

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 2-3
2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date pp. 6-10
3. Approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law pp. 13-15
4. Approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law pp. 20-21

The remainder of this report is submitted for the record and includes the following for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure pp. 3-6
- Federal Rules of Bankruptcy Procedure pp. 10-13
- Federal Rules of Civil Procedure..... pp. 15-18
- Federal Rules of Criminal Procedure..... pp. 18-20
- Federal Rules of Evidence pp. 21-24
- Other Items pp. 24-25

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 25, 2019. All members participated.

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

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

NOTICE

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Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and discussed four information items.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term “answer” in Rule 40(a)(3) to the term “response,” making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that “it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.” The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure

and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 3, 6, and 42, and Forms 1 and 2, with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

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

The proposed amendments address the effect on the scope of an appeal of designating a specific interlocutory order in a notice of appeal. The initial suggestion pointed to a line of cases in one circuit applying an *expressio unius rationale* to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order rather than treating a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment. Research conducted after receiving the suggestion revealed that the problem is not confined to a single circuit, but that there is substantial confusion both across and within circuits.

Rule 3(c)(1)(B) currently requires that a notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. However, some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal – the one

serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated – and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Advisory Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the term “judgment” and the term “order” are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court’s appellate jurisdiction, the word “appealable” is added before the word “order.” Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction, the phrase “from which the appeal is taken” replaces the phrase “being appealed.” Finally, the phrase “part thereof” is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result would require the appellant to designate the judgment – or the appealable order – from which the appeal is taken. Additional new subsections of Rule 3(c) would call attention to the merger principle.

The proposed amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court). Having different suggested forms for appeals from final judgments and appeals from other orders clarifies what should be designated in a notice of appeal. In addition, the Advisory Committee recommended conforming amendments to Rule 6 to change the reference to “Form 1” to “Forms 1A and 1B,” and to Form 2 to reflect the deletion of “part thereof” from Rule 3(c)(1)(B).

Rule 42 (Voluntary Dismissal)

Current Rule 42(b) provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due.” Prior to the 1998 restyling of the rules, Rule 42(b) used the word “shall” instead of “may” dismiss. Although the 1998 amendment to Rule 42 was intended to be stylistic only, some courts have concluded that there is now discretion to decline to dismiss. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals.

In addition, current Rule 42(b) provides that “no mandate or other process may issue without a court order.” This language has created some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court.

The issues with the language “no mandate or other process may issue without a court order” are avoided – and the purpose of that language served – by deleting it and instead stating directly in new subsection (b)(3): “A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.” A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Information Items

The Advisory Committee on Appellate Rules met on April 5, 2019. Discussion items included undertaking a comprehensive review of Rules 35 and 40, as well as a suggestion to

limit remote access to electronic files in actions for benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v.

Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

As detailed above, the proposed amendments to Rules 35 and 40 published for public comment in August 2018 create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider discrepancies between Rules 35 and 40. The discrepancies are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could “suggest” rehearing en banc. The Advisory Committee determined not to make the rules more parallel but continues to consider possible ways to clarify practice under the two rules.

Privacy in Railroad Retirement Act Benefit Cases

The Advisory Committee was forwarded a suggestion directed to the Advisory Committee on Civil Rules. The suggestion requested that Civil Rule 5.2(c), the rule that limits remote access to electronic files in certain types of cases, be amended to include actions for benefits under the Railroad Retirement Act because of the similarities between actions under the Act and the types of cases included in Civil Rule 5.2(c). But review of Railroad Retirement Act decisions lies in the courts of appeals. For this reason, the Advisory Committee on Appellate Rules will take the lead in considering the suggestion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021, and Official Form 122A-1, with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the

rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules and the official form are technical or conforming in nature and are recommended for final approval without publication.

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)

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a

statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income)

The Advisory Committee received a suggestion from an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California. He noted that Official Form 122A-1 contains an instruction at the end of the form, after the debtor's signature line, explaining that the debtor should *not* complete and file a second form (Official Form 122A-2) if

the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. He suggested that the instruction not to file also be added at the end of line 14a of Form 122A-1, where the debtor's current monthly income is calculated. The Advisory Committee agreed that repeating the instruction as suggested would add clarity to the form and recommended the change. The Standing Committee approved the change.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revision of Official Bankruptcy Form 122A-1 and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036 with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

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

Judge Brian Fenimore of the Western District of Missouri noted that Rule 2005(c) – a provision that deals with conditions to assure attendance or appearance – refers to now-repealed provisions of the Criminal Code. The Advisory Committee agreed that the current reference to 18 U.S.C. § 3146 is no longer accurate and recommended replacing it with a reference to 18 U.S.C. § 3142, where the topic of conditions is now located. Because 18 U.S.C. § 3142 also

addresses matters beyond conditions to assure attendance or appearance, the proposed rule amendment will state that only “relevant” provisions and policies of the statute should be considered.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007 clarifies that only an insurance depository institution as defined by section 3 of the Federal Deposit Insurance Act (FDIA) is entitled to heightened service of a claim objection, and that an objection to a claim filed by a credit union may be served on the person designated on the proof of claim.

Rule 3007 provides, in general, that a claim objection is not required to be served in the manner provided by Rule 7004, but instead can be served by mailing it to the person designated on a creditor’s proof of claim. The rule includes exceptions to this general procedure, one of which is that “if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h).” The purpose of this exception is to comply with a legislative mandate in the Bankruptcy Reform Act of 1994, set forth in Rule 7004(h), providing that an “insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)” is entitled to a heightened level of service in adversary proceedings and contested matters.

The current language in Rule 3007(a)(2)(A)(ii) is arguably too broad in that it does not qualify the term “insured depository institution” as being defined by the FDIA. Because the more expansive Bankruptcy Code definition of “insured depository institution” set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under the rule. The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in

Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Rule 7007.1 (Corporate Ownership Statement)

Continuing the advisory committees' efforts to conform the various disclosure statement rules to the pending amendment to Appellate Rule 26.1, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1.

Rule 9036 (Notice by Electronic Transmission)

The proposed amendment would implement a suggestion from the Committee on Court Administration and Case Management requiring high-volume-paper-notice recipients to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 will change to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Information Items

The Advisory Committee met on April 4, 2019. The agenda for that meeting included a report on the work of the Restyling Subcommittee on the process of restyling the Bankruptcy Rules. The Advisory Committee anticipates this project will take several years to complete.

The Advisory Committee also reviewed a proposed draft Director’s Bankruptcy Form for an application for withdrawal of unclaimed funds in closed bankruptcy cases, along with proposed instructions and proposed orders. The initial draft was the product of the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System. The Advisory Committee supported the idea of a nationally available form to aid in processing unclaimed funds, made minor modifications, and recommended that the Director adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director’s Bankruptcy Forms on December 1, 2019.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee’s agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision to Rule 30(b)(6) for objections; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was

strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the “number and description of” the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee’s report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the “continuing as necessary” language; (3) deleting the “number and description of” language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix C, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 7.1, the rule that addresses disclosure statements, with a request that it be published for comment in August 2019. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

The proposed amendment to Rule 7.1 would do two things. First, it would require a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to proposed amendments to Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019) and Bankruptcy Rule 8012 (to be considered by the Conference at its September 2019 session). Second, the proposal would amend the rule to require a party in a diversity case to disclose the citizenship of every individual or entity whose citizenship is attributed to that party.

