PRELIMINARY DRAFT OF

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Criminal Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts

Request for Comment

Comments are sought on Amendments to:

Appellate Rules	3, 13, 26.1, 28, and 32
Bankruptcy Rules	2002, 4001, 6007, 9036, 9037, and Official Form 410
Criminal Rule	16.1 (New)
Section 2254 Rule	5
Section 2255 Rule	5
Evidence Rule	807

All Written Comments are Due by February 15, 2018

THE UNITED STATES COURTS

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

AUGUST 2017

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

M E M O R A N D U M

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

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

DATE: **August 11, 2017**

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

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, advisory 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 advisory 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 Thursday, February 15, 2018**. 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:

- Appellate Rules in Washington, D.C. on November 9, 2017, and in Phoenix, Arizona, on January 5, 2018;
- Bankruptcy Rules in Washington, D.C., on January 17, 2018, and in Pasadena, California, on January 30, 2018;
- Criminal Rules in Chicago, Illinois, on October 24, 2017, and in Phoenix, Arizona, on January 5, 2018; and
- Evidence Rules in Boston, Massachusetts, on October 27, 2017, and in Phoenix, Arizona, on January 5, 2018.

If you wish to testify, you must notify the Committee **at least 30 days before the scheduled hearing**. Requests to testify should be e-mailed to: Rules_Support@ao.uscourts.gov, with a copy mailed to: 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.

At this time, the Committee on Rules of Practice and Procedure has only approved these proposed amendments for publication for comment. The proposed amendments have neither been submitted to nor considered by the Judicial Conference or the Supreme Court. 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 for approval in accordance with the Rules Enabling Act.

If 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, the proposed amendments would become effective on December 1, 2019 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

PART V: FEDERAL RULES OF EVIDENCE

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

RE: **Report of the Advisory Committee on Appellate Rules**

DATE: **May 22, 2017 (revised August 4, 2017)**

* * * * *

III. Action Items: New Amendments Proposed for Publication

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

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

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.[1] In light of the proposed changes to

[1] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy,

Rule 25, the Advisory Committee subsequently considered whether other Rules that require parties to "mail" documents also should be amended. Following its study of all the rules that use the word "mail," the Advisory Committee recommends changes to Rules 3(d) and 13(c).

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

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

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

Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), http://www.uscourts.gov/file/20163/download.

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

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

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

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

* * * * *

ADVISORY COMMITTEE NOTE

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

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

rules for computing and extending time. Subdivision (a)(4)(C) defines the term "last day" as follows:

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

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

B. Disclosure Requirements under Rule 26.1

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

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

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

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

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

The Advisory Committee considered requiring additional disclosures in bankruptcy cases, including disclosure of (a) each committee of creditors, (b) the parties to any adversary proceeding,

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

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

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

The proposed amendments to Rule 26.1 are as follows:

Rule 26.1 ~~Corporate~~ Disclosure Statement

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

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

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

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

~~(b)~~(e) **Time for Filing; Supplemental Filing.** ~~A party must file the~~ The Rule 26.1~~(a)~~ statement must be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the ~~party's~~ principal brief must include the statement before the table of contents. ~~A party must supplement its~~The statement must be supplemented whenever the information ~~that must be disclosed~~ required under Rule 26.1~~(a)~~ changes.

~~(c)~~(f) **Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ 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.

COMMITTEE NOTE

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

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

Rule 28. Briefs

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

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

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

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

* * * * *

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

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

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

* * * * *

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

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

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

entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

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

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

* * * * *

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

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

* * * * *

Committee Note

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

Rule 26.1 ~~Corporate~~ Disclosure Statement

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

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

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

party, the appellant must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must also identify any parent corporation and any publicly held corporation that owns 10% or more of its stock, or must state that there is no such corporation.

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

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

~~supplement its~~The statement must be supplemented whenever the information ~~that must be disclosed~~ required under Rule 26.1~~(a)~~ changes.

~~(c)~~(f) **Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ 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.

Committee Note

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

(d) requires persons who want to intervene to make the same disclosures as parties. Subdivisions (e) and (f) now apply to all of the disclosure requirements.

