

**COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE**

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

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TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

DATE: May 13, 2008

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 10 and 11 in Monterey, California. The Committee gave final approval to the package of time-computation amendments, to one new rule, and to three other proposed amendments. The Committee approved for publication three proposed amendments, and removed two items from its study agenda.

Part II.A of this report discusses the proposals for which the Committee seeks final approval: the time-computation amendments, proposed new Rule 12.1, and amendments to Rules 26(c), 4(a)(4)(B)(ii) and 22. Part II.B. discusses the Committee's requests to publish for comment proposed amendments to Form 4, Rule 1, and Rule 29. Part III covers other matters.

The Committee has tentatively scheduled its next meeting for November 13 and 14, 2008.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting¹ and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking final approval of the time-computation amendments and of four other items. The Committee is seeking approval for publication of three items.

¹ These minutes have not yet been approved by the Committee.

A. Items for Final Approval

1. Time-Computation Amendments

a. Introduction

The Committee proposes to amend Rule 26(a) to implement the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods.

To offset the change in the method of computing short time periods, the Committee proposes to amend time periods contained in the Appellate Rules. The changes can be summarized as follows. References to "calendar days" in Rules 25, 26 and 41 become simply references to "days." Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 28 days to correspond with proposed changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

The Committee also compiled a short list of appeal-related statutory time periods that the Committee recommends including among the periods that Congress will be asked to amend. The Committee's recommendations are as follows:

- The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days.
 - This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B).
- The "not less than 7" day period in 28 U.S.C. § 1453(c)(1) should be changed to "not more than 10" days.
 - This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method.

- The four-day deadlines in the Classified Information Procedures Act (“CIPA”) § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.
 - CIPA § 7(b) sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to those in CIPA § 7(b)) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations.
 - Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee.
- The 10-day mandamus petition deadline in the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771(d)(5), should be extended to 14 days.
 - 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim’s mandamus petition and a 5-day limit on continuances in the district court.
 - The Committee does not recommend any changes to the 72-hour or 5-day periods in the CVRA.

b. Text of Proposed Amendments and Committee Notes

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

Rule 26. Computing and Extending Time

- 1 **(a) Computing Time.** ~~The following rules apply in~~
 2 ~~computing any period of time specified in these rules or~~
 3 ~~in any local rule, court order, or applicable statute:~~

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

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4 ~~— (1) Exclude the day of the act, event, or default that~~
5 ~~begins the period.~~

6 ~~— (2) Exclude intermediate Saturdays, Sundays, and legal~~
7 ~~holidays when the period is less than 11 days, unless~~
8 ~~stated in calendar days.~~

9 ~~— (3) Include the last day of the period unless it is a~~
10 ~~Saturday, Sunday, legal holiday, or--if the act to be done~~
11 ~~is filing a paper in court--a day on which the weather or~~
12 ~~other conditions make the clerk's office inaccessible.~~

13 ~~— (4) As used in this rule, "legal holiday" means New~~
14 ~~Year's Day, Martin Luther King, Jr.'s Birthday,~~
15 ~~Washington's Birthday, Memorial Day, Independence~~
16 ~~Day, Labor Day, Columbus Day, Veterans' Day,~~
17 ~~Thanksgiving Day, Christmas Day, and any other day~~
18 ~~declared a holiday by the President, Congress, or the~~
19 ~~state in which is located either the district court that~~
20 ~~rendered the challenged judgment or order, or the circuit~~
21 ~~clerk's principal office. The following rules apply in~~
22 ~~computing any time period specified in these rules, in~~
23 ~~any local rule or court order, or in any statute that does~~
24 ~~not specify a method of computing time.~~

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- 25 (1) *Period Stated in Days or a Longer Unit.* When
26 the period is stated in days or a longer unit of time:
27 (A) exclude the day of the event that triggers the
28 period;
29 (B) count every day, including intermediate
30 Saturdays, Sundays, and legal holidays; and
31 (C) include the last day of the period, but if the
32 last day is a Saturday, Sunday, or legal
33 holiday, the period continues to run until the
34 end of the next day that is not a Saturday,
35 Sunday, or legal holiday.
- 36 (2) *Period Stated in Hours.* When the period is stated
37 in hours:
38 (A) begin counting immediately on the
39 occurrence of the event that triggers the
40 period;
41 (B) count every hour, including hours during
42 intermediate Saturdays, Sundays, and legal
43 holidays; and
44 (C) if the period would end on a Saturday,
45 Sunday, or legal holiday, the period continues

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46 to run until the same time on the next day that

47 is not a Saturday, Sunday, or legal holiday.

48 (3) *Inaccessibility of the Clerk's Office.* Unless the

49 court orders otherwise, if the clerk's office is

50 inaccessible:

51 (A) on the last day for filing under Rule 26(a)(1),

52 then the time for filing is extended to the first

53 accessible day that is not a Saturday, Sunday,

54 or legal holiday; or

55 (B) during the last hour for filing under Rule

56 26(a)(2), then the time for filing is extended

57 to the same time on the first accessible day

58 that is not a Saturday, Sunday, or legal

59 holiday.

60 (4) *"Last Day" Defined.* Unless a different time is set

61 by a statute, local rule, or court order, the last day

62 ends:

63 (A) for electronic filing in the district court, at

64 midnight in the court's time zone;

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65 (B) for electronic filing in the court of appeals, at
66 midnight in the time zone of the circuit
67 clerk's principal office;

68 (C) for filing under Rules 4(c)(1), 25(a)(2)(B),
69 and 25(a)(2)(C) – and filing by mail under
70 Rule 13(b) – at the latest time for the method
71 chosen for delivery to the post office,
72 third-party commercial carrier, or prison
73 mailing system; and

74 (D) for filing by other means, when the clerk's
75 office is scheduled to close.

76 (5) “Next Day” Defined. The “next day” is
77 determined by continuing to count forward when
78 the period is measured after an event and backward
79 when measured before an event.

80 (6) “Legal Holiday” Defined. “Legal holiday” means:

81 (A) the day set aside by statute for observing New
82 Year's Day, Martin Luther King Jr.'s
83 Birthday, Washington's Birthday, Memorial
84 Day, Independence Day, Labor Day,

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85 Columbus Day, Veterans' Day, Thanksgiving
86 Day, or Christmas Day; and
87 (B) any other day declared a holiday by the
88 President, Congress, or the state in which is
89 located either the district court that rendered
90 the challenged judgment or order, or the
91 circuit clerk's principal office.

92 * * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

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Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 20 U.S.C. § 7711(b)(1) (requiring certain petitions for review by a local educational agency or a state to be filed “within 30 working days (as determined by the local educational agency or State) after receiving notice of” federal agency decision).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology

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is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 5(b)(2), 5(d)(1), 28.1(f), & 31(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday,

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November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g., Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf. William G. Phelps, When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise under subdivision

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(a)(4)(A) if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” A corresponding provision exists in Rule 45(a)(2). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(4)(A) addresses electronic filings in the district court. For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals.

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the “last day” ends at the latest time (prior to midnight in the filer's time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable) using the filer's chosen method of submission. For example, if a correctional institution's legal mail system's rules of operation provide that items may only be placed in the mail system between 9:00 a.m. and 5:00 p.m., then the “last day” for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5:00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the “last day” ends at the time of that drop box's last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk's office in which the filing is made is scheduled to close.

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Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed “within 30 days after the judgment or order appealed from is entered”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) (“[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk’s office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday—no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are “declared a holiday by the President.” For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that “[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001”). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays.

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- 20 (v) for a new trial under Rule 59; or
21 (vi) for relief under Rule 60 if the motion is
22 filed no later than ~~10~~ 28 days after the
23 judgment is entered.

24 * * * * *

25 **(5) Motion for Extension of Time.**

26 * * * * *

- 27 (C) No extension under this Rule 4(a)(5)
28 may exceed 30 days after the prescribed
29 time or ~~10~~ 14 days after the date when
30 the order granting the motion is entered,
31 whichever is later.

- 32 **(6) Reopening the Time to File an Appeal.** The
33 district court may reopen the time to file an
34 appeal for a period of 14 days after the date
35 when its order to reopen is entered, but only
36 if all the following conditions are satisfied:

37 * * * * *

- 38 (B) the motion is filed within 180 days after
39 the judgment or order is entered or
40 within ~~7~~ 14 days after the moving party

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41 receives notice under Federal Rule of
42 Civil Procedure 77(d) of the entry,
43 whichever is earlier; and

44 * * * * *

45 **(b) Appeal in a Criminal Case.**

46 **(1) Time for Filing a Notice of Appeal.**

47 (A) In a criminal case, a defendant's notice
48 of appeal must be filed in the district
49 court within ~~10~~ 14 days after the later
50 of:

51 (i) the entry of either the judgment or
52 the order being appealed; or

53 (ii) the filing of the government's
54 notice of appeal.

