PRELIMINARY DRAFT OF

Proposed Amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence

Request for Comment

Comments are sought on Amendments to:

Bankruptcy Rules 1001 and 1006

Evidence Rules 803 and 902

All Written Comments are Due by
February 16, 2016

Prepared by the
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States

AUGUST 2015

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

M E M O R A N D U M

TO: **THE BENCH, BAR, AND PUBLIC**

FROM: **Honorable Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

DATE: **August 14, 2015**

RE: **Request for Comments on Proposed Rules Amendments**

The Judicial Conference Advisory Committees on Bankruptcy and Evidence Rules have proposed amendments to their respective rules, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, rules committee reports, and other information are attached and posted on the Judiciary's website at:

http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment

Opportunity for Public Comment

All comments on these proposed amendments will be carefully considered by the rules committees, which are composed of experienced trial and appellate lawyers, judges, and scholars. Please provide any comments on the proposed amendments, whether favorable, adverse, or otherwise, as soon as possible but **no later than Tuesday, February 16, 2016**. All comments are made part of the official record and are available to the public.

Comments concerning the proposed amendments must be submitted electronically by following the instructions at:

http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment

Members of the public who wish to present testimony may appear at public hearings on these proposals. The Advisory Committees will hold hearings on the proposed amendments on the following dates:

- Bankruptcy Rules in Washington, DC, on January 22, 2016, and in Pasadena, CA, on January 29, 2016;
- Rules of Evidence in Phoenix, AZ, on January 6, 2016, and in Washington, DC, on February 12, 2016.

If you wish to testify, you must notify the Committee in writing **at least 30 days before the scheduled hearing**. Requests to testify should be mailed to the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Suite 7-240, Washington, D.C. 20544.

After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. At this time, the Committee on Rules of Practice and Procedure has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference or the Supreme Court.

The proposed amendments would become effective on December 1, 2017, if they are approved, with or without revision, by the relevant Advisory Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify, or reject them.

If you have questions about the rulemaking process or pending rules amendments, please contact the Rules Committee Support Office at 202-502-1820 or visit http://www.uscourts.gov/rules-policies

TABLE OF CONTENTS

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

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: December 11, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 29 and 30, 2014, in Charleston, South Carolina.

* * * * *

The Advisory Committee is presenting one action item at this meeting—an amendment to Rule 1001 to bring it into conformity with Civil Rule 1.

* * * * *

II. Action Item—Rule 1001 for Approval For Publication

Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 states, "These rules shall be construed to secure the just, speedy, and inexpensive

determination of every case and proceeding," while Civil Rule 1 states, "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The pending amendment to Rule 1, which is expected to become effective on December 1, 2015, revises the current rule to state, "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee Note explains that "Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."

The Advisory Committee concluded that for purposes of consistency, we should revise Rule 1001 to track the language of Rule 1. The amendment to Rule 1 was part of the Duke Rules Package, and the other rule amendments in that group—to Civil Rules 4(m), 16, 26, 30, 31, 33, 34, 36, and 37—will automatically become part of the Bankruptcy Rules because those rules are made applicable in adversary proceedings. Moreover, deviation from the civil rule's language could give rise to a negative inference that the bankruptcy rule differs in the extent to which it encourages cooperation.

In considering whether to amend Rule 1001 to include the pending amendment to Rule 1, the Committee noted that the bankruptcy rule has never been amended to reflect the 1993 amendment to Rule 1, which added the words "and administered" to the last sentence. The Committee concluded that the language of the 1993 amendment should also be included in Rule 1001 so that the command of the two rules will be the same ("construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding").

* * * * *

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

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California. The draft minutes of that meeting are at Bankruptcy Appendix C.

* * * * *

Finally, the Committee approved a proposed rule amendment to Rule 1006(b) (relating to filing fees) for which it seeks publication.

* * * * *

II. Action Items

* * * * *

C. Item for Publication in August 2015

Action Item 10. Rule 1006(b)(1) (Filing Fee). This provision governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received a suggestion (12-BK-I) from the Bankruptcy Judges Advisory Group ("BJAG") that proposed amending Rule 1006(b) to clarify that courts may require a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. BJAG further suggested that any requirement for an initial installment payment at the time of filing be limited to 25% of the total filing fee.