Rule 28. Briefs

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

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

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

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

* * * * *

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

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

Excerpt from the May 22, 2017 Report of the Advisory Committee on Bankruptcy Rules

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

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 22, 2017

I. Introduction

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

* * * * *

II. Action Items

* * * * *

B. Items for Publication

The Committee recommends that the following rule amendments be published for public comment in August 2017. The rules in this group appear in Bankruptcy Appendix B.

Action Item 10. Rule 4001(c) (Obtaining Credit). The Advisory Committee received a suggestion from Bankruptcy Judge A. Benjamin Goldgar (N.D. Ill.) (Suggestion 16-BK-D) concerning Bankruptcy Rule 4001(c) and its application to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. It requires a motion, in accordance with Rule 9014 (governing contested matters), that contains specific disclosures and information. The suggestion posited that many of the required disclosures are unnecessary in and unduly burdensome for most chapter 13 cases, and they should be made inapplicable in chapter 13.

In reorganization cases, a request to obtain postpetition credit impacts the bankruptcy estate and creditors. For this reason, the Bankruptcy Code and the Bankruptcy Rules contain detailed provisions governing when such credit is permissible. Section 364 of the Bankruptcy Code sets forth the circumstances under which the trustee or debtor in possession may obtain postpetition credit in- and outside of the ordinary course of business. Rule 4001(c), in turn, governs the process for the trustee or debtor in possession to request approval of postpetition credit outside of the ordinary course of business.

Rule 4001(c) states in part:

> (B) *Contents.* The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2).

The rule then continues to outline eleven different elements of postpetition financing that must be explained in both the motion and concise statement—e.g., the granting of a lien or adequate protection or the determination of "the validity, enforceability, priority, or amount of" a prepetition claim.

Section 364 of the Bankruptcy Code does not permit a debtor to request authority to obtain postpetition credit. As noted above, § 364 speaks only of the "trustee," which

incorporates a debtor in possession under §§ 1203 and 1107 of the Bankruptcy Code. Nevertheless, § 1304(a) of the Bankruptcy Code provides, "A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business." That section also grants such a chapter 13 debtor the ability to incur postpetition credit on the terms and subject to the conditions of a trustee under § 364. Section 1304 does not, however, address a chapter 13 debtor who is not engaged in business and wants to obtain postpetition credit to, for example, purchase a car. As a result, courts are divided on whether a chapter 13 debtor not engaged in business is either required or permitted to seek authority to incur postpetition credit.

The Committee reviewed the history of Rule 4001(c), which showed that the provision was designed to address issues particular to chapter 11 cases. Most members agreed that, regardless of whether a motion was required under § 364 in all chapter 13 cases, Rule 4001(c) did not readily address issues pertinent to chapter 13 cases. They also recognized the burdens, time, and cost imposed by the rule in the chapter 13 context, which was addressed in the suggestion as well. Several members raised the point that, because of these factors, many courts have adopted local rules or issued orders to address requests for credit in chapter 13 cases. Members also discussed the potential implications of any change to limit or tailor the requirements of Rule 4001(c) to chapter 13 cases. On balance, the Committee decided to propose an amendment excluding chapter 13 cases from Rule 4001(c). Members emphasized that a decision to carve out chapter 13 cases did not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit, and a sentence so stating was added to the Committee Note. If such a motion is required or permissible, Rule 9013 (Motions: Form and Service) would govern, perhaps supplemented by complementary local rules. If not, no rule is necessary.

Accordingly, the Committee voted unanimously to propose for publication an amendment creating a new Rule 4001(c)(4) that makes subdivision (c) inapplicable to chapter 13 cases.

Action Item 11. Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim). Over the years, the Committee has been asked to review noticing issues in bankruptcy cases—both the mode of noticing and service (other than service of process) and the parties entitled to receive such notices or service. These issues are important in the federal bankruptcy system, but they are also complex. The Bankruptcy Rules contain approximately 145 rules addressing noticing or service issues, and many of those rules include multiple subparts with different requirements. Unlike many civil or criminal matters, a single bankruptcy case may involve hundreds of parties, and the Bankruptcy Rules require the clerk (or some other party as the court may direct) to notice or serve certain papers on all of these parties on numerous occasions. In addition, many courts have adopted local rules to address noticing and service issues in bankruptcy cases.