55 * * * * *

56 **(3) Effect of a Motion on a Notice of Appeal.**

57 (A) If a defendant timely makes any of the
58 following motions under the Federal Rules of
59 Criminal Procedure, the notice of appeal from
60 a judgment of conviction must be filed within
61 ~~10~~ 14 days after the entry of the order

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62 disposing of the last such remaining motion,
63 or within ~~10~~ 14 days after the entry of the
64 judgment of conviction, whichever period
65 ends later. This provision applies to a timely
66 motion:

- 67 (i) for judgment of acquittal under Rule 29;
68 (ii) for a new trial under Rule 33, but if
69 based on newly discovered evidence,
70 only if the motion is made no later than
71 ~~10~~ 14 days after the entry of the
72 judgment; or
73 (iii) for arrest of judgment under Rule 34.

74 * * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 28-day limit to match the revisions to the time limits in the Civil Rules.

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Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), “7 days” always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 5. Appeal by Permission

1

* * * * *

2

(b) Contents of the Petition; Answer or Cross-Petition;

3

Oral Argument.

4

* * * * *

5

(2) A party may file an answer in opposition or a

6

cross-petition within ~~7~~ 10 days after the petition is

7

served.

8

* * * * *

9

(d) Grant of Permission; Fees; Cost Bond; Filing the

10

Record.

11

(1) Within ~~10~~ 14 days after the entry of the order

12

granting permission to appeal, the appellant must:

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13 (A) pay the district clerk all required fees; and

14 (B) file a cost bond if required under Rule 7.

15 * * * * *

Committee Note

Subdivision (b)(2). Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Subdivision (d)(1). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

1 * * * * *

2 (b) Appeal From a Judgment, Order, or Decree of a
3 District Court or Bankruptcy Appellate Panel
4 Exercising Appellate Jurisdiction in a Bankruptcy
5 Case.

6 * * * * *

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7 (2) **Additional Rules.** In addition to the rules made
8 applicable by Rule 6(b)(1), the following rules
9 apply:

10 * * * * *

11 **(B) The record on appeal.**

12 (i) Within ~~10~~ 14 days after filing the notice
13 of appeal, the appellant must file with
14 the clerk possessing the record
15 assembled in accordance with
16 Bankruptcy Rule 8006 — and serve on
17 the appellee — a statement of the issues
18 to be presented on appeal and a
19 designation of the record to be certified
20 and sent to the circuit clerk.

21 (ii) An appellee who believes that other
22 parts of the record are necessary must,
23 within ~~10~~ 14 days after being served
24 with the appellant’s designation, file
25 with the clerk and serve on the appellant
26 a designation of additional parts to be
27 included.

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28

* * * * *

Committee Note

Subdivision (b)(2)(B). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 10. The Record on Appeal

1

* * * * *

2

(b) The Transcript of Proceedings.

3

(1) Appellant's Duty to Order. Within ~~10~~ 14 days

4

after filing the notice of appeal or entry of an order

5

disposing of the last timely remaining motion of a

6

type specified in Rule 4(a)(4)(A), whichever is

7

later, the appellant must do either of the following:

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* * * * *

9

(3) Partial Transcript. Unless the entire transcript is

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ordered:

11

(A) the appellant must — within the ~~10~~ 14 days

12

provided in Rule 10(b)(1) — file a statement

13

of the issues that the appellant intends to

14

present on the appeal and must serve on the

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15 appellee a copy of both the order or
16 certificate and the statement;

17 (B) if the appellee considers it necessary to have
18 a transcript of other parts of the proceedings,
19 the appellee must, within ~~10~~ 14 days after the
20 service of the order or certificate and the
21 statement of the issues, file and serve on the
22 appellant a designation of additional parts to
23 be ordered; and

24 (C) unless within ~~10~~ 14 days after service of that
25 designation the appellant has ordered all such
26 parts, and has so notified the appellee, the
27 appellee may within the following ~~10~~ 14 days
28 either order the parts or move in the district
29 court for an order requiring the appellant to
30 do so.

31 * * * * *

32 (c) **Statement of the Evidence When the Proceedings**
33 **Were Not Recorded or When a Transcript Is**
34 **Unavailable.** If the transcript of a hearing or trial is
35 unavailable, the appellant may prepare a statement of the

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36 evidence or proceedings from the best available means,
37 including the appellant's recollection. The statement
38 must be served on the appellee, who may serve
39 objections or proposed amendments within ~~10~~ 14 days
40 after being served. The statement and any objections or
41 proposed amendments must then be submitted to the
42 district court for settlement and approval. As settled and
43 approved, the statement must be included by the district
44 clerk in the record on appeal.

45 * * * * *

Committee Note

Subdivisions (b)(1), (b)(3) and (c). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

1 * * * * *

2 **(b) Filing a Representation Statement.** Unless the court
3 of appeals designates another time, the attorney who
4 filed the notice of appeal must, within ~~10~~ 14 days after

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5 filing the notice, file a statement with the circuit clerk
6 naming the parties that the attorney represents on appeal.

7 * * * * *

Committee Note

Subdivision (b). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

1 * * * * *

2 **(b) Application or Cross-Application to Enforce an**
3 **Order; Answer; Default.**

4 * * * * *

5 (2) Within ~~20~~ 21 days after the application for
6 enforcement is filed, the respondent must serve on
7 the applicant an answer to the application and file
8 it with the clerk. If the respondent fails to answer
9 in time, the court will enter judgment for the relief
10 requested.

11 * * * * *

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Committee Note

Subdivision (b)(2). The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

1 When the court files an opinion directing entry of
2 judgment enforcing the agency's order in part, the agency
3 must within 14 days file with the clerk and serve on each
4 other party a proposed judgment conforming to the opinion.
5 A party who disagrees with the agency's proposed judgment
6 must within ~~7~~ 10 days file with the clerk and serve the agency
7 with a proposed judgment that the party believes conforms to
8 the opinion. The court will settle the judgment and direct
9 entry without further hearing or argument.

Committee Note

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

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Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term “calendar days.” Rule 26(a) now takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period. Accordingly, “3 calendar days” in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply “3 days.”

Rule 26. Computing and Extending Time

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* * * * *

2

(c) Additional Time after Service. When a party is required

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or permitted to act within a prescribed period after a paper is

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served on that party, 3 ~~calendar~~ days are added to the

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prescribed period unless the paper is delivered on the date of

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service stated in the proof of service. For purposes of this

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Rule 26(c), a paper that is served electronically is not treated

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as delivered on the date of service stated in the proof of

9

service.

Committee Note

Subdivision (c). To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules formerly used the term “calendar days.” Because new subdivision (a) takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period, “3 calendar days” in subdivision (c) is amended to read simply “3 days.”

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Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) formerly required that a response to a motion be filed “within 8 days after service of the motion unless the court shortens or extends the time.” Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

Subdivision (a)(4). Subdivision (a)(4) formerly required that a reply to a response be filed “within 5 days after service of the response.” Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

Rule 28.1. Cross-Appeals

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* * * * *

2 **(f) Time to Serve and File a Brief.** Briefs must be served

3 and filed as follows:

4

* * * * *

5 (4) the appellee’s reply brief, within 14 days after the

6 appellant’s response and reply brief is served, but

7 at least 3 7 days before argument unless the court,

8 for good cause, allows a later filing.

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Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee’s reply brief be served “at least 3 days before argument unless the court, for good cause, allows a later filing.” Under former Rule 26(a), “3 days” could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing “3 days” to “7 days” alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

Rule 30. Appendix to the Briefs

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(b) All Parties’ Responsibilities.

(1) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the

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14 court's attention. The appellant must include the
15 designated parts in the appendix. The parties must
16 not engage in unnecessary designation of parts of
17 the record, because the entire record is available to
18 the court. This paragraph applies also to a
19 cross-appellant and a cross-appellee.

20 * * * * *

Committee Note

Subdivision (b)(1). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 31. Serving and Filing Briefs

1 **(a) Time to Serve and File a Brief.**

2 (1) The appellant must serve and file a brief within 40
3 days after the record is filed. The appellee must
4 serve and file a brief within 30 days after the
5 appellant's brief is served. The appellant may serve
6 and file a reply brief within 14 days after service of
7 the appellee's brief but a reply brief must be filed
8 at least 3 7 days before argument, unless the court,
9 for good cause, allows a later filing.

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* * * * *

Committee Note

Subdivision (a)(1). Subdivision (a)(1) formerly required that the appellant’s reply brief be served “at least 3 days before argument, unless the court, for good cause, allows a later filing.” Under former Rule 26(a), “3 days” could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing “3 days” to “7 days” alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

Rule 39. Costs

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(d) Bill of Costs: Objections; Insertion in Mandate.

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(2) Objections must be filed within ~~10~~ 14 days after

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service of the bill of costs, unless the court extends

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the time.