Over the course of several years, the Committee has given careful consideration to this suggestion. As part of its consideration, the Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding requiring initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications.

The FJC study revealed that the difference between the percentage of chapter 7 cases in which a fee waiver application was filed in districts requiring an upfront installment payment and in districts not requiring such a payment was not statistically significant. The FJC study also revealed that just over one-third of the bankruptcy courts (33) require an installment payment at the time of filing the petition and the application to pay the filing fee in installments. The amount of the required initial payment ranges from $40 to $135, and for courts that specify the required payment as a percentage of the total fees due upon filing, the percentage ranges from 25% to 50%. Many of the courts do not specify the consequences of failing to make the required payment. Of those that do, a few courts state that the application to pay in installments may or will be denied if the initial installment is not paid at filing. A greater number of courts provide for the possible dismissal of the case or rejection of the petition, by the clerk or by the court, with or without further notice.

The Committee concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application. Rule 1006(b)(1) requires a petition to be "accepted for filing if accompanied by the debtor's signed application" to pay the filing fee in installments. This means that a court cannot refuse to accept a petition because of the failure to make an initial installment payment, but the rule does not prohibit requiring such a payment. Therefore, the Committee decided not to make a revision to the rule in response to the BJAG suggestion.

Nevertheless, the FJC study raises a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing the amendment to Rule 1006(b)(1) that appears in Bankruptcy Appendix B. The

amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee voted unanimously to request publication for public comment of the proposed amendment in August 2015.

* * * * *

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of

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

the court, attorneys share this responsibility with the judge to whom the case is assigned.

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

Rule 1006. Filing Fee

* * * * *

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) *Application to Pay Filing Fee in Installments*. A voluntary petition by an individual shall be accepted for filing, regardless of whether any portion of the filing fee is paid, if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments.

* * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

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

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

DATE: May 7, 2015

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 17, 2015 at Fordham University School of Law in New York City.

The Committee seeks approval of two proposed amendments for release for public comment:

1. Abrogation of Rule 803(16), the ancient documents exception to the hearsay rule; and

2. Amendment of Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

II. Action Items

A. Proposed Abrogation of 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 Committee considered whether Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because 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 Committee concluded that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood 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 or the residual 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 great deal of reliable electronic data available to prove any dispute of fact.

The Committee considered four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. It ultimately determined, unanimously, that Rule 803(16) should be abrogated. In support of that determination, the Committee drew the following conclusions:

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable — an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay — as has happened in several reported cases.

- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

- The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for authenticity of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was

subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

● The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception — i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay — and if it is unreliable it should be excluded no matter how "necessary" it is.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it — the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception. In particular, there was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and would be difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee unanimously approved the proposal to abrogate Rule 803(16), together with the following Committee Note to explain that abrogation:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception — such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

Recommendation: The Committee recommends that the proposed abrogation of Evidence Rule 803(16) be issued for public comment.

B. Proposed Amendment to Evidence Rule 902

At its previous meeting, the Committee approved in principle changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person — in lieu of that person's testimony at trial. (Those changes were discussed as an information item at the January, 2015 Standing Committee meeting). At its Spring meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience — and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate litigation is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in Melendez-Diaz. The Committee determined that the problem with the affidavit found testimonial in Melendez-Diaz was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be

certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). In this regard, the Note approved by the Committee emphasizes that the goal of the amendments is narrow one: to allow electronic information that would otherwise be established by a witness instead to be established through a certification by that same witness.

Proposed Rule 902(13) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

The Proposed Committee Note to Rule 902(13) provides as follows:

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(14) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) Certified Data Copied From an Electronic Device, Storage Media or File. Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

The Proposed Committee Note to Rule 902(14) provides as follows:

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-

authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

* * * * *

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

~~**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.~~ **[Abrogated (Effective Dec. 1, 2017).]**

*** * * * ***

Committee Note

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it

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

is old and located in a place where it would likely be—*see* Rule 901(b)(8)—it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception—such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(13) Certified Records Generated by an Electronic Process or System.[2] A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other

[2] After discussion with the Standing Committee, the Committee Note was amended to provide examples of the Rule's application.

than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility on other grounds. For example,

assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

THIS PAGE INTENTIONALLY BLANK

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.[3] Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

[3] After discussion with the Standing Committee, stylistic changes were made to the text of the proposed amendment.