At its fall 2015 meeting, the Committee approved a work plan to study noticing issues generally in federal bankruptcy cases. At its spring 2016 meeting, the Committee determined that the ongoing electronic filing, notice, and service initiatives by the federal rules advisory

committees could mitigate many of the general concerns regarding the extent and cost of required noticing in bankruptcy cases, and therefore the Committee decided to defer undertaking an extensive overhaul of bankruptcy noticing provisions. Nevertheless, the Committee decided to review and evaluate the specific suggestions regarding noticing issues in bankruptcy cases that had been submitted to the Committee.

Based on its preliminary review, the Committee decided to focus first on a specific suggestion regarding providing electronic noticing and service to businesses, financial institutions, and other non-individual parties that hold claims or other rights against the debtor. These parties may receive numerous notices and papers in multiple bankruptcy cases; therefore, permitting electronic noticing and service on such parties would generate significant cost savings and other efficiencies. The Committee began exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered users of CM/ECF to opt into electronic noticing and service in bankruptcy cases. The Committee noted that it must ensure that any such amendment is consistent with § 342(e) and (f) of the Bankruptcy Code, which give certain creditors the right to designate a particular service address.

As discussed under Action Item 2, the Committee, in coordination with the other advisory committees, has proposed an amendment to Rule 5005(a) that addresses electronic filing. That rule, however, does not address noticing and service. Instead, Rule 7005 addresses those issues for adversary proceedings by making Civil Rule 5 applicable,[1] and, as discussed under Action Item 7, Rule 8011 addresses those issues for bankruptcy appeals.

The Committee has now turned its attention to Rule 9036, which allows the clerk to send notices electronically if the recipient provides written consent. The clerk often facilitates this written consent through the registered user agreement associated with the court's electronic-filing system. This consent, however, does not authorize anyone other than the clerk to notice or serve by electronic means, and it does not capture parties who are not registered users.

The Committee decided that it must proceed cautiously in considering an expansion of authority to notice or serve electronically. The Bankruptcy Code and the Bankruptcy Rules are an integrated set of principles that have served the bankruptcy system well for many years. Courts and parties generally understand the rules, as well as their rights and obligations under the rules. Moreover, many courts and practitioners have structured their noticing practices to comply with the existing rules, and any changes to the parties to be served or the methods of service could require significant revisions to those practices.

In this context, the Committee discussed the systems used by parties to receive and track notices and other papers from the court and other parties in bankruptcy cases. Although lawyers have generally implemented systems to receive and monitor electronic notices, many creditors have established systems based on mail receipt. Such a system allows the creditor to identify a particular mailing address and person to receive notices and other papers, which may ease the burdens associated with tracking and responding to such documents. In fact, § 342 of the

[1] Rule 9014(b) makes Civil Rule 5(b) applicable to contested matters.

Bankruptcy Code enables a creditor to request notice at a specified address in a particular chapter 7 or 13 case or all such cases before that court. The Committee gave significant consideration to the fact that creditors may have relied on this section of the Bankruptcy Code in establishing their internal procedures, as well as the fact that the Bankruptcy Rules must account for the rights of parties under the Bankruptcy Code.

Based on the Committee's research and its prior deliberations, it decided at the spring 2017 meeting that some enhanced use of electronic notice and service appears warranted. It discussed mandating electronic notice and service for all parties (other than pro se individuals), but it concluded that such an approach potentially conflicts with Code § 342 and could prove very disruptive, given courts' and parties' established practices and procedures. Phasing in electronic noticing and service would allow courts and parties to adjust to the new procedures while allowing both to start utilizing certain of the anticipated time and cost savings associated with electronic notice and service. Such an approach also would allow the Committee to monitor and evaluate the advantages and disadvantages to the increased use of electronic delivery.

The Committee previously discussed using the proof of claim form—Official Form 410—to allow parties to opt into, or out of, electronic notice and service. The proof of claim form is one of the forms frequently used by non-registered users in bankruptcy cases, including the large filers discussed above. It is filed both electronically and manually, so it would capture most creditors who participate in bankruptcy cases. The proof of claim form also already requests that the creditor provide an email address. As such, adding language to apprise the creditor of its ability to opt into, or out of, electronic notice and service would flow somewhat naturally from the existing form.