7

* * * * *

Committee Note

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

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* * * * *

(b) When Issued. The court’s mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term “calendar days.” Rule 26(a) now takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period. Accordingly, “7 calendar days” in subdivision (b) is amended to read simply “7 days.”

c. Changes Made After Publication and Comment

The Committee made only one change to Rule 26(a) after publication and comment: Because the Committee is seeking permission to publish for comment a proposed new Rule 1(b) that would adopt a FRAP-wide definition of the term “state,” the Committee decided to delete from Rule 26(a)(6)(B) the following parenthetical sentence: “(In this rule, ‘state’ includes the District of Columbia and any United States commonwealth, territory, or possession.)” That change required the corresponding deletion – from the Note to Rule 26(a)(6) – of part of the final sentence (the deleted portion read “, and defines the term ‘state’ – for purposes of subdivision (a)(6) – to include

the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of 'legal holiday,' 'state' includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.”)

The Committee made one change to its proposed amendments concerning Appellate Rules deadlines. Based on comments received with respect to the timing for motions that toll the time for taking a civil appeal, the Committee changed the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days (rather than to 30 days as in the published proposal). The published proposal's choice of 30 days had been designed to accord with the proposed amendments published by the Civil Rules Committee, which would have extended the deadline for tolling motions to 30 days. Because 30 days is also the time period set by Appellate Rule 4 and by 28 U.S.C. § 2107 for taking a civil appeal (when the United States and its officers or agencies are not parties), commentators pointed out that adopting 30 days as the cutoff for filing tolling motions would sometimes place would-be appellants in an awkward position: If the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

By the time of the Appellate Rules Committee's April 2008 meeting, the Civil Rules Committee had discussed this issue and had determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem of the 30-day appeal deadline. As described in the draft minutes of the Committee's April meeting, Committee members carefully discussed the relevant concerns and determined, by a vote of 7 to 1, to assent to the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days.

d. Summary of Public Comments

The public comments concerning the time-computation project as a whole are discussed in the Time-Computation Subcommittee's report. I summarize here the comments that pertain specifically to the Appellate Rules deadlines proposals.

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that the 8-day response deadline in Rule 27(a)(3)(A) should be enlarged not to 10 days (the Committee's proposal) but “to a higher number, such as 12 or 14 calendar days.” He argues that under the new time-computation method an 8-day deadline will result in less total response time than currently exists. He notes that “[w]hile some appellate motions are quite simple and easy to respond to, other[] motions are major substantive motions that require a long time to properly respond [to].” As an alternative to

lengthening the deadline for all responses, he suggests that the Committee consider “provid[ing] different response times for substantive and procedural motions, such as 7 calendar days for procedural ones and 21 for substantive ones...”

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York (“EDNY Committee”). As noted in the Time-Computation memo, the EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that when a period is counted backward from a future event, one will be unable to get the benefit of the three-day rule’s extension (which of course is triggered only for periods that are counted forward from the service of papers). The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods such as Civil Rule 6(c)’s provision concerning motion papers; the EDNY Committee suggests substituting a provision modeled on the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York (which counts forward rather than backward).

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor. He supports the deletion of “calendar” from Rule 26(c). With respect to one or more of the time periods in Appellate Rule 4 that the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so that the period in question would be 21 days, “to assure even a more liberal time frame.”

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal.

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal Reform to urge that Rule 29(e)’s seven-day deadlines for amicus briefs be lengthened to 14 days.

Howard Bashman’s Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at <http://www.law.com/jsp/article.jsp?id=1201918759261>. Mr. Bashman’s main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman’s concern is that this will (1) prevent a potential appellant from

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8 the date of service stated in the proof of service. For
9 purposes of this Rule 26(c), a paper that is served
10 electronically is not treated as delivered on the date of
11 service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day rule. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day rule provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

* * * * *

c. Changes Made After Publication and Comment

No changes were made after publication and comment, except for the style changes (described below) which were suggested by Professor Kimble.

As noted below, public comments on the time-computation project have raised once again the possibility of altering or eliminating the three-day rule. The Appellate Rules Committee agrees that it is worthwhile to study this proposal, and the proposal has been added to the Committee's agenda.

d. Summary of Public Comments

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. In a comment concerning the time-computation proposals, Alex Luchenitser of Americans United for Separation of Church and State suggests that “the amended rules [should] clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules.”

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook asserts that the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. In connection with his comments on the time-computation proposals, Mr. Horsley suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. Specifically, Mr. Horsley suggests that Rule 26(c) be amended to read:

When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period extended to the next business day if the 3rd day falls on a holiday or non-business day or unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Style suggestions. Professor Kimble suggests capitalizing “after” in the subdivision heading; deleting “prescribed” from “prescribed period”; and placing a comma after “under Rule 26(a)”.

3. New Rule 12.1

a. Introduction

The Committee seeks final approval of proposed new Appellate Rule 12.1 concerning indicative rulings. This Rule was published for comment in August along with proposed Civil Rule 62.1. Both rules will formalize (and raise awareness concerning) the practice of indicative rulings.

b. Text of Proposed Amendment and Committee Note

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

**Rule 12.1. Remand After an Indicative Ruling by the
District Court on a Motion for Relief That Is Barred by a
Pending Appeal**

- 1 **(a) Notice to the Court of Appeals.** If a timely motion is
2 made in the district court for relief that it lacks authority
3 to grant because of an appeal that has been docketed and
4 is pending, the movant must promptly notify the circuit
5 clerk if the district court states either that it would grant
6 the motion or that the motion raises a substantial issue.
- 7 **(b) Remand After an Indicative Ruling.** If the district
8 court states that it would grant the motion or that the
9 motion raises a substantial issue, the court of appeals
10 may remand for further proceedings but retains
11 jurisdiction unless it expressly dismisses the appeal. If
12 the court of appeals remands but retains jurisdiction, the
13 parties must promptly notify the circuit clerk when the
14 district court has decided the motion on remand.

*New material is underlined.

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The “substantial issue” standard may be illustrated by the following hypothetical: The district court

FEDERAL RULES OF APPELLATE PROCEDURE

grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals

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may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

c. Changes Made After Publication and Comment

No changes were made to the text of Rule 12.1. Two changes to the Note were made in response to public comments. Additional changes were made in consultation with the Civil Rules Committee and in response to some Appellate Rules Committee members' suggestions.

As published for comment, the second paragraph of the Note read: “[Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).] The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.” The Committee discussed the Solicitor General's concern that Appellate Rule 12.1 might be misused in the criminal context. In response, the Committee deleted the second paragraph as published and substituted the following language: “The procedure formalized by Rule 12.1 is helpful when relief is sought from

an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).”

As published for comment, the first sentence of the Note’s last paragraph read: “When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court’s disposition of the motion.” In response to a suggestion by Public Citizen, the Committee revised this sentence to refer to a “new or amended” notice of appeal rather than a “separate” notice of appeal.

The Committee, in consultation with the Civil Rules Committee, added the following parenthetical at the end of the Note’s first paragraph: “(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)” This parenthetical is designed to forestall confusion concerning the effect of tolling motions on a district court’s power to act.

The Committee, acting at the suggestion of the Civil Rules Committee, altered the wording of one sentence in the first paragraph and one sentence in the fifth paragraph of the Note. The changes are designed to remove references to remands of “the action,” since those references would be in tension with the Note’s advice concerning the advisability of limited remands. Thus, in the Note’s first paragraph “if the action is remanded” became “if the court of appeals remands for that purpose,” and in the Note’s fifth paragraph “may ask the court of appeals to remand the action” became “may ask the court of appeals to remand.”

The Committee also made stylistic changes to the Note’s first and third paragraphs. “Experienced appeal lawyers” became “Experienced lawyers,” and “act in face of a pending appeal” became “act in the face of a pending appeal.”

d. Summary of Public Comments

Three comments were submitted concerning proposed new Appellate Rule 12.1. In addition, two other comments concern proposed new Civil Rule 62.1. In the interest of completeness, all five of those comments are summarized here.

07-AP-011: Public Citizen Litigation Group. Public Citizen suggests one substantive and one stylistic change in the text of proposed Rule 12.1, and also suggests a change in the Note.

The proposed substantive change to the text stems from Public Citizen’s concern that courts of appeals should be absolutely barred from dismissing an appeal (when remanding for an indicative ruling) unless the appellant expressly requests that the appeal be dismissed. To set such an absolute bar, Public Citizen suggests adding a new sentence to Rule 12.1(b). With their proposed addition, Rule 12.1(b) would read:

Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Public Citizen also suggests amending the Note’s observation that “[w]hen relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court’s disposition of the motion.” Public Citizen “believe[s] that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee.”

Finally, Public Citizen suggests that in Rule 12.1(a) “because of an appeal that has been docketed” should be changed to read “because an appeal has been docketed.”

07-AP-014: United States Solicitor General. Paul D. Clement writes in support of proposed Rule 12.1 but urges that the Note be amended. The Department of Justice is concerned about the potential breadth of Rule 12.1’s application. The DOJ has identified only three instances in the criminal context where the indicative-ruling procedure would “legitimately arise[],” and the DOJ worries that unless the Note restricts Rule 12.1’s application in the criminal context to those instances, the federal trial courts “will be swamped with inappropriate motions by prisoners acting *pro se* who do not understand the limited purposes for which indicative rulings are warranted.” Thus, the DOJ proposes that the first sentence of the Note’s second paragraph be deleted and the following sentence added in its place: “Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronin*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c).”