The latter change aims to facilitate the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of an individual or entity attributed to a party. For example, a limited liability company takes on the citizenship of each of its owners. If one of the owners is a limited liability company, the citizenships of all the owners of that limited liability company pass through to the limited liability company that is a party in the action. Requiring disclosure of “every individual or entity whose citizenship is attributed” to a party will ensure early determination that jurisdiction is proper.

Information Items

The Advisory Committee met on April 2-3, 2019. Among the topics for discussion was the work of two subcommittees tasked with long-term projects, and the creation of a joint Appellate-Civil subcommittee.

Multidistrict Litigation Subcommittee

As previously reported, since November 2017, this subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC.

Subcommittee members have also participated in several conferences hosted by different constituencies, including MDL transferee judges.

At the Advisory Committee's April 2019 meeting, there was extensive discussion of the various issues on which the subcommittee has determined to focus its work. The Advisory Committee agreed with the subcommittee's inclination to focus primarily on four issues: (1) use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of some district court orders in MDL proceedings; (3) addressing the court's role in relation to global settlement of multiple claims; and (4) third-party litigation funding. It is still too early to know whether this work will result in any recommendation for amendments to the Civil Rules.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The subcommittee developed a preliminary draft rule for discussion purposes, including for discussion at the Advisory Committee's April 2019 meeting. On June 20, 2019, the subcommittee convened a meeting to obtain feedback on its draft rule. Invited participants included claimants' representatives, a magistrate judge, as well as representatives of ACUS, the Social Security Administration, and the DOJ. One of the authors of the study that forms the basis of the ACUS suggestion also attended. Each participant provided his or her perspective on the draft rule, followed by a roundtable discussion.

The subcommittee will continue to gather feedback on the draft rule, including from magistrate judges. The subcommittee hopes to come to a decision as to whether pursuit of a rule is advisable in time for the Advisory Committee’s October 2019 meeting.

Subcommittee on Final Judgment in Consolidated Cases

The Civil and Appellate Rules Advisory Committees have formed a joint subcommittee to consider whether either rule set should be amended to address the effect on the “final judgment rule” of consolidating initially separate cases.

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

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any “practical problems” have arisen post-*Hall*. If so, the subcommittee will determine the value of any rules amendments to address those problems.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on May 7, 2019. The bulk of the meeting focused on work of the Rule 16 Subcommittee, formed to consider suggestions from two district judges that

pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the robust expert disclosure requirements in Civil Rule 26. The Advisory Committee charged the subcommittee with studying the issue, including the threshold desirability of an amendment, as well as the features any recommended amendment should contain.

Early on, the subcommittee determined that it would be useful to hold a mini-conference to explore the contours of the issue with all stakeholders. At its October 2018 meeting (in anticipation of the mini-conference), the Advisory Committee heard a presentation by the DOJ on its development and implementation of policies governing disclosure of forensic and non-forensic evidence.

Participants in the May 6, 2019 mini-conference included defense attorneys, as well as prosecutors and representatives from the DOJ, each of whom has extensive personal experience with pretrial disclosures and the use of experts in criminal cases. The discussion proceeded in two parts. First, participants were asked to identify any concerns or problems with the current rule. Second, they were asked to provide suggestions on how to improve the rule.

The defense attorneys identified two problems with Rule 16 in its current form: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Defense practitioners reported they sometimes receive summaries of expert testimony a week or the night before trial, which significantly impairs their ability to prepare for trial. They also reported that they often do not receive sufficiently detailed disclosures to allow them to prepare to cross examine the expert witness. In stark contrast, the DOJ representatives reported no problems with the current rule.

As to the subcommittee's second inquiry concerning ways to improve the rule, participants discussed possible solutions on the issues of timing and completeness of expert

discovery. Significant progress was made in identifying common ground; the discussion produced concrete suggestions for language that would address the timing and sufficiency issues identified by defense practitioners. The subcommittee plans to present its report and a proposed amendment to Rule 16 at the Advisory Committee's September 2019 meeting.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term “non-propensity purpose” to “permitted purpose.”

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on May 3, 2019. The agenda included discussion of possible amendments to Rules 106, 615, and 702. The Advisory Committee also continues to monitor the development of the law following the decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

A subcommittee on Rule 702 has been considering questions that arise in the application of the rule, including treatment of forensic expert evidence. The subcommittee, after extensive discussion, made three recommendations with which the Advisory Committee agreed: (1) it would be difficult to draft a freestanding rule on forensic expert testimony because any such amendment would have an inevitable and problematic overlap with Rule 702; (2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note

because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and (3) it would not be advisable to publish a “best practices manual” for forensic evidence.

The subcommittee expressed interest in considering an amendment to Rule 702 that would focus on the important problem of overstating results in forensic and other expert testimony. One example: an expert stating an opinion as having a “zero error rate” where that conclusion is not supportable by the methodology. The Advisory Committee has heard extensively from the DOJ on its efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Advisory Committee is considering other ways to aid courts and litigants in meeting the challenges of forensic evidence, including assisting the FJC in judicial education. In this regard, the Advisory Committee is holding a mini-conference on October 25, 2019 at Vanderbilt Law School. The goal of the mini-conference is to determine “best practices” for managing *Daubert* issues. A transcript of the mini-conference will be published in the *Fordham Law Review*.

Possible Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)

The Advisory Committee continues to consider whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. A suggestion from a district judge noted two possible amendments: (1) to provide that a completing statement is admissible over a hearsay objection; and (2) to provide that the rule covers oral as well as written or recorded statements.

Several alternatives for an amendment to Rule 106 are under consideration. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

Possible Amendments to Rule 615 (Excluding Witnesses)

The Advisory Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order and whether it applies only to exclude witnesses from the courtroom (as stated in the text of the rule) or if it can extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony. Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Advisory Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Advisory Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the scope of the order is desirable. The investigation of this problem is consistent with the Advisory Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given increasing witness access to information about testimony through news, social media, or daily transcripts.

At its May 2019 meeting, the Advisory Committee resolved that any amendment to Rule 615 should allow, but not mandate, orders that extend beyond the courtroom. One issue that the Advisory Committee must work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

OTHER ITEMS

The Standing Committee's agenda included four information items. First, the Committee discussed a suggestion from the Chair of the Advisory Committee on Appellate Rules that a study be conducted to determine whether the Appellate, Bankruptcy, Civil, and Criminal Rules should be amended to change the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone.

The Chair authorized the creation of a joint subcommittee comprised of representatives of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and delegated to Judge Chagares the task of coordinating the subcommittee's work. The subcommittee plans to present its report to the Committee at its January 2020 meeting.

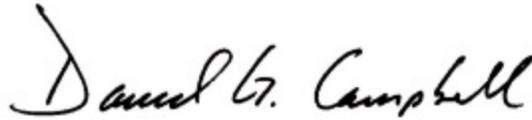
Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, based on feedback received at the Committee's January 2019 meeting, the Reporter to the Committee drafted revised proposed procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. The Committee discussed and approved those procedures.