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

THIS PAGE INTENTIONALLY BLANK

Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

(as codified in *Guide to Judiciary Policy*, Vol. 1, § 440)

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. __.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;

- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United

States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

THIS PAGE INTENTIONALLY BLANK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

JUDGE JEFFREY S. SUTTON, CHAIR

Dean C. Colson, Esq.

Chief Justice Brent E. Dickson
Supreme Court of Indiana

Roy T. Englert, Jr., Esq.

Gregory G. Garre, Esq.

Judge Neil M. Gorsuch

Judge Susan P. Graber

Dean David F. Levi

Judge Patrick J. Schiltz

Judge Amy J. St. Eve

Larry D. Thompson, Esq.

Judge Richard C. Wesley

Honorable Sally Yates
Acting Deputy Attorney General
U.S. Department of Justice

Judge Jack Zouhary

Professor Daniel R. Coquillette, Reporter
Rebecca A. Womeldorf, Secretary

ADVISORY COMMITTEE ON APPELLATE RULES

JUDGE STEVEN M. COLLOTON, CHAIR

Professor Amy Coney Barrett

Judge Michael A. Chagares

Justice Allison Eid
Supreme Court of Colorado

Judge Peter T. Fay

Gregory G. Katsas, Esq.

Neal Katyal, Esq.

Douglas Letter, Esq.

Kevin C. Newsom, Esq.

Judge Richard G. Taranto

Honorable Donald B. Verrilli, Jr.
Solicitor General
U.S. Department of Justice

Professor Catherine T. Struve, Reporter
Professor Daniel J. Capra, Associate Reporter

ADVISORY COMMITTEE ON BANKRUPTCY RULES

JUDGE SANDRA SEGAL IKUTA, CHAIR

Judge Stuart M. Bernstein

Judge Dennis R. Dow

Diana L. Erbsen
Deputy Assistant Attorney General
for Appellate & Review, Tax Div.
U. S. Department of Justice

Judge A. Benjamin Goldgar

Judge Jean C. Hamilton

Judge Arthur I. Harris

Jeffery J. Hartley, Esq.

Judge Robert James Jonker

Judge Adalberto Jose Jordan

Richardo I. Kilpatrick, Esq.

Thomas Moers Mayer, Esq.

Jill A. Michaux, Esq.

Professor Edward R. Morrison

Judge Amul R. Thapar

Professor S. Elizabeth Gibson, Reporter
Professor Michelle M. Harner, Associate Reporter

ADVISORY COMMITTEE ON CIVIL RULES

JUDGE DAVID G. CAMPBELL, CHAIR

John M. Barkett, Esq.

Elizabeth J. Cabraser, Esq.

Honorable Joyce Branda
Assistant Attorney General
Civil Division
U.S. Department of Justice

Judge Paul S. Diamond

Judge Robert Michael Dow, Jr.

Parker C. Folse, Esq.

Judge Paul W. Grimm

Dean Robert H. Klonoff

Judge Scott M. Matheson, Jr.

Judge David E. Nahmias

Judge Solomon Oliver, Jr.

Judge Gene E. K. Pratter

Virginia A. Seitz, Esq.

Judge Craig B. Shaffer

Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

ADVISORY COMMITTEE ON CRIMINAL RULES

JUDGE REENA RAGGI, CHAIR

Carol A. Brook, Esq.
Federal Public Defender

Honorable Leslie R. Caldwell
Assistant Attorney General
Criminal Division
U.S. Department of Justice

Judge James C. Dever III

Judge Morrison C. England, Jr.

Judge Gary Feinerman,

Mark Filip, Esq.

Chief Justice David E. Gilbertson
Supreme Court of South Dakota

Professor Orin S. Kerr

Judge Raymond M. Kethledge

Judge David M. Lawson

Judge Timothy R. Rice

John S. Siffert, Esq.

Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

ADVISORY COMMITTEE ON EVIDENCE RULES

JUDGE WILLIAM K. SESSIONS III, CHAIR

Justice Brent R. Appel
Supreme Court of Iowa

Honorable Matthew S. Axelrod
Principal Associate Deputy
Attorney General
U.S. Department of Justice

Daniel P. Collins, Esq.

A.J. Kramer, Esq.

Judge Debra Ann Livingston

Judge John Thomas Marten

Paul Shechtman, Esq.

Judge John A. Woodcock, Jr.

Professor Daniel J. Capra, Reporter

THIS PAGE INTENTIONALLY BLANK

STATE BAR ASSOCIATIONS'
POINTS OF CONTACT
TO THE RULES COMMITTEES

Alabama State Bar
J. Anthony McLain, Esquire

Alaska Bar Association
Bruce A. Moore, Esquire

State Bar of Arizona
William G. Klain, Esquire

Arkansas Bar Association
Karen K. Hutchins, Executive Director

The State Bar of California
Saul Berkovitch, Esquire

Colorado Bar Association
Charles C. Turner, Executive Director

Connecticut Bar Association
Elizabeth J. Stewart, Esquire

Delaware State Bar Association
Gregory B. Williams, Esquire

The District of Columbia Bar
Candace Smith-Tucker, Esquire

The Florida Bar
Patricia Barksdale, Esquire

Georgia State Bar Association
Glen M. Darbyshire, Esquire

Hawaii State Bar Association
Howard G. McPherson, Esquire

Idaho State Bar
Diane K. Minnich, Executive Director

Illinois State Bar Association
Charles J. Northrup, General Counsel

Indiana State Bar Association
Thomas A. Pyrz, Esquire

The Iowa State Bar Association
Mollie Pawlosky, Esquire

Kansas Bar Association
Joseph Molina, Director of Government Affairs

Kentucky Bar Association
Norman E. Harned, Esquire

Louisiana State Bar Association
Loretta Lawson, Executive Director

Maine State Bar
Karen Frink Wolf, Esquire

Maryland State Bar Association
Keith R. Truffer, Esquire

Massachusetts Bar Association
Martin W. Healy, Esquire

State Bar of Michigan
Janet K. Welch, Executive Director
Cliff Flood, General Counsel

Minnesota State Bar Association
Nancy Mischel, Associate Executive Director

The Mississippi Bar
Larry Houchins, Executive Director

The Missouri Bar
Robert Stoeckl, Esquire

State Bar of Montana
Betsy Brandborg, Esquire

Nebraska State Bar Association
Terry R. Wittler, Esquire

State Bar of Nevada
Kimberly Farmer, Esquire

New Hampshire Bar Association
Dan Wise, Communications Director

New Jersey State Bar Association
D. Todd Sidor, Esquire

State Bar of New Mexico
Judge Carl J. Butkus, Esquire

New York State Bar Association
Sharon M. Porcellio, Esquire

North Carolina Bar Association
Kim Crouch, Director of Governmental Affairs Office

State Bar Association of North Dakota
William A. Neumann, Esquire

Ohio State Bar Association
Jessica Emch, Esquire

Oklahoma Bar Association
James C. Milton, Esquire

Oregon State Bar
Hon. Michael W. Mosman

Pennsylvania Bar Association
Susan E. Etter, Esquire

Rhode Island Bar Association
Helen Desmond McDonald, Executive Director

South Carolina Bar
Charmy Medlin, Membership Services Director

South Dakota Bar
Thomas C. Barnett, Jr., Executive Director

Tennessee Bar Association
Allan F. Ramsaur, Esquire

State Bar of Texas
Michael McCrum, Esquire

Utah State Bar
Hon. James T. Blanch

Vermont Bar Association
Robert M. Paolini, Executive Director

The Virginia Bar Association
Yvonne McGhee, Esquire

Virginia State Bar
Mary Yancey Spencer, Deputy Executive Director

Washington State Bar Association
Elizabeth Turner, Esquire

The West Virginia State Bar
Anita R. Casey, Esquire

State Bar of Wisconsin
Sarah A. Zylstra, Esquire

Wyoming State Bar
Sleeter C. Dover, Esquire

Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544
uscourts.gov