain proceeding, that request should be indicated in Line 5. Each country where any additional foreign proceeding known to the foreign representative is pending must be disclosed on Line 7. See Bankruptcy Rule 1004.2. Evidence of the foreign proceeding and of the foreign representative's appointment must accompany the petition. See 11 U.S.C. § 1515(b). These documents must be translated into English in accordance with 11 U.S.C. § 1515(d). The foreign representative must also attach a list of persons or bodies entitled to notice. See Bankruptcy Rule 2002(q).

The petition calls for information about the debtor, including the debtor's name (Line 1), other unique identifying information, if available (Line 2), and center of main interest (Line 9). The type of debtor is also requested (Line 11).

The foreign representative must indicate the basis for venue in the district by selecting an appropriate checkbox and, if necessary, providing additional information, such as a statement explaining why venue in the district is appropriate (Line 12). See 28 U.S.C. § 1410.

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Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court

12/15

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Attach any supporting documents to this form.**
Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)

Also attach copies of documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called “Bankruptcy Rule”) 3001(c) and (d).
- **Do not attach original documents because attachments may be destroyed after scanning.**
- **If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.**
- **A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual’s tax identification number, or financial account number, and only the year of any person’s date of birth.** See Bankruptcy Rule 9037.
- **For a minor child, fill in only the child’s initials and the full name and address of the child’s parent or guardian.** For example, write *A.B., a minor child (John Doe, parent, 123 Main St., City, State)*. See Bankruptcy Rule 9037.

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court’s PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate. 11 U.S.C. § 503.

Claim: A creditor’s right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. § 101 (5). A claim may be secured or unsecured.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. § 101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor’s name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include a mortgage; lien; certificate of title; financing statement; in some instances, the original security agreement, or other document showing that a security interest has been filed or recorded.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to privacy on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily

granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part if the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

Fill in this information to identify the case:

Draft Jan. 17, 2014

Debtor 1 _____
 Debtor 2 _____
 (Spouse, if filing)
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number _____

Official Form 410
Proof of Claim

12/15

Read the instructions before filling out this form. Use this form to make a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

The law requires that filers **must leave out or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor? _____
 Name of the current creditor (the person or entity to be paid for this claim)
 Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else? No
 Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Name _____	Name _____
	Number _____ Street _____	Number _____ Street _____
	City _____ State _____ ZIP Code _____	City _____ State _____ ZIP Code _____
	Contact phone _____	Contact phone _____
	Contact email _____	Contact email _____
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	

4. Does this claim amend one already filed? No
 Yes. Claim number on court claims registry (if known) _____ Filed on _____
 MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim? No
 Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?** No
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____

7. **How much is the claim?** \$ _____ **For leases state only the amount of default.**

Does this amount include interest or other charges?
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?** Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as healthcare information.

9. **Is all or part of the claim secured?** No
 Yes. The claim is secured by a lien on property.

Nature of property:
 Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
 Motor vehicle
 Other. Describe: _____

Basis for perfection: _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: \$ _____
Amount of the claim that is secured: \$ _____
Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: \$ _____

Annual Interest Rate (when case was filed) _____ %
 Fixed
 Variable

10. **Is this claim based on a lease?** No
 Yes. **Amount necessary to cure any default as of the date of the petition.** \$ _____

11. **Does this claim involve a right to setoff?** No
 Yes. Explain: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

- No
 Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

- Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). \$ _____
- Up to \$2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). \$ _____
- Wages, salaries, or commissions (up to \$12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). \$ _____
- Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). \$ _____
- Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). \$ _____
- Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. \$ _____

* Amounts are subject to adjustment on 4/1/16 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

Check the appropriate box:

- I am the creditor.
- I am the creditor's attorney or authorized agent.
- I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
 MM / DD / YYYY

 Signature

Print the name of the person who is completing and signing this claim:

Name _____
 First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
 Number Street

City State ZIP Code

Contact phone _____ Email _____

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Official Form 410A

Instructions for Mortgage Proof of Claim Attachment

United States Bankruptcy Court

12/15

Introduction

This form is used only in individual debtor cases. When required to be filed, it must be attached to *Proof of Claim* (Official Form B410) with other documentation required under the Federal Rules of Bankruptcy Procedure.