The Committee considered whether to suggest an "opt-in" or "opt-out" approach. An opt-in approach is akin to the written consent required currently under the rules for a party to receive papers electronically. It would require the party to take an extra step to acknowledge that it agrees to receive notices and papers electronically. It also is a more gradual move toward electronic notice and service. An opt-out approach arguably would be more inclusive, bringing more parties into electronic notice and service. It also may be administratively easier to implement. But an opt-out approach is arguably inconsistent with the plain language of § 342 of the Bankruptcy Code. Under either approach, the language on the proof of claim form could explain the consequences of the choice. The Committee chose to proceed with an opt-in approach by adding a checkbox to the proof of claim form for choosing receipt of all notices and papers by email.

The Committee recognized that a change to the proof of claim form alone likely is not sufficient to implement electronic notice and service on registered users and consenting parties by the clerk and other parties serving papers in bankruptcy cases. As discussed above, Rule 5005 does not address service, and Rule 9036 (as well as registered user agreements) limit the use of electronic notice and service to the clerk or such other person as directed by the court.

To address these limitations and supplement any change to the proof of claim form (as well as the pending amendment to Civil Rule 5(b)), the Committee voted to propose a targeted

amendment to Rule 2002(g) to allow for email, as well as mailing addresses, and then an accompanying, more general amendment to Rule 9036. The Rule 2002(g) amendment would expand the references to mail to include other means of delivery and delete "mailing" before "address," thereby allowing a creditor to receive notices by email. The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to other persons by electronic means that the person consented to in writing. The texts of these amendments and the amendment to Official Form 410 are included in Appendix B.

The Committee voted unanimously to seek the publication of these amendments for public comment this summer.

Action Item 12. Rule 6007(b) (Motion to Abandon Property). The Committee received a suggestion from Bankruptcy Judge A. Benjamin Goldgar (16-BK-C) concerning the process for abandoning estate property under § 554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent treatment afforded notices to abandon property filed by the bankruptcy trustee and motions to compel the trustee to abandon property filed by parties in interest. Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest's motion to compel abandonment.

Section 554(a) of the Bankruptcy Code authorizes the trustee, after notice and hearing, to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Section 554(b) provides that "[o]n the request of a party in interest and after notice and hearing, the court may order the trustee to abandon any property of the estate" that could be abandoned under subsection (a). Courts interpreting these two subsections have determined, among other things, that only the trustee or debtor in possession has authority to abandon property of the estate and that a hearing is not mandatory under either subsection if the notice or motion provides sufficient information concerning the proposed abandonment, is properly served, and neither the trustee, debtor, nor any other party in interest objects to the notice or motion. Consequently, the content and service of a notice to abandon, or a motion to compel the abandonment of, estate property is critically important to the resolution of the matter.

Bankruptcy Rule 6007 addresses the service of abandonment papers. Subdivision (a) of the rule applies only to trustee notices to abandon property, and it is detailed, providing:

> (a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the

> court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

Subsection (b), on the other hand, applies to motions to compel abandonment, and it states only, "A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate."

Several courts have observed the different nature of the two subdivisions of Rule 6007.[2] In addition, at least one court and *Collier on Bankruptcy* have noted the potential confusion created by the Committee Note to the rule,[3] which provides, "*Subdivision (b)* implements § 554(b) which specifies that a party in interest may request an order that the trustee abandon property. The rule specifies that the request be by motion and, pursuant to the Bankruptcy Code, lists the parties who should receive notice."[4]

Given the different nature of the two subdivisions of Rule 6007, courts have developed different approaches to assessing the adequacy of service by a party in interest of its motion to compel abandonment under Rule 6007(b). These approaches generally include reading subdivision (b) as incorporating the service requirements of subdivision (a); using the service requirements imposed by Rules 9013 (Motions: Form and Service) and 9014 (Contested Matters) for motions filed in the bankruptcy case; or specifying by order or local rule the parties required to be served under Rule 6007(b).

Courts reading subdivisions (a) and (b) of Rule 6007 as creating parallel noticing requirements reason that the purpose of service under the two subdivisions is identical and that little, if any, reason exists to treat them differently. Other courts reach a similar result by invoking Rule 9013 and directing the movant to serve all parties in interest. Courts generally require service on all creditors, indenture trustees, committees, and the United States trustee, i.e., the same parties entitled to notices of intent to abandon under Rule 6007(a). But an argument also exists that under the plain language of Rules 6007(b) and 9013, absent a court order or local rule to the contrary, service of the party in interest's motion to compel abandonment on only the trustee or debtor in possession is sufficient.