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association’s Rules and Practice Committee (“Seventh Circuit Bar Association”). He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One of the comments that resulted from this discussion is as follows: “It appear[s] that [Civil Rule 62.1 and Appellate Rule 12.1] are aimed primarily or

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to “a judgment altered or amended upon” a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that “[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.” After the restyling, subdivision (a)(4)(B)(ii) provided: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.”

One court has explained that the 1998 amendment introduced ambiguity into the Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to “a judgment altered or amended upon” a post-trial motion, and refers instead to “a judgment’s alteration or amendment” upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment’s alteration or amendment upon such a motion.

c. Changes Made After Publication and Comment

No changes were made to the proposal as published. Instead, the Committee has added the commentators' suggestions to its study agenda.

d. Summary of Public Comments

07-AP-009: Peder K. Batalden. Peder K. Batalden, an associate at Horvitz & Levy, LLP, argues that the proposed amendment “carries an unintended consequence.” He points out that the proposed amended Rule 4(a)(4)(B)(ii) “[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*” disposing of the last remaining tolling motion. He observes that this “poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order.” He points out that a district court may permit the prevailing party to submit a proposed amended judgment, may then allow the other party time to object, and thus may take more than 30 days between entering the order disposing of the tolling motion and entering the amended judgment. Mr. Batalden underscores his point by reporting that he “face[s] a comparable issue in a current case.”

Mr. Batalden suggests “delet[ing] entirely the language ‘or a judgment’s alteration or amendment upon such a motion’ from the amended rule.” He envisions that the effect of such a deletion would be as follows:

In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive.... [B]y operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

07-AP-011: Public Citizen Litigation Group. Public Citizen has “no quarrel with the proposed wording change.” But Public Citizen further suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that “the original notice of appeal serves as the appellant’s appeal from any order disposing of any post-trial motion.” Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead “is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk.” Thus, deleting the requirement that appellants file a new or amended notice

in order to challenge the disposition of a postjudgment motion “would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts.”

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association’s Rules and Practice Committee (“Seventh Circuit Bar Association”). He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. Participants in that discussion doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) “would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal.” Participants suggested amending Rule 4(a) “to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal.”

5. Rule 22(b)(1)

a. Introduction

The Committee seeks final approval of an amendment to Rule 22 that would conform the Appellate Rules to a change that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings Under 28 U.S.C. §§ 2254 or 2255. The Appellate Rules amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255.

b. Text of Proposed Amendment and Committee Note

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

1 **Rule 22. Habeas Corpus and Section 2255 Proceedings**

2 * * * * *

3 **(b) Certificate of Appealability.**

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

state why a certificate should not issue has been deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 now delineates the relevant requirement. Subdivision (b)(1) continues to require that the district clerk send the certificate and the statement of reasons for grant of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

c. Changes Made After Publication and Comment

No changes were made to Appellate Rule 22 after publication and comment, except for the style changes (described below) which were suggested by Professor Kimble. However, as detailed in the report of the Criminal Rules Committee, a number of changes have been made to the proposals concerning Rule 11 of the habeas and Section 2255 rules in response to public comment. At the Appellate Rules Committee meeting (which took place before the Criminal Rules Committee meeting), members discussed the version of the revised Rule 11 amendments that had been proposed by the writs subcommittee of the Criminal Rules Committee; the Appellate Rules Committee concluded that the revised version of the Rule 11 proposals would be compatible with the published version of the Appellate Rule 22(b) proposal. Thus, the Appellate Rules Committee gave final approval to the Rule 22(b) amendment, subject to Professor Kimble's style suggestions and contingent upon the approval by the Criminal Rules Committee of a corresponding amendment to Rule 11 of the habeas and Section 2255 rules.

d. Summary of Public Comments

A number of the public comments focused on the habeas / 2255 Rule 11 proposal rather than the Appellate Rule 22 proposal. In the interests of completeness, all comments on either Rule 11 or Rule 22 are summarized here.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Mr. Horsley states that the proposed amendment to Rule 22 "is well put as shown," and he "do[es] not suggest any changes."

07-AP-013; 07-CR-012: Massachusetts Attorney General. Martha Coakley, the Attorney General of Massachusetts, writes in opposition to both the Rule 11 proposal and the Rule 22 proposal. Ms. Coakley fears that these proposed amendments "would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal." The proposal would burden district judges, she argues, by requiring the district judge to assess whether a COA should issue under 28 U.S.C. § 2253(c) in *all cases*, rather than only those in which an appeal is ultimately taken. She also suggests that such a requirement – by producing some instances where the district judge issues a COA – might lead

some habeas petitioners to appeal when they would not otherwise have done so. And she notes that by requiring the district judge to make the COA determination “without any opportunity for input from petitioners or their counsel,” the proposal would eliminate the chance for petitioners to “narrow the claims on which they seek issuance of a certificate.” Ms. Coakley suggests that the goal of efficiency would be better served by stricter enforcement of Rule 22’s existing requirements, which she asserts are “rarely followed in practice.”

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal Reform to oppose the Rule 11 proposals. He states that “requiring judges entering adverse final orders to contemporaneously issue or deny a certificate of appealability deprives, possibly in an unconstitutional fashion, the parties of the opportunity to brief ... the issue.” He suggests that the Rule 11 proposals not be adopted, or alternatively that “the Court, before issue or denial of a certificate of appealability, first be required to permit the parties to show cause why a certificate of appealability should not issue.”

07-CR-005: Gene Vorobyov. Mr. Vorobyov, a criminal appellate practitioner who devotes a portion of his practice to handling § 2254 appeals in the Ninth Circuit, writes in opposition to the proposed amendment because he prefers the existing procedure under which the would-be appellant seeks a COA post-judgment. The time span that may elapse between the entry of judgment and the request for the COA benefits the judge, Mr. Vorobyov argues, by providing an opportunity to “look at [the case] with a fresh eye.” Moreover, he argues that this time span gives habeas petitioners an opportunity to research and “prepare a more effective argument” in favor of a COA, and that the petitioner may also use the time span to seek counsel. Mr. Vorobyov predicts that in a case in which the habeas petition is referred to a magistrate judge, and the magistrate judge’s report and recommendation recommends dismissal of the petition, the proposed procedure would be inefficient and unfair because the habeas petitioner would feel constrained to “make an anticipatory request for the COA [when filing objections to the report and recommendation] even though [the report and recommendation] may not be fully adopted by the district court.”

07-CR-010: Paul R. Bottei. Mr. Bottei, an Assistant Federal Public Defender in Nashville, Tennessee, expresses concern about the proposed amendment because it would deprive the petitioner of the opportunity to brief the issue of his or her entitlement to a COA. The petitioner should have the opportunity to brief that issue separately from and after the merits, Mr. Bottei argues, because “[i]t is the petitioner who bears the burden of showing entitlement to a certificate,” because “[s]uch entitlement is governed by a standard that differs from the standard for granting habeas relief,” and because the authorities that the petitioner may adduce to meet the COA standard may differ from those that would have been relevant to the merits briefing itself. Those authorities might, for example, include “otherwise non-precedential rulings from other courts (including other circuits, district courts, and possibly state courts).”

In place of the proposed provisions, Mr. Bottei offers a different proposal under which (1) the district judge must issue a COA when dismissing a habeas petition if the judge “independently determines” the petitioner is entitled to a COA; (2) the petitioner then has a time limit for asking the district judge to issue a COA on any other claims; and (3) the district judge then rules on the petitioner’s entitlement to a COA on any other claims.

07-CR-013: Public Interest Litigation Clinic. Joseph W. Luby, Acting Executive Director of the Public Interest Litigation Clinic, writes to express “great concern” about the proposed Rule 11 for cases under Section 2254. Mr. Luby, whose office represents capital habeas petitioners, observes that “a district court’s decision to grant or deny a COA carries tremendous and often final consequences.” Like Mr. Bottei, Mr. Luby points out that “the standard governing issuance of a COA differs from that governing the petitioner’s entitlement to relief.” Like Ms. Coakley, Mr. Luby notes that the proposal would eliminate the opportunity for petitioners to narrow the issues by seeking a COA only as to a handful of the strongest claims. He also observes that the proposal “deprives a petitioner of the opportunity to cite post-petition developments in support of” the issuance of a COA. He argues that it would be undesirable “for the court to deny a COA before the parties even know what the [district court’s] reasoning is, much less before they have the opportunity to comment upon it.”

Mr. Luby offers an alternative proposal: He suggests setting a 10- or 15-day deadline post-judgment for prisoners to apply to the district court for a COA.

Style suggestions. Professor Kimble suggests that the proposed Rule 22 amendment be slightly modified, by capitalizing “under” in the phrase “Proceedings under 28 U.S.C. § 2254 or § 2255,” and by inserting “ , along” between “court of appeals” and “with the notice.”