Fourth, at the request of the Judiciary Planning Coordinator, Committee members discussed the extent to which the Committee's current strategic initiatives have achieved their desired outcomes and the proposed approach for the 2020 update to the *Strategic Plan for the*

Federal Judiciary, and authorized Judge Campbell to convey the Committee's views to the Judiciary Planning Coordinator.

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive, flowing style.

David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Form (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Appendix D – Federal Rules of Evidence (proposed amendment and supporting report excerpt)

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A party
4 may petition for a hearing or rehearing en banc.

5 * * * * *

6 (2) Except by the court's permission:

7 (A) a petition for an en banc hearing or rehearing
8 produced using a computer must not exceed
9 3,900 words; and

10 (B) a handwritten or typewritten petition for an
11 en banc hearing or rehearing must not
12 exceed 15 pages.

13 * * * * *

14 **(e) Response.** No response may be filed to a petition for
15 an en banc consideration unless the court orders a

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 response. The length limits in Rule 35(b)(2) apply to
17 a response.

18 * * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

1 **Rule 40. Petition for Panel Rehearing**

2 * * * * *

3 **(a) Time to File; Contents; ~~Answer-Response~~; Action**
4 **by the Court if Granted.**

5 * * * * *

6 (3) ~~Answer-Response~~. Unless the court requests, no
7 ~~answer-response~~ to a petition for panel rehearing
8 is permitted. ~~But ordinarily,~~ rehearing will not
9 be granted in the absence of such a request. If a
10 response is requested, the requirements of
11 Rule 40(b) apply to the response.

12 * * * * *

13 **(b) Form of Petition; Length.** The petition must comply
14 in form with Rule 32. Copies must be served and filed
15 as Rule 31 prescribes. Except by the court's
16 permission:

4 FEDERAL RULES OF APPELLATE PROCEDURE

- 17 (1) a petition for panel rehearing produced using a
18 computer must not exceed 3,900 words; and
19 (2) a handwritten or typewritten petition for panel
20 rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

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

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
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 31, 2019

1 **I. Introduction**

2 The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio,
3 Texas.

* * * * *

4 It approved proposed amendments previously published for comment for which it seeks
5 final approval. These proposed amendments, discussed in Part II of this report, relate to length
6 limits for responses to petitions for rehearing (Rules 35 and 40).

* * * * *

* * * * *

31

Committee Note

32

33

34

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

35

Rule 40. Petition for Panel Rehearing

* * * * *

36

37

(a) Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted.

* * * * *

38

39

40

41

(3) **~~Answer~~Response.** Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But ordinarily,~~ rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

42

43

44

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

45

46

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

47

48

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

49

50

51

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response,"

52 rather than an “answer,” to make the terminology consistent with Rule 35; this change is
53 intended to be stylistic only.

* * * * *

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief Is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 * * * * *

8 (f) OTHER NOTICES. Except as provided in
9 subdivision (l) of this rule, the clerk, or some other person as
10 the court may direct, shall give the debtor, all creditors, and
11 indenture trustees notice by mail of:

12 * * * * *

13 (7) entry of an order confirming a chapter 9, 11,
14 ~~or~~12, or 13 plan;

15 * * * * *

16 (h) NOTICES TO CREDITORS WHOSE CLAIMS
17 ARE FILED. ~~In a chapter 7 case, after 90 days following~~

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

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

18 ~~the first date set for the meeting of creditors under § 341 of~~
19 ~~the Code,~~

20 (1) *Voluntary Case.* In a voluntary chapter 7
21 case, chapter 12 case, or chapter 13 case, after 70 days
22 following the order for relief under that chapter or the
23 date of the order converting the case to chapter 12 or
24 chapter 13, the court may direct that all notices required
25 by subdivision (a) of this rule be mailed only to:

- 26 • the debtor,
- 27 • the trustee,
- 28 • all indenture trustees,
- 29 • creditors that hold claims for which proofs of
30 claim have been filed, and
- 31 • creditors, if any, that are still permitted to file
32 claims because an extension was granted
33 under Rule 3002(c)(1) or (c)(2).

34 (2) *Involuntary Case.* In an involuntary chapter

35 7 case, after 90 days following the order for relief under
36 that chapter, the court may direct that all notices
37 required by subdivision (a) of this rule be mailed only
38 to:

- 39 • the debtor,
- 40 • the trustee,
- 41 • all indenture trustees,
- 42 • creditors that hold claims for which proofs of
43 claim have been filed, and
- 44 • creditors, if any, that are still permitted to file
45 claims ~~by reason of~~ because an extension was
46 granted ~~pursuant to~~ under Rule 3002(c)(1) or
47 (c)(2).

48 (3) Insufficient Assets. In a case where notice of
49 insufficient assets to pay a dividend has been given to
50 creditors ~~pursuant to~~ under subdivision (e) of this rule,
51 after 90 days following the mailing of a notice of the

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

52 time for filing claims ~~pursuant to~~ under
53 Rule 3002(c)(5), the court may direct that notices be
54 mailed only to the entities specified in the preceding
55 sentence.

56 * * * * *

57 (k) NOTICES TO UNITED STATES TRUSTEE.

58 Unless the case is a chapter 9 municipality case or unless the
59 United States trustee requests otherwise, the clerk, or some
60 other person as the court may direct, shall transmit to the
61 United States trustee notice of the matters described in
62 subdivisions (a)(2), (a)(3), (a)(4), (a)(8), ~~(a)(9)~~, (b), (f)(1),
63 (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and
64 notice of hearings on all applications for compensation or
65 reimbursement of expenses.

66 * * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

6 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 **Rule 2004. Examination**

2 * * * * *

3 (c) COMPELLING ATTENDANCE AND
4 PRODUCTION OF DOCUMENTS OR
5 ELECTRONICALLY STORED INFORMATION. The
6 attendance of an entity for examination and for the
7 production of documents or electronically stored
8 information, whether the examination is to be conducted
9 within or without the district in which the case is pending,
10 may be compelled as provided in Rule 9016 for the
11 attendance of a witness at a hearing or trial. As an officer of
12 the court, an attorney may issue and sign a subpoena on
13 behalf of the court ~~for the district in which the examination~~
14 ~~is to be held where the case is pending~~ if the attorney is
15 admitted to practice in that court ~~or in the court in which the~~
16 ~~case is pending~~.

17 * * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

1 **Rule 8012. ~~Corporate~~ Disclosure Statement**

2 (a) ~~WHO MUST FILE~~ NONGOVERNMENTAL
3 CORPORATIONS. Any nongovernmental ~~corporate party~~
4 corporation that is a party to a proceeding appearing in the
5 district court or BAP must file a statement that identifies any
6 parent corporation and any publicly held corporation that
7 owns 10% or more of its stock or states that there is no such
8 corporation. The same requirement applies to a
9 nongovernmental corporation that seeks to intervene.

10 (b) DISCLOSURE ABOUT THE DEBTOR. The
11 debtor, the trustee, or, if neither is a party, the appellant must
12 file a statement that:

13 (1) identifies each debtor not named in the
14 caption; and

15 (2) for each debtor that is a corporation,
16 discloses the information required by Rule 8012(a).