Applicable Law and Rules

Rule 3001(c)(2)(A) of the Federal Rules of Civil Procedure requires for the bankruptcy case of an individual that any proof of claim be accompanied by a statement itemizing any interest, fees, expenses, and charges that are included in the claim.

Rule 3001(c)(2)(B) requires that a statement of the amount necessary to cure any default be filed with the claim if a security interest is claimed in the debtor's property.

If a security interest is claimed in property that is the debtor's principal residence, Rule 3001(c)(2)(C) requires this form to be filed with the proof of claim. The form implements the requirements of Rule 3001(c)(2)(A) and (B).

If an escrow account has been established in connection with the claim, Rule 3001(c)(2)(C) also requires an escrow statement to be filed with the proof of claim. The statement must be prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law.

Directions

Definition

This form must list all transactions on the claim from the *first date of default* to the petition date. The *first date of default* is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Information required in Part 1: Mortgage and Case Information

Insert on the appropriate lines:

- the case number;
- the names of Debtor 1 and Debtor 2;
- the last 4 digits used to identify the mortgage loan number (i.e., the last 4 digits of the loan account number or any other information to identify the account);
- the creditor's name;
- the servicer's name, if applicable; and
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method).

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt;
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

Also disclose the *Total amount of funds on hand*. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under *Total debt*.

Information required in the Part 3: Arrearage as of the Date of Petition

Insert the amount of the principal and interest portion of all prepetition monthly installments that remain outstanding as of the petition date. The escrow portion of prepetition monthly installment payments should not be included in this figure.

Insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P.

Insert any *escrow deficiency for funds advanced*. This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Insert the *Projected escrow shortage* as of the date the bankruptcy petition was filed. The *projected escrow shortage* is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O.

This calculation should result in the amount necessary to cure any prepetition default on the note or mortgage that arises from the failure of the borrower to satisfy the amounts required under the Real Estate Settlement Practices Act (RESPA). The amount necessary to cure should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the *Proof of Claim*, as required by Rule 3001(c)(2)(C).

Insert the amount of funds on hand that are unapplied or held in a suspense account as of the petition date.

Total the amounts due listed in Part 3, subtracting the funds on hand, and insert the calculated amount in *Total prepetition arrearage*.

Information required in Part 4: Monthly Mortgage Payment

Insert the principal and interest payment amount of the monthly payment as of the petition date.

Insert the monthly escrow portion of the monthly payment. This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a claimant should assume that the

escrow deficiency and shortage will be paid through a plan of reorganization and provide for a credit of a like amount when calculating postpetition escrow installment payments.

Claimants should also add any monthly private mortgage insurance amount.

Insert the sum of these amounts in *Total monthly payment*.

Information required in Part 5: Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter:

- the date of the default in Column A;
- amount incurred in Column D;
- description of the charge in Column E;
- principal balance, escrow balance, and unapplied or suspense funds balance as of that date in Columns M, O, and Q, respectively.

For (1) all subsequently accruing installment payments; (2) any subsequent payment received; (3) any fee, charge, or amount incurred; and (4) any escrow charge satisfied since the date of first default, enter the information in date order, showing:

- the amount paid, accrued, or incurred;
- a description of the transaction;
- the contractual due date, if applicable;
- how the amount was applied or assessed; and
- the resulting principal balance, accrued interest balance, escrow balance, outstanding fees or charges balance, and the total unapplied funds held or in suspense.

If more space is needed, fill out and attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary.

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Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	14-00001	Principal balance:	\$103,000.00	Principal & interest due:	\$2,000.00	Principal & interest:	\$500.00
Debtor 1:	John Smith	Interest due:	\$1900.00	Prepetition fees due:	\$1,000.00	Monthly escrow:	\$200.00
Debtor 2:	Jane Smith	Fees, costs due:	\$1,000.00	Escrow deficiency for funds advanced:	\$1,600.00	Private mortgage insurance:	n/a
Last 4 digits to identify:	6789	Escrow deficiency for funds advanced:	\$1,600.00	Projected escrow shortage:	\$1,000.00	Total monthly payment:	\$700.00
Creditor:	Mortgage Trust 2012	Less total funds on hand:	– \$200.00	Less funds on hand:	– \$200.00		
Servicer:	Mortgage Servicer A	Total debt:	\$107,900.00	Total prepetition arrearage:	\$5,400.00		
Fixed accrual/daily simple interest/other:	Fixed Accrual						