B. Items for Publication

The Committee is aware that the preferred practice is to hold proposed amendments so that they can be published in groups. The Committee notes, however, the need to amend Form 4 as soon as possible to comply with the privacy rules. The Committee therefore suggests that Form 4 should be published for comment in summer 2008. Assuming that Form 4 is published for comment in summer 2008, the Committee seeks permission to publish proposed amendments to Rules 1 and 29 at that time as well.

1. Form 4

The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor’s initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals’ home addresses (so that only the city and state are shown). These rules

require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office (“AO”) has made interim changes to the version of Form 4 that is posted on the AO’s website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, participants in the Committee’s fall 2007 meeting noted that Form 4 requires a lot of detail. Not all i.f.p. applications require so much detail; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks permission to publish the following proposed amendment.

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

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

1
2
3
4
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7

* * * * *

7. *State the persons who rely on you or your spouse for support.*

<u>Name [or, if under 18, initials only]</u>	Relationship	Age
_____	_____	_____

* * * * *

13. *State the ~~address~~ city and state of your legal residence.*

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

- 8 Your daytime phone number: (____) _____
- 9 Your age: _____ Your years of schooling: _____
- 10 ~~Your~~ Last four digits of your social-security number: _____

2. Rule 1(b)

Proposed new Rule 1(b) would define the term “state” for the purposes of the Appellate Rules. The proposal to define the term “state” grew out of the time-computation project’s discussion of the definition of “legal holiday”; that definition includes state holidays, and it was thought useful to define “state,” for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. (As published for comment, the proposed amendment to Rule 26(a) included such a definition for purposes of the time-computation rule. However, as noted above, the Advisory Committee has deleted the definition from proposed Rule 26(a) on the assumption that the proposed amendment to Rule 1(b) will be approved for publication in summer 2008.)

As discussed below, the adoption of the proposed definition in Rule 1(b) will permit the deletion of the reference to a “Territory, Commonwealth, or the District of Columbia” from Rule 29(a). The term “state” also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) would require any changes in Rules 22, 44 or 46, but the Committee welcomes public comment on the proposed definition’s effects on those Rules.

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

Rule 1. Scope of Rules; Definition; Title

- 1 **(a) Scope of Rules.**
- 2 (1) These rules govern procedure in the United States
- 3 courts of appeals.

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

FEDERAL RULES OF APPELLATE PROCEDURE

- 4 (2) When these rules provide for filing a motion or
5 other document in the district court, the procedure
6 must comply with the practice of the district court.
- 7 **(b) ~~{Abrogated}~~ Definition.** In these rules, ‘state’ includes
8 the District of Columbia and any United States
9 commonwealth or territory.
- 10 **(c) Title.** These rules are to be known as the Federal Rules
11 of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term “state” to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

3. Rule 29

Rule 29(a) currently provides that “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” If proposed Rule 1(b) is adopted, it will define “state” to include D.C. and U.S. commonwealths or territories. In that event, the reference to a “Territory, Commonwealth, or the District of Columbia” should be deleted from Rule 29(a).

Accordingly, the Committee seeks permission to publish for comment the following proposed amendment to Rule 29(a). The amendment is shown along with the proposed amendment to Rule 29(c) which the Standing Committee approved for publication at its January 2008 meeting. Assuming that the Standing Committee approves the Rule 29(a) amendment for

FEDERAL RULES OF APPELLATE PROCEDURE

15 ~~parties by Rule 26.1.~~ An amicus brief need not comply

16 with Rule 28, but must include the following:

17 (1) a table of contents, with page references;

18 (2) a table of authorities — cases (alphabetically

19 arranged), statutes and other authorities — with

20 references to the pages of the brief where they are

21 cited;

22 (3) a concise statement of the identity of the amicus

23 curiae, its interest in the case, and the source of its

24 authority to file;

25 (4) an argument, which may be preceded by a

26 summary and which need not include a statement

27 of the applicable standard of review; and

28 (5) a certificate of compliance, if required by Rule

29 32(a)(7);

30 (6) if filed by an amicus curiae that is a corporation, a

31 disclosure statement like that required of parties by

32 Rule 26.1; and

33 (7) unless filed by an amicus curiae listed in the first

34 sentence of Rule 29(a), a statement that, in the first

35 footnote on the first page:

FEDERAL RULES OF APPELLATE PROCEDURE

- 36 (A) indicates whether a party’s counsel authored
37 the brief in whole or in part;
- 38 (B) indicates whether a party or a party’s counsel
39 contributed money that was intended to fund
40 preparing or submitting the brief; and
- 41 (C) identifies every person — other than the
42 amicus curiae, its members, or its counsel —
43 who contributed money that was intended to
44 fund preparing or submitting the brief.

45 * * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term “state” to include “the District of Columbia and any United States commonwealth or territory.” That definition renders subdivision (a)’s reference to a “Territory, Commonwealth, or the District of Columbia” redundant. Accordingly, subdivision (a) is amended to refer simply to “[t]he United States or its officer or agency or a state.”

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

FEDERAL RULES OF APPELLATE PROCEDURE

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., *Supreme Court Practice* 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments").

III. Information Items

The Committee discussed and retained on its study agenda the proposed amendments to Rules 4(a)(1) and 40(a)(1) that would clarify those Rules' application to cases in which a federal officer or employee is sued in his or her individual capacity. Those proposed amendments were published for comment in August 2007; the comments received on them were favorable although commentators did suggest a few changes. However, shortly after the Standing Committee approved these proposed amendments for publication, the Supreme Court decided *Bowles v. Russell*, 127 S. Ct. 2360 (2007). *Bowles* holds that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. In the course of explaining that conclusion, the Supreme Court relied on the notion that statutory appeal time limits are jurisdictional. In the wake of *Bowles*, the proposed amendment to Rule 4(a)(1) must be reassessed in the light of the fact that civil appeal deadlines are set not only by Rule 4(a) but also by 28 U.S.C. § 2107. The Committee has asked the Department of Justice for its views on this question, and has retained the proposed amendments on its study agenda.

More generally, the Committee continues to monitor developments under *Bowles*. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), did not directly concern appeal times; rather, it concerned the statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court's opinion touched upon *Bowles*. Jurisdictional issues are also implicated in *Greenlaw v. United States*, which was argued on April 15, 2008. Meanwhile, the courts of appeals are working out *Bowles*' implications in a variety of contexts. Under the developing caselaw, statutorily-backed appeal deadlines are likely to be held jurisdictional. Some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional. And there is a nascent circuit split concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements.

The Committee discussed and retained on its study agenda several other issues, concerning appeal bonds under Appellate Rule 7; amicus briefs with respect to panel rehearing and rehearing en banc; the effect of the separate document requirement in cases involving belated tolling motions; and the prepayment of postage in connection with inmate filings.

The Committee discussed and removed from its study agenda two proposals. One proposal, by Judge Jerry Smith, was that Rule 35(e) be amended so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. The other proposal, by Judge Alan Lourie, was that Rule 28.1 should be amended to curb abuse of the page limits for briefing on cross-appeals. Following the April meeting, I wrote to Judges Smith and Lourie to let them know of the Committee's decision not to proceed further with their respective proposals, and I thanked them for bringing these matters to the Committee's attention.

DRAFT

Minutes of Spring 2008 Meeting of Advisory Committee on Appellate Rules April 10 and 11, 2008 Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,¹ Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office (“AO”); and Ms. Marie Leary from the Federal Judicial Center (“FJC”). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee’s appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes’ discussion of model local rules.

¹ Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

III. Report on January 2008 Meeting of Standing Committee

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b) concerning the definition of the term “state” was not submitted to the Standing Committee in January, because of the need for the Advisory Committee to consider a few refinements to the proposal.

Judge Stewart invited Judge Hartz to update the Committee concerning the January meeting of the Standing Committee subcommittee, which Judge Hartz chairs, on issues relating to the sealing of entire cases. Judge Hartz reported that the subcommittee has decided to limit its focus to cases that are entirely sealed; that decision, though, does not eliminate all questions of scope, since there may in some instances be questions as to what constitutes sealing of the entire case (for example, such issues may arise in connection with bankruptcy proceedings). Timothy Reagan of the Federal Judicial Center is preparing a study to inform the subcommittee’s further deliberations. A representative from a district court clerk’s office will be assisting the subcommittee, as will Jonathan Wroblewski of the DOJ.

Judge Rosenthal observed that the Standing Committee had a relatively light agenda for its January meeting. This enabled the Committee to engage in a preliminary discussion of the Civil Rules Committee’s projects concerning Civil Rules 26 and 56.

As an additional update on events since the Advisory Committee’s November 2007 meeting, Judge Stewart reported that he had written to William Thro, the Virginia State Solicitor General, to let him know that the Committee, after careful study, has determined not to take any additional action at this time on the proposal to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart noted that most circuits have now responded to his letter concerning circuit-specific briefing requirements. The letter has served the goal of drawing each circuit’s attention to the issue, and it is to be hoped that the court of appeals’ transition to the case management / electronic case filing system will provide an occasion for each circuit to review whether its local briefing requirements are necessary.