17 ~~(b)(c)~~ TIME TO FILE; SUPPLEMENTAL

1 FILING. ~~A party must file the~~ A Rule 8012 statement must:

2 (1) be filed with ~~its~~ the principal brief or upon
3 filing a motion, response, petition, or answer in the
4 district court or BAP, whichever occurs first, unless a
5 local rule requires earlier filing.;

6 (2) Even if the statement has already been filed,
7 ~~the party's principal brief must be included~~ include a
8 ~~statement~~ before the table of contents in the principal
9 brief; and

10 (3) A party must supplement its statement be
11 supplemented whenever the ~~required~~ information
12 required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to Fed.R.App.P. 26.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of appeals. It

10 FEDERAL RULES OF BANKRUPTCY PROCEDURE

also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

1 **Rule 8013. Motions; Intervention**

2 (a) CONTENTS OF A MOTION; RESPONSE;
3 REPLY.

4 (1) *Request for Relief.* A request for an order or
5 other relief is made by filing a motion with the
6 district or BAP clerk, ~~with proof of service on the~~
7 ~~other parties to the appeal.~~

8 * * * * *

1

Committee Note

Subdivision (a)(1) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

12 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 **Rule 8015. Form and Length of Briefs; Form of**
2 **Appendices and Other Papers**

3
4

* * * * *

5 (g) ITEMS EXCLUDED FROM LENGTH. In
6 computing any length limit, headings, footnotes, and
7 quotations count toward the limit, but the following items do
8 not:

- 9 • ~~the~~ cover page;
- 10 • ~~a corporate~~ disclosure statement under
11 Rule 8012;
- 12 • ~~a~~ table of contents;
- 13 • ~~a~~ table of citations;
- 14 • ~~a~~ statement regarding oral argument;
- 15 • ~~an~~ addendum containing statutes, rules, or
16 regulations;
- 17 • certificates of counsel;
- 18 • ~~the~~ signature block;

- 19 • ~~the~~ proof of service; and
- 20 • any item specifically excluded by these
- 21 rules or by local rule.

22 * * * * *

Committee Note

The amendment to subdivision (g) is made to reflect recent amendments to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system. Because each item listed in Rule 8015(g) will not always be required, the initial article is deleted. The word “corporate” is deleted before “disclosure statement” to reflect a concurrent change in the title of Rule 8012.

14 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 **Rule 8021. Costs**

2 * * * * *

3 (d) BILL OF COSTS; OBJECTIONS. A party who
4 wants costs taxed must, within 14 days after entry of
5 judgment on appeal, file with the bankruptcy clerk, ~~with~~
6 ~~proof of service,~~ and serve an itemized and verified bill of
7 costs, unless the bankruptcy court extends the time.

Committee Note

Subdivision (d) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

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

Case number _____
(If known)

Check one box only as directed in this form and in Form 122A-1Supp:

- 1. There is no presumption of abuse.
- 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 122A-2).
- 3. The Means Test does not apply now because of qualified military service but it could apply later.

Check if this is an amended filing

Official Form 122A-1

Chapter 7 Statement of Your Current Monthly Income

12/19

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

- Not married.** Fill out Column A, lines 2-11.
- Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
- Married and your spouse is NOT filing with you. You and your spouse are:**
 - Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
 - Living separately or are legally separated.** Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____
5. Net income from operating a business, profession, or farm	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	\$ _____
	Ordinary and necessary operating expenses	– \$ _____ – \$ _____
Net monthly income from a business, profession, or farm	\$ _____	\$ _____
6. Net income from rental and other real property	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	\$ _____
	Ordinary and necessary operating expenses	– \$ _____ – \$ _____
Net monthly income from rental or other real property	\$ _____	\$ _____
7. Interest, dividends, and royalties	\$ _____	\$ _____

Column A Debtor 1 Column B Debtor 2 or non-filing spouse

8. Unemployment compensation

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:

For you \$ For your spouse \$

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.

\$ \$

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.

_____ \$ _____
_____ \$ _____

\$ \$
+ \$ + \$

Total amounts from separate pages, if any.

11. Calculate your total current monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

\$ + \$ = \$ Total current monthly income

Part 2: Determine Whether the Means Test Applies to You

12. Calculate your current monthly income for the year. Follow these steps:

12a. Copy your total current monthly income from line 11. Copy line 11 here \$
Multiply by 12 (the number of months in a year). x 12
12b. The result is your annual income for this part of the form. 12b. \$

13. Calculate the median family income that applies to you. Follow these steps:

Fill in the state in which you live.
Fill in the number of people in your household.

Fill in the median family income for your state and size of household. 13. \$
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. How do the lines compare?

- 14a. Line 12b is less than or equal to line 13. On the top of page 1, check box 1, There is no presumption of abuse. Go to Part 3. Do NOT fill out or file Official Form 122A-2.
14b. Line 12b is more than line 13. On the top of page 1, check box 2, The presumption of abuse is determined by Form 122A-2. Go to Part 3 and fill out Form 122A-2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

X Signature of Debtor 1

X Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A-2.
If you checked line 14b, fill out Form 122A-2 and file it with this form.

Committee Note

The instruction on line 14a is amended to remind a debtor for whom there is no presumption of abuse that Official Form 122A-2 (*Chapter 7 Means Test Calculation*) should not be filled out or filed.

Excerpt from the May 30, 2019 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

DAVID G. CAMPBELL
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MEMORANDUM

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

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 30, 2019

1 **I. Introduction**

2 The Advisory Committee on Bankruptcy Rules met in San Antonio, Texas, on April 4,
3 2019.

* * * * *

4 At the meeting the Advisory Committee gave its final approval to the amendments to three
5 rules that were published for comment last August. The amendments are to Rules 2002 (Notices),
6 2004 (Examination), and 8012 (Corporate Disclosure Statement). The Advisory Committee also
7 approved without publication technical amendments to * * * * * Official Form 122A-1 (Chapter
8 7 Statement of Your Current Monthly Income).

* * * * *

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9 Part II of this report presents those action items along with two others that the Advisory
10 Committee voted on at its fall 2018 meeting. At that earlier meeting, the Advisory Committee
11 voted to seek final approval without publication of conforming, technical amendments to Rules
12 8012, 8013, and 8015 to remove or qualify references to “proof of service” * * * * *.

13 The action items are organized as follows:

14 A. Items for Final Approval

15 (A1) Rules published for comment in August 2018—

- 16 • Rule 2002;
- 17 • Rule 2004; and
- 18 • Rule 8012.

19 (A2) Approval without publication—

- 20 • * * * * *;
- 21 • Rules 8013, 8015, and 8021; and
- 22 • Official Form 122A-1.

* * * * *

23 **II. Action Items**

24 **A. Items for Final Approval**

25 *(A1) Rules published for comment in August 2018.*

26 **The Advisory Committee recommends that the Standing Committee approve and**
27 **transmit to the Judicial Conference the proposed rule amendments that were published for**
28 **public comment in August 2018 and are discussed below.** Bankruptcy Appendix A includes
29 the rules that are in this group.

30 **Action Item 1. Rule 2002 (Notices).** A package of amendments to Rule 2002 was
31 published that would (i) require giving notice of the entry of an order confirming a chapter 13 plan,
32 (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter
33 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision
34 specifying the deadline for objecting to confirmation of a chapter 13 plan.