In considering whether to propose a clarifying amendment, the Committee first discussed whether parties and courts need additional guidance under Rule 6007(b), given that Rule 9013 governs as a general matter motions filed in bankruptcy cases. Although some members

---

[2] *See, e.g.*, *In re HIE of Effingham, LLC*, 2014 WL 1304641 at *5 (S.D. Ill. Mar. 28, 2014) (noting the different service standards set forth in Rule 6007(a) and (b) and observing that Rule 6007(b) "is silent on the issue of whom is to be given notice of such motions"). *See also Dunlap v. Independence Bank*, 2007 WL 2827649 (W.D. Ky. 2007); *In re Caron*, 50 B.R. 27 (Bankr.N.D.Ga.1984).

[3] *See HIE of Effingham*, 2014 WL 1304641 at *5 (citing COLLIER ON BANKRUPTCY ¶ 6007.02[2][B]).

[4] FED. R. BANKR. P. 6007(b), 1983 Committee Note.

believed that the existing language of the rules was adequate, others found ambiguity and some confusion in the abandonment process under Rule 6007(b). Members considered the important implications for the estate when a third party seeks to compel abandonment of estate property, and they debated whether providing notice only to the trustee or debtor in possession was sufficient. Members also observed differences in how courts proceed once a motion to compel abandonment is granted—e.g., whether the trustee must file a notice to abandon property or, rather, the abandonment process is complete upon entry of the order granting the motion to compel. On balance, the Committee determined that the language of Rule 6007(b) should be clarified to identify the parties to be served with the motion and notice of the motion, as well as the fact that the entry of an order granting a motion to compel abandonment completes the abandonment process.

The Committee voted unanimously to seek publication for public comment of a proposed amendment to Rule 6007(b) that largely tracks the language of Rule 6007(a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.[5]

Action Item 13. Rule 9037(h) (Motion to Redact a Previously Filed Document). In response to a suggestion (14-BK-B) submitted by the Committee on Court Administration and Case Management ("CACM"), the Committee is proposing an amendment to Rule 9037 (Privacy Protections for Filings Made with the Court). The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. In order to allow other advisory committees to consider whether they wanted to propose similar amendments to their parallel rules, the Committee has held the proposed amendment in abeyance since it approved it for publication at the spring 2016 meeting. Because the other advisory committees have now determined not to pursue similar amendments, the Committee seeks approval for publication of Rule 9037(h) this summer.

In its suggestion, CACM expressed the need for a uniform national procedure for belatedly redacting personal identifiers in documents that were filed in bankruptcy courts without complying with Rule 9037(a)'s protection of social security numbers, financial account numbers, birth dates, and names of minor children. The suggestion consisted of two parts. First, CACM suggested that Bankruptcy Rule 5010 (Reopening Cases) be amended to reflect the recently adopted judiciary policy that a closed bankruptcy case does not have to be reopened in order for the court to order the redaction of information described in Rule 9037. Second, CACM suggested that Rule 9037 be amended to require that notice be given to affected individuals of a request to redact a previously filed document. Such an amendment would reflect the Judicial Conference's recent addition of § 325.70 to the privacy policy, which states in part that "the court should require the . . . party [requesting redaction] to promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

[5] Because of the desire to track the language of Rule 6007(a) in subdivision (b), the Committee chose not to adopt the changes suggested by the style consultants.

The Committee decided that any amendments that might be proposed should be made exclusively to Rule 9037 and not to Rule 5010. With the assistance of our clerk representative, the Committee gathered information about bankruptcy courts' current practices for the redaction of previously filed documents. The Committee was particularly interested in learning the various ways in which courts are attempting to accommodate the need to inform individuals that belated redaction of personal identifiers is being sought without drawing attention to the public availability of the unredacted documents.

In considering the proposed amendment, the Committee assumed the availability of court technology that allows the filing of a motion to redact to trigger the immediate restriction of access to the filed document that is to be redacted. An attorney member of the Committee reported that her local court's electronic filing system has that capacity, and a clerk representative confirmed the existence of that capability. The Committee thought that being able to restrict access to the motion and the unredacted document would be important in preventing the filing of the motion from highlighting the existence of the unredacted document on file. The Committee also concluded that the rule itself should not specify the precise technological methods to be used, since they will likely evolve over time.