V. Action Items

A. For final approval

1. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart invited the Reporter to update the Committee on the overall status of the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods; to offset the change in the method of computing short time periods, the project also includes a package of proposals to alter rule-based and statutory deadlines. More than twenty public comments were received concerning the time-computation project. Five commentators, including Chief Judge Frank H. Easterbrook and the Public Citizen Litigation Group, commented favorably on the overall project; these commentators welcome the project's goal of simplifying and clarifying the time-computation rules. Four commentators commented unfavorably: The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York argued against the adoption of the time-computation proposals generally, while three other commentators (including Professor Alan Resnick) argued against adopting a days-are-days approach in the bankruptcy context. Those commenting unfavorably argue that the current system works well; that the transition to the proposed days-are-days counting method will cause great disruption due to the need to alter not only deadlines in the national rules but also deadlines in statutes, local rules and standing orders; and that to the extent that the current time-counting system can pose difficulties, this could be ameliorated by designing software that could be integrated into the CM/ECF system and that could perform the requisite calculations.

A number of commentators have argued strongly that the proposed days-are-days time-computation system should not be adopted unless and until the necessary changes have been made to relevant deadlines, not only in the national rules but also in statutes and local rules. The DOJ has stressed this point, asserting that if the time-counting changes take effect without the necessary changes to statutory time periods, the purposes of some of those statutes could be frustrated. The DOJ has submitted a list of the statutory periods that it considers to be priorities for amendment.

The Time-Computation Subcommittee carefully considered these concerns. Members discussed the arguments leveled against the project, and noted that these concerns were very similar to those that had been fully aired during the advisory committees' earlier consideration of the project. The Subcommittee therefore recommends that the project proceed. The Subcommittee takes very seriously the concerns expressed concerning time periods set by statutes and by local rules. The Subcommittee recommends that the project proceed on the assumption that the amendments will stay on track to take effect December 1, 2009. But to that end, it is essential that each Advisory Committee vote, at its spring 2008 meeting, on a list of the statutory periods (relevant to that Committee's field of expertise) which Congress should be

asked to lengthen. Judge Rosenthal observed that, in addition, plans are underway to facilitate the work that will be necessary to amend each circuit's and district's local rules. Mr. Letter noted that some statutory periods may need to be changed but different groups may not agree on what the nature of the change should be; he asked whether those provisions would be omitted from the list submitted to Congress. Judge Rosenthal stated that so far, the goal in assembling the list has been to identify candidates that (1) are used often enough to make it worthwhile to lengthen them; (2) are currently calculated using the Rules' time-computation method; and (3) are non-controversial. The list of proposed changes compiled by the Criminal Rules Committee will be run past the National Association of Criminal Defense Lawyers for their views. The hope is to work out any differences of opinion in advance, so as to be able to present to Congress a list of non-controversial proposals. Judge Rosenthal noted that discussions have already been held with legislative staffers about the general concept of the time-computation project, and the staffers gave the project a very warm reception; their view is that the proposed legislation makes sense and should not be problematic, particularly if it does not include controversial items. The discussions have included a timetable for taking the time-computation proposals to Congress in order to coordinate with a December 1, 2009 effective date for the project as a whole.

The Reporter noted that the Time-Computation Subcommittee had discussed possible approaches to the compilation of the list of statutory periods for amendment. The majority view on the Subcommittee is that the list should not include all of the possibly affected statutes, but rather should target those statutory periods that are a high priority for amendment given the frequency of their use and the relative importance of adjusting the time periods in question. She noted, however, that one member of the Subcommittee, Mr. Levy, had argued that the approach should instead be to include all the affected statutes – whether or not they are frequently used – unless a change to a particular statute would be so controversial as to threaten the overall viability of the proposal. A Committee member expressed agreement with Mr. Levy's views, stating that it seems unfair to exclude a statute from the list just because that statute does not affect a large number of practitioners. Mr. Clement asked whether there might be some merit to an approach that takes as its default position lengthening every potentially affected time period. The Reporter noted that not all periods listed on the long list of potentially affected statutes are actually in need of lengthening. In compiling that long list, the Reporter erred on the side of inclusivity; thus, some periods on the list may not actually be periods that are currently computed using the Rules' time-computation provisions. The Appellate Rules Deadlines Subcommittee's experience confirms this fact. For example, the Subcommittee examined some statutory periods concerning the publication in the Federal Register of certain Federal Circuit decisions concerning customs-related issues, and concluded that no lengthening of these periods would be appropriate, in part because those who practice in this field do not currently compute the periods using Rule 26(a). Mr. Rabiej noted that it will be a delicate task to synchronize the passage of legislation with the adoption of the package of amendments.

The Reporter also noted that a number of the public comments suggested ways of altering the time-computation template. The Time-Computation Subcommittee considered those suggestions but ultimately decided not to recommend any changes to the template rule or note.

Three suggestions were rejected by Subcommittee consensus. The first was to change the definition of the end of the last day (for purposes of electronic filing) from “midnight” to “11:59:59”; the Subcommittee does not believe that retaining the reference to “midnight” will be misleading. The second suggestion was to set the end of the last day at midnight for all filers, not just for electronic filers; the Subcommittee believes that this would not be appropriate as a default rule, and that for districts which wish to use a drop-box and opt out of the default rule, this can be accomplished by local rule. The third suggestion was to change the text of the Rule to emphasize that the Rule’s time-computation provisions do not apply to date-certain deadlines; the Subcommittee believes that this fact is already clear from the text and Note.

Two other comments prompted some disagreement within the Subcommittee but did not receive majority support. In response to the comments submitted, the Subcommittee discussed whether it would be advisable to add language to the Note to make it even clearer that the national time-computation rules trump local rules’ time-computation provisions (such as local rule provisions that set time periods in business days). Though there was some support for such an addition, others felt that it would not be desirable to add Note language concerning what is, in essence, a transitional issue concerning the need for conforming changes to the local rules. Instead, the materials that are provided to each local rulemaking body will make clear that if local rules set a time-counting method that differs from the national rules’ approach (for example, by setting time periods in business days) those local rules should be amended. The Subcommittee also discussed the fact that the inclusion of state holidays within the definition of legal holidays may pose a trap for some litigants when a backward-counted deadline is at issue. This is because if a backward-counted deadline ends on a legal holiday, one must continue counting backwards until one reaches a day that is neither a legal holiday nor a weekend day; thus, if a backward-counted deadline ends on a state holiday, that will mean that the deadline actually falls *before* the state holiday – but a litigant who is unfamiliar with the state holiday in question might not recognize this fact. To eliminate this possible trap for the unwary, the Subcommittee discussed whether it would be advisable to redraft subdivision (a)(6) so that state holidays count as legal holidays only for forward-counted deadlines and not for backward-counted ones. Some Subcommittee members, however, felt that such a change would add excessive complexity and confusion, so the change was rejected.

Judge Stewart invited Judge Sutton, who chairs the Appellate Rules Committee’s Deadlines Subcommittee, to introduce that Subcommittee’s report concerning deadlines that should be amended in the light of the proposed new time-computation rules. Judge Sutton noted that the Appellate Rules Committee has already concluded that it should go along with the time-computation project, despite some members’ doubts, because the Appellate Rules should take the same approach as the other sets of Rules. The Deadlines Subcommittee has taken as its goal the lengthening of the Appellate Rules deadlines so as to offset the shift in time-computation approach.

Judge Sutton noted that a number of comments had been submitted on the Appellate Rules deadlines proposals, but that, for the reasons outlined in the Reporter’s memo on behalf of

the Subcommittee, the Subcommittee had decided to recommend only one change in the proposals as published. The Subcommittee does recommend altering the proposals in response to a concern raised by Howard Bashman with respect to the timing for motions that toll the time for taking a civil appeal. The Civil Rules Committee had published proposed amendments that would extend the deadline for such motions to 30 days – i.e., the same time period as that for taking a civil appeal (when the United States and its officers or agencies are not parties). Mr. Bashman points out that if the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

Judge Rosenthal reported that the Civil Rules Committee discussed this issue at its April 7-8 meeting and determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem raised by Mr. Bashman. The Civil Rules Committee, however, wishes to defer to the Appellate Rules Committee's view on this issue, and so if the Appellate Rules Committee feels that 28 days is too close to 30 days, then the Civil Rules Committee's second choice would be to set the tolling motions' deadlines at 21 days.

A number of Committee members observed that 28 days is very close to 30 days, that the timing would be very tight if the tolling-motion deadline is set at 28, and that in that event it would be likely that appellants would still end up filing protective notices of appeal because they would be unsure whether or not another party would file a tolling motion. Responding to a member's observation that a 28-day deadline could permit a party to ascertain via the CM/ECF system whether another party has filed a tolling motion before the 30-day deadline for filing a notice of appeal is reached, Mr. Fulbruge pointed out that a large number of litigants are pro se litigants who will not be participating in CM/ECF.