Part 5 : Loan Payment History from First Date of Default

		Account Activity				How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance
4/1/13	\$700.00			Monthly payment	4/1/2013	\$700.00						\$103,050			0	
4/16/13			\$50.00	Late fee	4/1/2013	\$700.00				\$50.00		\$103,050			\$50.00	
4/25/14			\$600.00	Property taxes	4/1/2013	\$700.00			\$600.00			\$103,050		-\$600.00	\$50.00	
5/1/13	\$700.00			Monthly payment	4/1/2013	\$1400.00						\$103,050		-\$600.00	\$50.00	
5/16/13			\$50.00	Late fee	4/1/2013	\$1400.00				\$50.00		\$103,050		-\$600.00	\$100.00	
6/1/13	\$700.00			Monthly payment	4/1/2013	\$2100.00						\$103,050		-\$600.00	\$100.00	
6/16/13			\$50.00	Late fee	4/1/2013	\$2100.00				\$50.00		\$103,050		-\$600.00	\$150.00	
6/25/13			\$1200.00	Insurance	4/1/2013	\$2100.00			\$1200.00			\$103,050		-\$1800.00	\$150.00	
7/1/13	\$700.00			Monthly payment	4/1/2013	\$2800.00						\$103,050		\$1800.00	\$150.00	
7/16/13			\$50.00	Late fee	4/1/2013	\$2800.00						\$103,050		\$1800.00	\$150.00	
7/25/13			\$850.00	Foreclosure fee	4/1/2013	\$2800.00				\$850.00		\$103,050		\$1800.00	\$1000.00	
7/27/13		\$820.00		Payment	5/1/2013	\$2100.00	\$50.00	\$450.00	\$200.00		\$120.00	\$103,000		\$1600.00	\$1000.00	\$120.00
8/1/13	\$700.00			Monthly payment	6/1/2013	\$2800.00						\$103,000		\$1600.00	\$1000.00	
8/3/13				Bankruptcy Filed												

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Fill in this information to identify the case:

Draft March 31, 2014

Debtor 1 _____

Debtor 2
(Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/15

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____ Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: _____

Date of payment change:
Must be at least 21 days after date of this notice _____/_____/_____

New total payment: \$ _____
Principal, interest, and escrow, if any

Part 1: Escrow Account Payment Adjustment

1. Will there be a change in the debtor's escrow account payment?

- No
- Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: \$ _____ New escrow payment: \$ _____

Part 2: Mortgage Payment Adjustment

2. Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- No
- Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% New interest rate: _____%

Current principal and interest payment: \$ _____ New principal and interest payment: \$ _____

Part 3: Other Payment Change

3. Will there be a change in the debtor's mortgage payment for a reason not listed above?

- No
- Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: _____

Current mortgage payment: \$ _____ New mortgage payment: \$ _____

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

X

Signature _____

Date ____/____/____

Print:

First Name Middle Name Last Name

Title _____

Company _____

Address

Number Street

City State ZIP Code

Contact phone (____) ____-____

Email _____

Fill in this information to identify the case:

Draft March 31, 2014

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/15

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002. 1.

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: _____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

No

Yes. Date of the last notice: ____/____/____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Bankruptcy/Proof of claim fees	_____	(5) \$ _____
6. Appraisal/Broker's price opinion fees	_____	(6) \$ _____
7. Property inspection fees	_____	(7) \$ _____
8. Tax advances (non-escrow)	_____	(8) \$ _____
9. Insurance advances (non-escrow)	_____	(9) \$ _____
10. Property preservation expenses. Specify: _____	_____	(10) \$ _____
11. Other. Specify: _____	_____	(11) \$ _____
12. Other. Specify: _____	_____	(12) \$ _____
13. Other. Specify: _____	_____	(13) \$ _____
14. Other. Specify: _____	_____	(14) \$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002. 1.

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date ____/____/____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street
City State ZIP Code

Contact phone (____) ____-____ Email _____

COMMITTEE NOTE

Official Form 410, *Proof of Claim*, applies in all cases. Form 410 replaces Official Form 10, Proof of Claim. It is renumbered to distinguish it from the forms used by debtors for case opening, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 410 has been substantially reorganized. A new question has been added at line 10 that solicits information about claims based on leases.