The Committee took note of the existence of services that maintain and make available to subscribers parallel dockets for all the bankruptcy courts. The existence of these dockets outside the control of the courts means that an unredacted document can continue to be accessible despite a belated redaction and the court's restriction of access to the unredacted document in the court's files. The Subcommittee concluded that resolution of this problem is outside the scope of rulemaking authority and that the proposed rule should address only documents within the courts' control. Knowledge of the existence of these services, however, did lead the Committee to conclude that, following a successful motion to redact, access to the motion and the unredacted document should remain restricted. The Committee also informed CACM of the potential impact that these unofficial dockets have on the effectiveness of courts' belated redaction of filed documents.

The Committee concluded that there is no need to set out in a rule the Judicial Conference policy that closed cases do not have to be reopened in order to redact a filed document. The proposed Committee Note, however, does explain that the prescribed procedures apply to both open and closed cases.

The Committee also decided that the rule should not attempt to prescribe a procedure for redacting large numbers of cases at a time. Instead, as the Committee Note explains, those procedures are left up to individual court discretion.

At the spring 2017 meeting, the Committee approved some stylistic changes to the proposed amendment and voted unanimously to seek approval of Rule 9037(h) for public comment.

* * * * *

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

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

* * * * *

(g) ADDRESSING NOTICES.

(1) Notices required to be mailed or otherwise delivered under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For purposes of this subdivision—

(A) a proof of claim filed by a creditor or indenture trustee that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive

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

notices ~~to~~at that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive notices ~~to~~at that address.

* * * * *

Committee Note

Subdivision (g) of the rule is amended to allow a creditor to elect to receive notices by email. A creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

(c) OBTAINING CREDIT.

* * * * *

(4) This subdivision (c) does not apply in chapter 13 cases.

* * * * *

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision. This amendment does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit.

Rule 6007. Abandonment or Disposition of Property

* * * * *

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, the order effects the abandonment without further notice, unless otherwise directed by the court.

Committee Note

Subdivision (b) of the rule is amended to specify the parties to be served with the motion and any notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) more closely with the procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice or effect the abandonment of property ordered by the court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

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

Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk or other party may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any complaint or motion required to be served in accordance with Rule 7004.~~the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court~~

~~may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.~~

Committee Note

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery has increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Rule 9037. Privacy Protection for Filings Made with the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must file a motion to redact. The movant must:

(A) attach a copy of the previously filed, unredacted document, showing the proposed redactions;

(B) include the docket or proof-of-claim number of the previously filed document; and

(C) unless the court orders otherwise, serve the debtor, debtor's attorney, trustee if any, United States trustee, filer of the unredacted

document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document.* The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, these restrictions on public access remain in effect until a further court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion

must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

The moving party must attach to the motion a copy of the original document showing the proposed redactions. The attached document must otherwise be identical to the one previously filed. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410

Proof of Claim

12/18

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____
❑ Check this box if you would like to receive all notices and papers by email instead of by regular mail.	

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

   __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ❑ No
   - ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
   - ❑ No
   - ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

   Limit disclosing information that is entitled to privacy, such as health care information.

   _____

9. **Is all or part of the claim secured?**
   - ❑ No
   - ❑ Yes. The claim is secured by a lien on property.

     Nature of property:
     - ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
     - ❑ Motor vehicle
     - ❑ Other. Describe: _____

     Basis for perfection: _____

     Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

     Value of property: $_____

     Amount of the claim that is secured: $_____

     Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

     Amount necessary to cure any default as of the date of the petition: $_____

     Annual Interest Rate (when case was filed)_____%
     - ❑ Fixed
     - ❑ Variable

10. **Is this claim based on a lease?**
    - ❑ No
    - ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ❑ No
    - ❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.

❑ I am the creditor's attorney or authorized agent.

❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

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

MEMORANDUM

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

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 19, 2017

I. Introduction

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C.

* * * * *

The Committee also recommends that the following proposed amendments be published for public comment:

(1) Rule 16.1 (new)

* * * * *

V. Action Item: New Rule 16.1

Proposed new Rule 16.1 originated in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve "millions of pages of documentation," "thousands of emails," and "gigabytes of information." At the suggestion of Judge David Campbell, chair of the Standing Committee, the Committee held a mini-conference to learn more about the issues and to determine whether a rule amendment to deal with discovery in cases that are complex or involve large quantities of electronically stored information (ESI) would be warranted.