An attorney member stated that based on his experience with the amount of work involved in preparing postjudgment motions, he favors extending the deadline for such motions to 28 days; he asked whether a possible way to resolve Mr. Bashman's concern might be to ask Congress to extend the 30-day deadline for civil appeals to 35 days and to make a corresponding change to the same deadline in Rule 4. Two other members expressed support for such a possibility. However, another attorney member countered that the 30-day time limit for civil notices of appeal is deeply ingrained in practitioners' minds and it would be unwise to tamper with that familiar deadline. Solicitor General Clement noted that he can see the benefits of extending the tolling-motion deadline to 28 days; that the proximity of the 28-day and 30-day deadlines is unlikely to be a big problem, especially since counsel will often coordinate with one another and will thus know whether a tolling motion will be made; and that he is not sure there is enough reason to alter the 30-day appeal time limit. The members who favor consideration of extending the appeal-time deadline responded that counsel do not always coordinate well with

one another, and that since the time-computation project will result in the alteration of other deadlines there should not be a downside to altering the 30-day deadline as well. It was pointed out, however, that altering the 30-day deadline would be a significant change, and one that was not mentioned when the Appellate Rules deadlines proposals were published for comment. A member noted that if the Committee agrees to the 28-day time period for the tolling motions, it can continue to review the matter to see whether the 28-day and 30-day deadlines pose a problem in practice once the time-computation amendments go into effect.

A motion was made and seconded to approve the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days as well. The motion passed by a vote of 7 to 1.

Judge Sutton noted that the Advisory Committee has been asked to finalize its list of statutory periods that should be amended in the light of the proposed change in time-computation method. The statutory provisions that warrant particular attention are the 7-day deadline in 28 U.S.C. § 2107(c); the “not less than 7 days” period in 28 U.S.C. § 1453(c); the 72-hour, 5-day and 7-day time periods in 18 U.S.C. § 3771(d); the 4-day and 10-day periods in the Classified Information Procedures Act (“CIPA”) § 7(b); and the 4-day and 10-day periods in 18 U.S.C. § 2339B(f)(5)(B).

The Reporter noted that the Committee had already approved the proposal with respect to the 7-day period in Section 2107(c). This period, which constitutes one of the time limits on making a motion to reopen the time to appeal, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(b). Section 1453’s “not less than 7” day period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court’s remand order; “not less than” was clearly a drafting error. Section 1453 should be amended to set the time limit at “not more than 10 days” to correct the drafting error and offset the shift in time-computation method. 18 U.S.C. § 3771(d) involves the procedures for appellate review of district court determinations concerning rights provided by the Crime Victims’ Rights Act (CVRA). 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim’s mandamus petition and a 5-day limit on continuances in the district court. The DOJ and the Criminal Rules Committee’s deadlines subcommittee recommend extending the 10-day mandamus petition deadline, but do not recommend extending the other CVRA deadlines. CIPA § 7 sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to CIPA § 7) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations. The DOJ has recommended extending the CIPA deadlines and the material-support 4-day deadlines. The Criminal Rules Committee’s deadlines subcommittee has recommended amending the 4-day deadlines to state that they should be computed by excluding

intermediate weekends and holidays; the subcommittee has asked the DOJ to consider further its recommendation concerning CIPA's 10-day deadline.

The Committee discussed the CVRA's 72-hour deadline for decisionmaking by the court of appeals. Mr. Fulbruge noted that the brevity of this deadline imposes a significant burden on the court. A judge noted, however, that in practice the attorneys involved might not object if the court takes longer than 72 hours. A member questioned the wisdom of including this deadline among the list of statutory provisions that should be amended.

Judge Stewart asked the Committee to vote on each statutory deadline separately. The Committee by voice vote approved the following requests concerning the statutory deadlines. The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days. The "not less than 7" day period in 28 U.S.C. § 1453(c) should be changed to "not more than 10" days. The four-day deadlines in CIPA and the material-support statute should be amended to specify that intermediate weekends and holidays are excluded. Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee. By consensus, the Committee decided not to recommend any changes to the 72-hour or 5-day periods in the CVRA; but the Committee voted to recommend changing the CVRA's 10-day mandamus petition deadline to 14 days.

By voice vote, the Committee approved the amendment to Rule 26(a) as published; later in the meeting, the Committee voted to delete from proposed Rule 26(a)(6)(B) the definition of the term "state" (because the Committee voted to approve for publication a FRAP-wide definition of that term). The Committee voted to approve the package of Rule deadlines changes as published with one alteration. The one alteration, as discussed above, is that instead of changing the cutoff time in Rule 4(a)(4)(A)(vi) to 30 days, the Committee voted to change that time period to 28 days.

2. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

Judge Stewart invited Judge Sutton to introduce the Appellate Rules Deadlines Subcommittee's recommendation concerning the proposed amendment to Rule 26(c)'s three-day rule. The amendment would clarify the interaction between the three-day rule and Rule 26(a)'s time-computation provisions, and would bring Rule 26(c)'s version of the three-day rule into conformity with the three-day rules in Civil Rule 6 and Criminal Rule 45. Two comments can be taken to express support for this amendment. On the other hand, Chief Judge Easterbrook commented that Rule 26(c)'s three-day rule should be abolished altogether. Judge Sutton noted that Chief Judge Easterbrook's criticisms of the three-day rule are forceful, especially as they apply to circuits that have made the transition to electronic filing; he suggested that this issue should be placed on the Committee's study agenda.

By voice vote, the Committee approved the amendment to Rule 26(c) as published (subject to style changes which had been suggested by Professor Kimble) and placed on its study agenda the proposal to eliminate the three-day rule.

3. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

Judge Stewart invited the Reporter to introduce the published amendment adding new Rule 12.1. The proposal grows out of a suggestion by the Solicitor General in 2000 and is designed to promote awareness of and uniformity in the practice of indicative rulings concerning motions which the district court lacks authority to grant due to a pending appeal.

Proposed Appellate Rule 12.1 corresponds with proposed Civil Rule 62.1, which was approved at the Civil Rules Committee's April 7-8 meeting. The Civil Rules Committee made a change to the Note of Rule 62.1 as published: Instead of stating that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue," the Note now states that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue."

A number of comments were received concerning the proposals. The Public Citizen Litigation Group suggests altering the proposal to bar the court of appeals from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen also suggests that when the Note discusses the need for a separate notice of appeal with respect to the court's disposition of a motion, the Note should refer to the possibility that an amended notice of appeal may be used. The DOJ has expressed support for the indicative-ruling proposal in the civil context. However, the Solicitor General's letter voices concern over the possibility that new Rule 12.1 might be misused in the criminal context. The Solicitor General suggests that the second paragraph of Rule 12.1's Note be revised to read: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronin*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)." Members of the Seventh Circuit Bar Association's Rules and Practice Committee have suggested that if the new rules are aimed primarily at Civil Rule 60 motions, then the comments should mention that fact so as to avoid other motions being made under the new rules. Professor Bradley Shannon has questioned the propriety of the indicative-ruling procedure in the light of principles of American procedure, if not principles of justiciability.

The Reporter did not recommend adopting Public Citizen's suggestion that the court of appeals be barred from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen's concern about unwarranted dismissals of appeals is understandable, but on the

other hand there may be reasons to preserve some flexibility for the court of appeals. No change was warranted in response to the suggestion by members of the Seventh Circuit Bar Association committee; the Notes to Rules 62.1 and 12.1 already focus on the use of the indicative-ruling mechanism in the Civil Rule 60(b) context, but a deliberate choice has been made not to limit the Rules to that context. The Reporter also disagreed with Professor Shannon's critique of the appropriateness of the indicative-ruling practice; she noted that the practice is well established and does not raise justiciability problems.

The Reporter did recommend that the Committee adopt changes to Rule 12.1's Note to respond to suggestions by Public Citizen and by the Solicitor General. Specifically, she recommended altering the Note as suggested by Public Citizen, so that the first sentence of the last paragraph would read: "When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion." She also recommended replacing the existing second paragraph of the Note with the following language: "The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)." This language differs from that suggested by the Solicitor General because rather than stating that the Rule "is limited" to those three categories of application in the criminal context, it states the Committee's expectation, leaving room for the possibility that other uses may arise.