35 Three different subdivisions of the rule are affected.

- 36 • *Rule 2002(f)(7)* currently requires the clerk, or someone else designated by the clerk, to
37 give notice to the debtor, all creditors, and indenture trustees of the “entry of an order
38 confirming a chapter 9, 11, or 12 plan.” The amendment would include chapter 13 plans
39 within this provision.

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- 40 • *Rule 2002(h)* provides an exception to the general noticing requirements set forth in Rule
41 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the
42 court) to give “the debtor, the trustee, all creditors and indenture trustees” at least 21 days’
43 notice of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement
44 in chapter 7 cases with respect to creditors that fail to file a timely proof of claim. The
45 amendment would make this exception also applicable to chapter 12 and 13 cases and
46 would change the time provisions in the subdivision to conform to recent amendments to
47 Rule 3002 setting deadlines for filing proofs of claim.
- 48 • *Rule 2002(k)* provides for transmitting notices under specified parts of Rule 2002 to the
49 U.S. trustee, including notices under subdivision (b). Because the deadline for giving
50 notice of the time for filing objections to confirmation of chapter 13 plans was recently
51 moved from subdivision (b) to subdivision (a)(9), which currently is not specified in
52 subdivision (k), the provision would be amended to include a reference to (a)(9) to ensure
53 that the U.S. trustee continues to receive notice of this deadline.

54 Six sets of comments were submitted on one or more of these proposed amendments. Four
55 of the comments (submitted by Danielle Young, Nancy Whaley, Ellie Bertwell of Aderant
56 CompuLaw, and the National Association of Bankruptcy Trustees) included brief statements of
57 support for the amendments.

58 Ryan Johnson, the clerk of the Bankruptcy Court for the Northern District of West Virginia,
59 was generally supportive of the amendments, but he raised two additional points about Rule
60 2002(h). First, he said that in a chapter 13 case, the clerk’s noticing responsibilities should extend
61 beyond the 70-day proof-of-claim deadline as stated in Rule 3002(c). The applicable deadline, he
62 said, should include the additional 30 days afforded to a debtor or trustee to file a claim on behalf
63 of a creditor under Rule 3004. He also stated that with respect to notices required by Rule
64 2002(a)(2) and (a)(3), Rule 2002(h) should require notice to creditors that were entitled to service
65 of the noticed motion even if those entitled to service did not file a proof of claim.

66 The Bankruptcy Section of the Federal Bar Association, while supporting the other Rule
67 2002 amendments, questioned the need for including the entry of an order confirming a chapter 13
68 plan within the notice requirement of Rule 2002(f)(7). It noted that in the Bankruptcy Court for
69 the Western District of Texas, the clerk already is responsible for “publishing the order confirming
70 the plan through its Bankruptcy Noticing Center . . . [, and] [s]ervice is accomplished by first class
71 mail and, where applicable, electronic mail.” As a result, the Section argued, “there appears to be
72 little benefit requiring a notice of an order confirming plan that has already been served on parties
73 in interest.”

74 After carefully considering the comments, the Advisory Committee voted unanimously to
75 approve the amendments to Rule 2002 as published.

76 **Action Item 2. Rule 2004 (Examination).** Rule 2004 provides for the examination of
77 debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under
78 subdivision (c) of the rule, the attendance of a witness and the production of documents may be
79 compelled by means of a subpoena. The Business Law Section of the American Bar Association,

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80 on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a
81 suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the
82 scope of the production of documents and electronically stored information (“ESI”). The Advisory
83 Committee discussed the suggestion at the fall 2017 and spring 2018 meetings. By a close vote,
84 the Committee decided not to add a proportionality requirement to the rule, but it decided
85 unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored
86 information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45,
87 which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

88 Three sets of comments were submitted in response to publication. The Debtor/Creditor
89 Rights Committee of the Business Law Section of the State Bar of Michigan commented that
90 proportionality should be a factor that a bankruptcy judge has the discretion to consider in ruling
91 on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004
92 examination. It argued that in the bankruptcy context, where resources are already limited in many
93 cases, the impact of having to produce all ESI, without consideration of proportionality, could
94 significantly impact the likely success of a case.

95 The other two comments were supportive of the amendments as proposed. The National
96 Association of Bankruptcy Trustees supported the inclusion of electronic records within the rule
97 and the updating to conform to Rule 45 as promoting clarity of scope. The Federal Bar
98 Association’s Bankruptcy Section supported the published changes to Rule 2004(c) and urged
99 caution before imposing a proportionality requirement. It expressed concern that doing so would
100 likely increase litigation.

101 The Advisory Committee unanimously approved the amendments to Rule 2004(c) as
102 published. It saw no reason to revisit the question of proportionality since that issue had recently
103 been carefully considered and rejected by the Advisory Committee.

104 **Action Item 3. Rule 8012 (Corporate Disclosure Statement).** Rule 8012 requires a
105 nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy
106 appellate panel to file a statement identifying any parent corporation and any publicly held
107 corporation that owns 10% or more of the party’s stock (or file a statement that there is no such
108 corporation). It is modeled on FRAP 26.1. The Appellate Rules Committee proposed amendments
109 to FRAP 26.1 that have been approved by Supreme Court, including one that is specific to
110 bankruptcy appeals.

111 At the spring 2018 meeting, the Advisory Committee considered and approved for
112 publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1. These
113 amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the
114 debtor. This subdivision would require the disclosure of the names of any debtors in the underlying
115 bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in
116 the underlying bankruptcy case, the disclosure of the information required of corporations under
117 subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to
118 subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal

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119 and would make stylistic changes to what would become subdivision (c), regarding supplemental
120 disclosure statements.

121 Three comments were submitted in response to publication. All were supportive.

122 In light of the conforming nature of the amendments and the lack of any negative comment
123 on them, the Advisory Committee gave them final approval. One member of the Advisory
124 Committee expressed the need for additional amendments to the disclosure statement rules to
125 extend the requirements to a broader range of entities. The Advisory Committee, however,
126 concluded that any such expansion should be undertaken in coordination with the other advisory
127 committees and should not hold up amendments that are designed to conform to amendments to
128 FRAP 26.1 that are expected to go into effect on December 1 of this year.

129 *(A2) Conforming or technical amendments proposed for approval without publication.*

130 **The Advisory Committee recommends that the Standing Committee approve and**
131 **transmit to the Judicial Conference the proposed rule and form amendments that are**
132 **discussed below.** The rules and form as proposed for amendment are in Bankruptcy Appendix A.

* * * * *

133 **Action Item 5. Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs;**
134 **Form of Appendices and Other Papers), and 8021 (Costs).** The Supreme Court has approved
135 amendments to several Federal Rules of Appellate Procedure that are expected to go into effect in
136 December of this year. The amendment to FRAP 25(d) would eliminate the requirement of proof
137 of service for documents served through the court’s electronic-filing system. This amendment
138 parallels the amendment to Bankruptcy Rule 8011(d) that went into effect last December. The
139 other FRAP amendments—to FRAP 5, 21, 26, 32, and 39—would reflect this change by either
140 eliminating or qualifying references to “proof of service” so as not to suggest that such a document
141 is always required. Because the Part VIII Bankruptcy Rules in large part track the language of
142 FRAP counterparts, the Advisory Committee voted to seek approval without publication of
143 conforming changes to three bankruptcy appellate rules.