At the mini-conference, experienced private practitioners and public defenders working with these issues expressed strong support for a rule change. One question was whether the ESI Protocol worked out by the Justice Department and defense representatives[1] was sufficient to solve most problems. The defense attorneys reported that some prosecutors and judges do not know about the ESI Protocol, nor do they understand the problems some disclosures pose for the defense. The prosecutors who attended were not initially convinced a rule was needed. They did agree that not all judges or Assistant United States Attorneys are aware of the ESI Protocol and that more training would be useful. They also emphasized that any rule had to be flexible in order to address variation between cases. Prosecutors agreed that a rule directing prosecutors to the protocol would be helpful.

All attendees agreed that ESI discovery issues are handled very differently between districts, and that most criminal cases, large and small, now include ESI. Problems can arise, for example, with social media, cell site data, storage devices, and other evidence an incarcerated defendant would have trouble reviewing. A surprising degree of consensus developed about what sort of rule was needed: something simple, that puts the principal responsibility on the lawyers, and encourages the use the ESI Protocol, which saves time and is cost-effective for the courts. Some participants reported that once the parties get together and actually consult the ESI Protocol, discovery goes very smoothly. Participants did not support a rule that would attempt to specify narrowly the type of case in which this attention was required, or list the individual options that should be considered, such as providing an index.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified. The proposed amendment was drafted after reviewing several examples of local rules and orders addressing this issue, and unanimously approved first by the Subcommittee and then by the Advisory Committee at its April meeting. The Committee chose to place the new language in a new Rule 16.1 rather than Rule 16 because it addresses activity that is to occur shortly after arraignment and well in advance of discovery. Also, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

The new rule has two sections.

[1] The Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" (2012).

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting "no later than" 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial contact, which can then be followed by additional conversations. The rule does not prescribe a time period for seeking judicial assistance. Members noted that subsection (b) bears some resemblance to Civil Rule 26(f), but is much more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial." The phrase "determine or modify" contemplates two possible situations. If there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to "determine" when and how disclosures should be made. But if they wish to change the existing discovery schedule, the parties must seek a modification. A modification is required if (1) the schedule or manner of discovery is ordered by the judge in their individual case or (2) is included in a standing order or local rule. In any case, the request to "determine or modify" discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached.

The district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and in local rules and standing orders. The rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the court to accept their agreement or otherwise limit the court's discretion. To avoid any confusion, this point is emphasized in the Committee Note, which states: "Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure."

The Committee Note also emphasizes that the rule does not attempt to state specific requirements for the manner or timing of disclosure of ESI, but also states that counsel "should be aware of best practices." As an example of these best practices, it cites the ESI Protocol. The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

The Committee considered but decided not to broaden this provision to include other grounds for judicial action, such as "the interests of justice" or simply "other grounds." The proposal is narrowly focused, and the Committee concluded it does not need to accommodate other traditional concerns, such as delays for conflicts in trial dates. Members also expressed concern about the unanticipated consequences of a broad undefined phrase.

The Committee also considered a suggestion that it delete the phrase "to facilitate preparation for trial," but concluded that it should be retained. This phrase is the heart of the proposal from the point of view of the defense community that first brought the problems of discovery in complex cases to the Committee's attention.

After the adoption of amendments to incorporate some suggestions from the style consultants and to clarify the Committee Note, the Committee voted unanimously to forward Rule 16.1 to the Standing Committee with the recommendation that it be published for public comment. The Committee views the proposed rule as a modest but positive step to respond to significant changes in discovery.

The Committee unanimously recommends that the Standing Committee approve the new Rule 16.1, and the accompanying Committee Note, for publication for public comment.

*** * * * ***

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

Rule 16.1. Pretrial Discovery Conference and Modification

(a) Discovery Conference. No later than 14 days after the arraignment the attorneys for the government and the defendant must confer, and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important

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

in cases involving electronically stored information (ESI) or other voluminous or complex discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

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

MEMORANDUM

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

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 19, 2017

I. Introduction

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C.

* * * * *

The Committee also recommends that the following proposed amendments be published for public comment:

* * * * *

(2) Rule 5 of the Rules Governing Proceedings under Sections 2254 and 2255.