Official Form 410A, *Mortgage Proof of Claim Attachment*, is revised in its content and format. Rather than requiring a home mortgage claimant to fill in blanks with itemized information about the principal, interest, and fees due as of the petition date and the amount necessary to cure a prepetition default, the form now requires the claimant to provide a loan history that reveals when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. Because completion of the revised form can be automated, it will permit claimants to comply with Rule 3001(c)(2)(C) with efficiency and accuracy. Attachment of a loan history with a home mortgage proof of claim will also provide transparency about the basis for the claimant's calculation of the claim and arrearage amount.

The loan history should begin with the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently

brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Official Forms 410S1 and 410S2, *Notice of Mortgage Payment Change* and *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, are revised as part of the Forms Modernization Project. There are formatting changes throughout the forms.

B416A (Official Form 416A) (12/15) Form 416A. CAPTION (FULL)

Debtor [1] _____

[Debtor 2] _____

Other names used by the debtor within the last 8 years

[Other names used by the debtor within the last 8 years]

Address

[Address, if Debtor 2 lives at a different address

_____]

Last 4 digits of Social Security number or ITIN _____

Last 4 digits of Social Security number or ITIN _____

[Employer Identification Number _____]

[Employer Identification Number _____]

United States Bankruptcy Court for the _____

[Bankruptcy district]

Case number _____

Chapter you are filing under _____

[Designation of Character of Paper]

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COMMITTEE NOTE

Official Form 416A, *Caption*, applies on all forms where prescribed. Form 416A replaces Official Form 16A, *Caption*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Debtor _____

United States Bankruptcy Court for the _____

[Bankruptcy district]

Case number: _____

Chapter you are filing under: _____

[Designation of Character of Paper]

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COMMITTEE NOTE

Official Form 416B, *Caption*, applies on all forms where prescribed. Form 416B replaces Official Form 16B, *Caption*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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B416D (Official Form 416D) (12/15) Form 416D. Caption to Use in Adversary Proceeding

Debtor 1 _____ Plaintiff _____
Defendant _____

United States Bankruptcy Court for the _____
[Bankruptcy district]

Case number: _____ Chapter you are filing under: _____ Adv. Proc. No. _____

Complaint [or other designation]

[If in a *Notice of Appeal* (see Form 417A) or other notice filed and served by a debtor, this caption must be altered to include the debtor's address and Employer's Tax Identification Numbers (EIN), last four digits of Social Security numbers, or Individual Taxpayer Identification number (ITIN) as in Form 416A.]

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COMMITTEE NOTE

Official Form 416D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*, applies on all forms where prescribed. Form 416D replaces Official Form 16D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 424
(12/15)

[Caption as described in Fed. R. Bankr. P. 7010 or 9004(b), as applicable]

Certification to Court of Appeals by All Parties

A notice of appeal having been filed in the above-styled matter on _____ [Date], _____, _____, and _____, [names of all the appellants and all the appellees, if any], who are all the appellants [and all the appellees] hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter:

- is required under 28 U.S.C. § 158(a)
- is not required under 28 U.S.C. § 158(a).

[If from a final judgment, order, or decree] This certification arises in an appeal from a final judgment, order, or decree of the United States Bankruptcy Court for the _____ District of _____ entered on _____ [Date].

[If from an interlocutory order or decree] This certification arises in an appeal from an interlocutory order or decree, and the parties hereby request leave to appeal as required by 28 U.S.C. § 158(a).

[The certification shall contain one or more of the following statements, as is appropriate to the circumstances.]

The judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

Or

The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

Or

An immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

[The parties may include or attach the information specified in Rule 8001.]

Signed: [If there are more than two signatories, all must sign and provide the information requested below. Attach additional signed sheets if needed.]

Attorney for Appellant (or
Appellant, if not represented
by an attorney):

Printed name of signer:

Address:

Telephone number:

(____) _____ - _____

Date:

____/____/____
MM / DD / YYYY

____/____/____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 424, *Certification to Court of Appeal by All Parties* replaces Official Form 424, *Certification to Court of Appeal by All Parties*. It is revised as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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