144 Rule 8015(g) (Items Excluded from Length), paralleling the amendments to FRAP 32(f),
145 would be amended to eliminate the articles “a” and “the” before the items in a brief excluded in
146 calculating a brief’s length. It would also be amended to delete “corporate” before “disclosure
147 statement” to reflect the pending amendment to the title of Rule 8012.

148 Rule 8021(d) (Bill of Costs; Objections) would be amended to delete the reference to proof
149 of service in order to maintain consistency with FRAP 39(d).

150 Rule 8013(a)(1) also refers to “proof of service.” It states that “[a] request for an order or
151 other relief is made by filing a motion with the district or BAP clerk, with proof of service on the
152 other parties to the appeal.” The corresponding FRAP provision (FRAP 27(a)) does not include

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153 the last phrase, so no amendment has been proposed to that rule. To take account of situations in
154 which proof of service is not required, Rule 8013(a)(1) would be amended by ending the provision
155 with “clerk,” thereby omitting the reference to proof of service. The circumstances under which
156 proof of service would be required would then be governed by Rule 8011(d)(1) (only required for
157 documents served other than through the court’s electronic-filing system).

158 **Action Item 6. Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly**
159 **Income).** A senior staff attorney who assists pro se debtors in the Bankruptcy Court for the Central
160 District of California submitted a suggestion regarding one of the means test forms—Official Form
161 122A-1. He suggested that the instruction not to file Official Form 122A-2 if the debtor’s current
162 monthly income multiplied by 12 is less than or equal to the applicable median family income
163 should be repeated on the form. Currently that instruction appears after the signature and date
164 lines, and the staff attorney suggested that it also be added to the end of line 14a. He said that
165 many pro se debtors to whom line 14a applies fail to see the instruction under the signature and
166 date and, as a result, unnecessarily spend time and effort completing Official Form 122A-2
167 (Chapter 7 Means Test Calculation).

168 The Advisory Committee agreed that the form should be amended as suggested. The
169 current form was revised as part of the Forms Modernization Project in 2015. One of the main
170 purposes of the project was to make the forms easier to understand, including by pro se parties.
171 Amending line 14a as suggested would make that instruction parallel to the instruction on line 14b.
172 Line 14b says to fill out Form 122A-2 under the described circumstances. The form also includes
173 a similar statement after the signature and date. Likewise, the equivalent form for chapter 13—
174 Official Form 122C-1 (Chapter 13 Statement of Your Current Monthly and Calculation of
175 Commitment Period)—includes an instruction not to fill out Form 122C-2 both at line 17a and
176 after the signature and date. Adding to line 14a the statement not to fill out and file Form 122A-2
177 would add clarity to the form.

178 Because of the technical nature of the proposed amendment, the Advisory Committee
179 requests that it be approved without publication.

* * * * *

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

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

2 * * * * *

3 **(b) Notice of the Deposition; Other Formal**
4 **Requirements.**

5 * * * * *

6 **(6) *Notice or Subpoena Directed to an***

7 ***Organization.*** In its notice or subpoena, a party
8 may name as the deponent a public or private
9 corporation, a partnership, an association, a
10 governmental agency, or other entity and must
11 describe with reasonable particularity the matters
12 for examination. The named organization must
13 ~~then~~ designate one or more officers, directors, or
14 managing agents, or designate other persons who
15 consent to testify on its behalf; and it may set out

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

16 the matters on which each person designated will
17 testify. Before or promptly after the notice or
18 subpoena is served, the serving party and the
19 organization must confer in good faith about the
20 matters for examination. A subpoena must advise
21 a nonparty organization of its duty ~~to make this~~
22 ~~designation.~~ to confer with the serving party and
23 to designate each person who will testify. The
24 persons designated must testify about
25 information known or reasonably available to the
26 organization. This paragraph (6) does not
27 preclude a deposition by any other procedure
28 allowed by these rules.

29 * * * * *

Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or

subpoena is served about the matters for examination. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about the purposes of the deposition and the organization's information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In

appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).

Excerpt from the June 4, 2019 Report of the Advisory Committee on Civil Rules

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: June 4, 2019

Introduction

The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2-3, 2019.

* * * * *

The Committee has two action items to report. The first is a recommendation for adoption of an amendment of Civil Rule 30(b)(6) that simplifies the proposal published for comment in August 2018.

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16 **I. Action Items**

17 **A. For Final Approval: Rule 30(b)(6)**

18 The Rule 30(b)(6) amendment proposal published for public comment drew much attention.
19 Twenty-five witnesses appeared at the hearing in Phoenix and 55 at the hearing in Washington, DC.
20 Some 1780 written comments were submitted, about 1500 of them during the last week of public
21 comment. Summaries of the testimony and those written comments are included at Appendix A.

22 Having reviewed the public commentary and received the Subcommittee’s report and
23 recommendation, the Advisory Committee is bringing forward a modified version of the preliminary
24 draft amendments with the recommendation that it be forwarded to the Judicial Conference for
25 adoption. The Committee has concluded that an amendment requiring in all cases what many
26 commenters affirmed was best practice – conferring about the matters for examination in order to
27 improve the focus of the examination and preparation of the witness – would improve the rule.

28 The Advisory Committee also considered an alternative of proposing publication for public
29 comment of a revised amendment that would require the organization to identify the designated
30 witness or witnesses a specified time before the deposition, and also add a 30-day notice requirement
31 for 30(b)(6) depositions. It was agreed that any such revised proposal would require re-publication
32 and public comment. The importance of such additional disclosure and the risks that the information
33 might be misused were addressed. It was noted that good lawyers who testified during the hearings
34 said that they often would agree to identify their witness or witnesses in advance when confident that
35 this information would not be misused, but that several emphasized also that there were cases in
36 which they would not provide advance identification. Advisory Committee members expressed
37 uneasiness about overriding those decisions not to identify witnesses in advance. After extensive
38 discussion described in the minutes of its meeting, the Committee decided not to propose that the
39 Standing Committee direct publication of this alternative.

40 At the end of this section of the report are a version of the published preliminary draft
41 showing the changes made after public comment as well as a “clean” version of the amended rule
42 and Committee Note. This report explains the changes made to the proposal after the public
43 comment period.

44 Deleting the requirement to confer about witness identity: Very strong opposition to this
45 directive was expressed by many witnesses and in many comments. Witnesses emphasized that the
46 case law strongly supports the unilateral right of the organization to choose its witness, and asserted

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47 that the requirement that the organization confer in “good faith” would undercut that case law.
48 Although the Committee Note said that the choice of the witness remained the sole prerogative of
49 the organization, that raised the question how it could then be the subject of a mandatory requirement
50 to confer in good faith.

51 It bears mention that there was limited public comment in favor of requiring the organization
52 to confer about witness identity from those who regularly use this rule to obtain information from
53 organizations. Some candidly acknowledged that they had no say in the organization’s choice of a
54 witness so long as the person selected was properly prepared to address the matters for examination
55 on the 30(b)(6) list.