* * * * *

VI. Action Item: Rule 5(d) of the Rules Governing 2255 Actions and Rule 5(e) of the Rules Governing 2254 Actions

Judge Richard Wesley first drew the Committee's attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a thorough review of the cases, the Committee has concluded that the text of the current rule (as well as the parallel language in Rule 5(e) of the Rules Governing 2254 actions) is contributing to a misreading of the rule by a significant number of district courts. The current rule provides that a prisoner can file a reply "within a time fixed by the judge." The reference to filing "within a time fixed by the judge" can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing. Indeed, some members acknowledged that they had previously been uncertain whether the rule granted a right to reply. Acknowledging the remote prospect that appellate review will correct the interpretation, the Committee agreed an amendment is warranted.

The Committee approved language that would clearly signal that the moving party in 2255 cases (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

> The moving party may file a reply to the respondent's answer or other pleading.
> The judge must set the time to file, unless the time is already set by local rule.

There was some concern that retaining "may" (rather than "has a right to" or "is entitled to") in the first sentence might not solve the problem. On the other hand, as the style consultants emphasized, it was important not to cast doubt on the meaning of "may," a term that is used in many other rules. To address this, the Committee added a sentence to the Committee Note, which the style consultants accepted: "We retain the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

The proposed amendment does not set a presumptive time for filing, as there was considerable concern that the rule retain the discretion individual courts and judges use to accommodate local circumstances and practices. It also recognizes that the time for filing is sometimes set by local rule, as research by the Federal Judicial Center indicates. Declining to impose a new, presumptive filing period avoids disrupting the widely varying practices among the districts. When there is no local rule, requiring the judge to set a time for filing will help avoid uncertainty that might trip up unwary prisoners and create unnecessary litigation.

The Committee also approved a parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The earlier Committee that revised both amendments saw no reason to

treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

The Committee unanimously recommends that the Standing Committee approve the amendments to Rule 5 of the Rules Governing Section 2254 and 2255 Cases, and the accompanying Committee Notes, for publication for public comment.

*** * * * ***

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(e) Reply. The petitioner may ~~submit~~file a reply to the respondent's answer or other pleading ~~within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

---

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

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(d) Reply. The moving party may ~~submit~~file a reply to the respondent's answer or other pleading~~ within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

---

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

Excerpt from the May 7, 2017 Report of the Advisory Committee on Evidence Rules

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

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2017

*****

II. Action Item—Proposed Amendment to Rule 807

The Committee has been considering possible changes to Rule 807—the residual exception to the hearsay rule—for the last two years. The project began with exploring the possibility of expanding the residual exception to allow admissibility of more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation—including discussion with a panel of experts at a Conference held at Pepperdine Law School—the Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review—Rule 804(b)(6) forfeiture—is not based on reliability at all. A review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one. Given the difficulty and disutility of the "equivalence" standard, the Committee has determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee has determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration is a typical source for assuring that a statement is reliable. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" and consistent with the "purpose of the rules" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the drafters' avoidance of the term "materiality" in Rule 403—and that avoidance was well-reasoned, because the term "material" is used in so many different contexts. The courts have essentially held that "material" means "relevant"—and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be—and has been—used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a "just" result. The Committee has determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

- The current notice requirement is problematic in at least four respects:

1. Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

2. The requirement that the proponent disclose "particulars" has led to unproductive arguments and unnecessary case law.

3. There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4. The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable—which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so. Furthermore, the Committee has made it clear in the amendment that the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions. This assures, again, that parties will be able to invoke the exception only when they can establish the need to do so.

The Committee unanimously recommends that the Standing Committee issue the following proposed amendments to Rule, and accompanying Committee Note, for public comment:

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~ 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

~~**(2)** it is offered as evidence of a material fact;~~

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has

shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see,* Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the rule as amended. The prior requirement that the declarant's address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

*****

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) ~~it is offered as evidence of a material fact;~~

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

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~;~~ ~~and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard" has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be

superfluous in that they are already found in other rules (*see,* Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the rule as amended. The prior requirement that the declarant's address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same

exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

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.

§ 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 AO 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 AO 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).

Last substantive revision (Transmittal 01-007) October 3, 2013
Last revised (minor technical changes) December 1, 2015

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