56 Deleting “continue as necessary”: The preliminary draft directed that the conference not only
57 be in good faith but also that it “continue as necessary.” To a large extent, that provision was
58 included because the draft directed the parties to confer about the identity of the witness. Very often
59 the organization could not be expected to settle on a specific person to testify without first having
60 obtained a clear understanding of what matters were to be addressed. So there was a need for a rule
61 provision emphasizing that the amendment requires an iterative interaction in most instances. But
62 that need has lessened with deletion of the requirement to confer on witness identity.

63 Removal of this provision is not meant to say that the parties need never engage in an
64 iterative exchange about the matters for examination. Indeed, even though the conference is now
65 limited to the matters for examination it will often be fruitful for the parties to touch base more than
66 once with regard to the kinds of information available and the burdens of obtaining it. The revised
67 Committee Note makes this point.

68 Deleting the directive to confer about the “number and description of” the matters for
69 examination: The Advisory Committee did not propose adding to the rule a numerical limitation on
70 matters for examination, though it was urged to do so. But the preliminary draft did direct the parties
71 to discuss “the number” of matters.

72 The directive to discuss the number of matters in addition to conferring about the matters
73 themselves drew strong objections during the public comment period. The right focus, many said,
74 was on the matters themselves. Discussing an abstract number did not serve a productive purpose.
75 To the extent it might result in some sort of numerical limit, it might also encourage broader
76 descriptions so that the list of matters would be shorter. That seems out of step with both the
77 particularity direction in the rule and with a requirement to confer that is designed in significant part
78 to improve the focus of the listed matters and ensure that the organization understands exactly what
79 the noticing party is trying to find out. The Committee recommends removing “number of” from the
80 conference requirement.

81 The addition of the words “description of” seemed unnecessary; the basic objective ought
82 to be to confer about and refine the matters for examination.

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83 Adding a reference to Rule 31(a)(4) depositions to the Committee Note. Rule 31(a)(4)
84 authorizes a deposition by written questions of an organization “in accordance with Rule 30(b)(6).”
85 It also requires that the noticing party’s questions and any questions any other parties wish the officer
86 to pose to the witness be served in advance. Although it has repeatedly been told about problems
87 with Rule 30(b)(6) depositions, the Advisory Committee has not been advised that there have been
88 any problems with this mode of obtaining testimony from organizations. And the advance exchange
89 of all questions to be asked would make a conference about the matters for examination superfluous.
90 Accordingly, a paragraph has been added at the end of the Committee Note to explain that the
91 conference requirement does not apply to a deposition under Rule 31(a)(4).

92 GAP Report: Having received public comment, the Advisory Committee
93 recommends that the proposed requirement to confer about witness identity be
94 removed, that the direction that the parties' conference “continue as necessary” be
95 deleted, and that the directive that the parties confer about the “number and
96 description of” the matters for examination be deleted, with the amendment requiring
97 only that the parties confer about the matters for examination.

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98 AMENDMENT PROPOSED TO BE FORWARDED TO JUDICIAL CONFERENCE

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

100 * * * * *

101 (b) NOTICE OF THE DEPOSITION;
102 OTHER FORMAL REQUIREMENTS

103 * * * * *

104 (6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party
105 may name as the deponent a public or private corporation, a partnership, an
106 association, a governmental agency, or other entity and must describe with reasonable
107 particularity the matters for examination. The named organization must ~~then~~
108 designate one or more officers, directors, or managing agents, or designate other
109 persons who consent to testify on its behalf; and it may set out the matters on which
110 each person designated will testify. Before or promptly after the notice or subpoena
111 is served, and continuing as necessary, the serving party and the organization must
112 confer in good faith about the number and description of the matters for examination
113 and the identity of each person the organization will designate to testify. A subpoena
114 must advise a nonparty organization of its duty ~~to make this designation and to confer~~
115 with the serving party and to designate each person who will testify. The persons
116 designated must testify about information known or reasonably available to the
117 organization. This paragraph (6) does not preclude a deposition by any other
118 procedure allowed by these rules.

119 * * * * *

120 DRAFT COMMITTEE NOTE

121 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
122 Particular concerns raised have included overlong or ambiguously worded lists of matters for
123 examination and inadequately prepared witnesses. This amendment directs the serving party and the
124 named organization to confer before or promptly after the notice or subpoena is served, ~~and to~~
125 ~~continue conferring as necessary, regarding about~~ the number and description of matters for
126 examination ~~and the identity of persons who will testify.~~ At the same time, it may be productive to
127 ~~discuss other matters, such as having the serving party identify in advance of the deposition the~~
128 ~~documents it intends to use during the deposition, thereby facilitating deposition preparation.~~ The
129 amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to
130 designate each person who will ~~one or more witnesses to~~ testify. It facilitates collaborative efforts
131 to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

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132 Candid exchanges about the purposes of the deposition and the discovery goals and
133 organization's information structure may clarify and focus the matters for examination, and enable
134 the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding
135 later disagreements reduce the difficulty of identifying the right person to testify and the materials
136 needed to prepare that person. Discussion of the number and description of topics may avoid
137 unnecessary burdens. Although the named organization ultimately has the right to select its
138 designees, discussion about the identity of persons to be designated to testify may avoid later
139 disputes. It may be productive also to discuss "process" issues, such as the timing and location of
140 the deposition, the number of witnesses and the matters on which each witness will testify, and any
141 other issue that might facilitate the efficiency and productivity of the deposition.

142 The amended rule directs that the parties confer either before or promptly after the notice or
143 subpoena is served. If they begin to confer before service, the discussion may be more productive
144 if the serving party provides a draft of the proposed list of matters for examination, which may then
145 be refined as the parties confer. ~~The rule recognizes that the process of conferring may will often be~~
146 ~~iterative, and that a single conference may not suffice. For example, the organization may be in a~~
147 ~~position to discuss the identity of the person or persons to testify only after the matters for~~
148 ~~examination have been delineated. Consistent with Rule 1, t~~The obligation is to confer in good faith
149 about the matters for examination, consistent with Rule 1, and but the amendment does not require
150 the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the
151 court. The duty to confer continues if needed to fulfill the requirement of good faith. But the
152 conference process must be completed a reasonable time before the deposition is scheduled to occur.

153 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
154 conference may provide an occasion for beginning discussion of these topics. In appropriate cases,
155 it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan
156 submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference
157 under Rule 16.

158 Because a Rule 31 deposition relies on written questions rather than a description with
159 reasonable particularity of the matters for examination, the duty to confer about the matters for
160 examination does not apply when an organization is deposed under Rule 31(a)(4).

161 “Clean” Version

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

163 * * * * *

164
165 (b) NOTICE OF THE DEPOSITION;
166 OTHER FORMAL REQUIREMENTS

167 * * * * *

168 (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party
169 may name as the deponent a public or private corporation, a partnership, an
170 association, a governmental agency, or other entity and must describe with reasonable
171 particularity the matters for examination. The named organization must designate
172 one or more officers, directors, or managing agents, or designate other persons who
173 consent to testify on its behalf; and it may set out the matters on which each person
174 designated will testify. Before or promptly after the notice or subpoena is served, the
175 serving party and the organization must confer in good faith about the matters for
176 examination. A subpoena must advise a nonparty organization of its duty to confer
177 with the serving party and to designate each person who will testify. The persons
178 designated must testify about information known or reasonably available to the
179 organization. This paragraph (6) does not preclude a deposition by any other
180 procedure allowed by these rules.

181 * * * * *

182 DRAFT COMMITTEE NOTE

183 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
184 Particular concerns raised have included overlong or ambiguously worded lists of matters for
185 examination and inadequately prepared witnesses. This amendment directs the serving party and the
186 named organization to confer before or promptly after the notice or subpoena is served about the
187 matters for examination. The amendment also requires that a subpoena notify a nonparty
188 organization of its duty to confer and to designate each person who will testify. It facilitates
189 collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and
190 26(b)(1).

191 Candid exchanges about the purposes of the deposition and the organization’s information
192 structure may clarify and focus the matters for examination, and enable the organization to designate
193 and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be
194 productive also to discuss “process” issues, such as the timing and location of the deposition, the

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195 number of witnesses and the matters on which each witness will testify, and any other issue that
196 might facilitate the efficiency and productivity of the deposition.

197 The amended rule directs that the parties confer either before or promptly after the notice or
198 subpoena is served. If they begin to confer before service, the discussion may be more productive
199 if the serving party provides a draft of the proposed list of matters for examination, which may then
200 be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1,
201 the obligation is to confer in good faith about the matters for examination, but the amendment does
202 not require the parties to reach agreement. In some circumstances, it may be desirable to seek
203 guidance from the court.

204 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
205 conference may provide an occasion for beginning discussion of these topics. In appropriate cases,
206 it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan
207 submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference
208 under Rule 16.

209 Because a Rule 31 deposition relies on written questions rather than a description with
210 reasonable particularity of the matters for examination, the duty to confer about the matters for
211 examination does not apply when an organization is deposed under Rule 31(a)(4).

* * * * *

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 404. Character Evidence; Other Crimes, Wrongs**
2 **or ~~Other~~ Acts**

3 * * * * *

4 **(b) Other Crimes, Wrongs, or ~~Other~~ Acts.**

5 (1) *Prohibited Uses.* Evidence of a any other crime,
6 wrong, or ~~other~~ act is not admissible to prove a
7 person's character in order to show that on a
8 particular occasion the person acted in accordance
9 with the character.

10 (2) *Permitted Uses; ~~Notice in a Criminal Case.~~* This
11 evidence may be admissible for another purpose,
12 such as proving motive, opportunity, intent,
13 preparation, plan, knowledge, identity, absence of
14 mistake, or lack of accident. ~~On request by a~~
15 ~~defendant in a criminal case, the prosecutor must:~~

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

- 16 **(3) Notice in a Criminal Case.** In a criminal case, the
17 prosecutor must:
- 18 **(A)** provide reasonable notice ~~of the general~~
19 ~~nature~~ of any such evidence that the
20 prosecutor intends to offer at trial, so that
21 the defendant has a fair opportunity to meet
22 it; and
- 23 **(B)** articulate in the notice the permitted
24 purpose for which the prosecutor intends to
25 offer the evidence and the reasoning that
26 supports the purpose; and
- 27 **(C)** do so in writing before trial— or in any
28 form during trial if the court, for good
29 cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.
- The pretrial notice must be in writing—which requirement 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.
- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When

notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See, e.g., United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.
- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided

when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Excerpt from the May 30, 2019 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

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CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 30, 2019

1 **I. Introduction**

2 The Advisory Committee on Evidence Rules (the “Committee”) met on May 3, 2019, in
3 Washington, D.C.

* * * * *

4 The Committee made the following determinations at the meeting:

- 5 ● It unanimously approved the proposed amendment to Rule 404(b) and is
6 submitting it to the Standing Committee for final approval.

* * * * *

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7 **II. Action Item**

8 **A. Proposed Amendment to Rule 404(b), for Final Approval**

9 The Committee has been monitoring significant developments in the case law on Rule
10 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have
11 suggested that the rule needs to be more carefully applied and have set forth criteria for that more
12 careful application. The focus has been on three areas:

13 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the
14 bad act evidence proves that purpose without relying on a propensity inference.

15 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the
16 defendant has not actively contested those elements.

17 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not
18 covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the
19 charged crime.

20 Over several meetings, the Committee considered a number of textual changes to address
21 these case law developments. At its April, 2018 meeting the Committee determined that it would
22 not propose substantive amendments to Rule 404(b) to accord with the developing case law,
23 because they would make the Rule more complex without rendering substantial improvement.
24 Thus, any attempt to define “inextricably intertwined” is unlikely to do any better than the courts
25 are already doing, because each case is fact-sensitive, and line-drawing between “other” acts and
26 acts charged will always be indeterminate. Further, any attempt to codify an “active dispute” raises
27 questions about how “active” a dispute would have to be, and is a matter better addressed by
28 balancing probative value and prejudicial effect. Finally, an attempt to require the court to establish
29 the probative value of a bad act by a chain of inferences that did not involve propensity would add
30 substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a
31 proper purpose but is nonetheless bound up with a propensity inference --- an example would be
32 use of the well-known “doctrine of chances” to prove the unlikelihood that two unusual acts could
33 have both been accidental.

34 The Committee also considered a proposal to provide a more protective balancing test for
35 bad acts offered against defendants in criminal cases: that the probative value must outweigh the
36 prejudicial effect. While this proposal would have the virtue of flexibility and would rely on the
37 traditional discretion that courts have in this area, the Committee determined that it would result
38 in too much exclusion of important, probative evidence.

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39 The Committee did recognize, however, that important protection for defendants in
40 criminal cases could be promoted by expanding the prosecutor’s notice obligations under Rule
41 404(b). The Department of Justice proffered language that would require the prosecutor to
42 “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the
43 evidence and the reasoning that supports the purpose.” In addition, the Committee determined that
44 the current requirement that the prosecutor must disclose only the “general nature” of the bad act
45 should be deleted, in light of the prosecution’s expanded notice obligations under the DOJ
46 proposal. And the Committee easily determined that the existing requirement that the defendant
47 request notice was an unnecessary impediment and should be deleted.

48 Finally, the Committee determined that the restyled phrase “crimes, wrongs, or other acts”
49 should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that
50 Rule 404(b) applies to other acts and not the acts charged.

51 The proposal to amend Rule 404(b), focusing mainly on a fortified notice requirement in
52 criminal cases, was released for public comment in August, 2018. The public comment was sparse,
53 but largely affirmative. At its May, 2019 meeting, the Committee considered the public comments,
54 as well as comments made at the Standing Committee meeting of June, 2018. The Committee
55 made minor changes to the proposal as issued for public comment --- the most important change
56 being that the term “non-propensity purpose” in the text was changed to “permitted purpose.”

57 ***The Committee unanimously approved proposed amendments to the notice provision of***
58 ***Rule 404(b), and the textual clarification of “other” crimes, wrongs, or acts. The Committee***
59 ***recommends that these proposed changes, and the accompanying Committee Note, be approved***
60 ***by the Standing Committee and referred to the Judicial Conference.***

* * * * *