The Solicitor General stated that the DOJ would prefer its suggested Note language to that proffered by the Reporter; in the DOJ's view, "anticipates" – the term used in the Reporter's suggested formulation – weakens the language undesirably. A member asked how the DOJ could be sure that the three situations listed in its suggested language are the only criminal contexts in which the indicative-ruling practice might prove useful. A judge member questioned how likely the indicative-ruling practice is to be used in the criminal context. Another judge observed that in a recent Tenth Circuit decision, the court abated an appeal in order to permit the appellant to file a Section 2255 motion in the district court; he observed that it would be undesirable for the Note to state that such a procedure is foreclosed. Another judge member asked the DOJ to explain the reason for its concern about the Reporter's suggested Note language. Mr. Letter responded that the DOJ is concerned that without limiting language in the Note, the indicative-ruling mechanism might be misused by jailhouse litigants. The judge member responded that his instinct is to avoid defining or limiting the uses to which the mechanism can be put. The Solicitor General asked whether the Committee would be willing to say "envisions" rather than "anticipates." A member wondered whether, given the DOJ's concerns, it might be better to remove the Note's reference to the criminal context. It was noted, however, that the Criminal Rules Committee is planning to consider whether to adopt an indicative-ruling provision for the Criminal Rules; the Criminal Rules Committee might benefit

from the opportunity to observe how the practice develops under new Appellate Rule 12.1. A member expressed support for the term “anticipates.” By voice vote, the Committee decided to adopt the Reporter’s suggested changes to the Note language for the Note’s second paragraph and for the first sentence of the Note’s last paragraph.

A member questioned the Note’s statement that “[a]fter an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand.” She observed that if a timely tolling motion is filed – or a Rule 60(b) motion is filed within the current 10-day time limit – then the effectiveness of the notice of appeal is suspended until the district court rules on the last such remaining motion. The Committee determined, subject to later consultation with the Civil Rules Committee, that the Note language should say “while it [the appeal] remains pending and effective” – so as to flag the fact that a notice of appeal is not effective while a timely tolling motion remains pending. After the meeting, the Committee, in consultation with the Civil Rules Committee, reconsidered this change. By email circulation, the Committee deleted “and effective” and added a new parenthetical at the end of the Note’s first paragraph. That parenthetical reads: “(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)”

Another member provided some stylistic edits to paragraphs one and three of the Note. The Committee also approved changes to paragraphs one and five of the Note that correspond to the changes made by the Civil Rules Committee with respect to proposed Civil Rule 62.1.

4. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

Judge Stewart invited the Reporter to introduce the published amendment to Appellate Rule 4(a)(4)(B)(ii). The proposed amendment is designed to fix a problem (which dates from the 1998 restyling) by replacing the Rule’s current reference to challenging “a judgment altered or amended upon” a timely post-trial motion with a reference to challenging “a judgment’s alteration or amendment upon” such a motion.

Three comments were submitted on this proposal. Peder K. Batalden notes that amended Rule 4(a)(4)(B)(ii) “[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*” disposing of the last remaining tolling motion, and he argues that this can create hardship when a long period elapses between the entry of the order and the entry of the amended judgment. Mr. Batalden suggests “delet[ing] entirely the language ‘or a judgment’s alteration or amendment upon such a motion’ from the amended rule.” Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that “the original notice of appeal serves as the appellant’s appeal from any order disposing of any post-trial motion.” Likewise, participants in a

Seventh Circuit Bar Association committee lunch suggested amending Rule 4(a) “to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal.”

The Reporter recommended that the Committee approve the proposal as published. The commentators’ further suggestions for amending Rule 4(a) are separable from the current proposal and would go well beyond it. They can be added to the Committee’s agenda for further study.

By voice vote, the Committee approved the proposal as published. By consensus, the commentators’ suggestions were placed on the Committee’s study agenda.

5. Item No. 07-AP-C (FRAP 22 – proposed changes in light of pending amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255)

Judge Stewart invited the Reporter to present the published amendment to Rule 22. The amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255. The proposed amendment to Rule 22 was published in tandem with the proposed amendments to Rule 11(a) of the habeas and Section 2255 rules.

Professor Kimble provided some suggestions on the style of the Rule 22 proposal. The other comments submitted on the proposals were uniformly negative; their criticisms focused on the fact that the proposed amendments to Rule 11(a) would require the district judge to rule on the COA issue at the same time that he or she decides the merits. The Massachusetts Attorney General fears that these proposed amendments “would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal.” Also, she suggests that the rules should give petitioners an opportunity to narrow the claims on which they seek a COA. Other commentators argued strongly that it is important for the petitioner to have a chance to read the district court’s merits decision and brief the COA issue before the district court decides whether to grant a COA.

The Reporter noted that the Criminal Rules Committee’s writs subcommittee has decided to recommend republication in order to seek comment on a different proposal; the new proposal will still direct the district judge to rule on the COA issue at the time of the merits decision, except that it will give the judge the option of directing the parties to submit arguments on whether or not a COA should issue. The new proposal will also permit a party to move for reconsideration within 14 days if a COA is issued or denied at the same time as the merits decision is announced. The published Rule 22 amendment would be compatible with this proposal.

The Committee by voice vote approved Rule 22 as published, subject to Professor Kimble's style changes.

B. For publication

1. Item No. 07-AP-D (FRAP 1 – definition of “state”)

Judge Stewart invited the Reporter to introduce the proposed amendments concerning the definition of the term “state.” The proposal to define the term “state” grew out of the time-computation project's discussion of the definition of “legal holiday”; that definition includes state holidays, and it was thought useful to define “state,” for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. As published for comment, the proposed amendment to Rule 26 includes such a definition for purposes of the time-computation rule. At its November 2007 meeting, the Committee approved a new Appellate Rule 1(b) that would adopt such a definition for the Appellate Rules in general. However, because it seemed advisable for the Committee to consider a few additional matters in connection with the Appellate Rule 1(b) proposal, that proposal was not presented to the Standing Committee at its January 2008 meeting.

Proposed Appellate Rule 1(b) is similar to the proposed amendment to Civil Rule 81 that was published for comment in summer 2007. The Civil Rules Committee invited comment on whether the term “possession” should be included in the definition. The DOJ, in its comment on the Civil Rule 81 amendment, opposed the inclusion of the term “possession.” The DOJ argues that possession might be incorrectly interpreted to include U.S. military bases overseas. The Civil Rules Committee, at its April 7-8 meeting, deleted the term “possession” from the Civil Rule 81 amendment, and, with that deletion, approved the proposal. Deleting the term “possession” from the Appellate Rule 1(b) definition seems harmless, since it appears that “possession” is no longer a commonly used term and is equivalent to “territory.”

In light of proposed Rule 1(b), the Committee should also consider amending Rule 29(a) to remove the current reference to “a ... Territory, Commonwealth, or the District of Columbia,” since that will be redundant once the term “state” is defined in Rule 1(b). When publishing the proposed amendments for comment, the Committee should highlight the fact that the term “state” is used in Rules 22, 44, and 46, so that those who comment can take those provisions into account. New Rule 1(b) should not cause any problem concerning the application of Rule 22; if an entity that is encompassed within Rule 1(b)'s definition of “state” is not subject to the federal habeas framework, the question of Rule 22's applicability to that entity will simply never arise. There is no reason to think that Rule 1(b)'s definition would cause problems in the application of Rule 29(a) (concerning amicus filings), Rule 44 (concerning constitutional challenges to state statutes), or Rule 46 (concerning admission to the bar). In any event, comment can be solicited on these questions.

The Committee by voice vote approved proposed Rule 1(b) for publication, subject to the deletion of the term “possession,” and likewise approved the proposed amendment to Rule 29(a) for publication. The Committee also voted to delete from proposed Rule 26(a)(6)(B) the definition of the term “state.”

VI. Discussion Items

A. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited the Reporter to discuss her memo concerning the proposal to amend Appellate Rules 4(a)(1)(B) and 40(a)(1).

The Reporter stated that as a policy matter, the proposed amendments seem like a very good idea. It would be useful to make clear that the longer periods for taking civil appeals or seeking rehearing apply to suits involving federal employees as well as federal officers, and apply to certain types of individual-capacity suits as well as to official-capacity suits. (As highlighted by Public Citizen’s comments, it would be desirable to clarify whose view of the facts should control for purposes of determining whether an individual-capacity suit qualifies for the longer periods.) But though the proposals make good sense as a policy matter, it is also necessary to consider the implications of the fact that the 30-day and 60-day appeal periods are set by statute as well as by rule. Under the Supreme Court’s decision in *Bowles v. Russell*, that raises the question whether the proposed amendment to Rule 4(a)(1)(B) would enlarge the availability of the 60-day period beyond what is permitted by the relevant statute – 28 U.S.C. § 2107. Analysis of the statute’s text and history suggests that the statutory term “officer” may not include all federal “employees.” The evidence is less conclusive on the question of individual-capacity suits, and here there is a circuit split, with the Second Circuit taking a narrow view and the Fourth, Fifth and Ninth Circuits taking a broader view.

The Solicitor General reiterated the DOJ’s view that the proposals are desirable as a policy matter. He stated that the DOJ will continue to study the issues raised by the Reporter, and to determine whether it wishes to advocate adoption of some portion of the proposals (such as the proposed amendment to Rule 40 concerning rehearing).

Members discussed various aspects of the proposed formulation. A judge asked whether there might be an alternative to referring to individual-capacity suits for acts or omissions occurring in connection with duties performed on the United States’ behalf. Would a more functional approach be better – for example, to draw the line at whether the United States is representing the defendant? It was suggested, though, that such a formulation might not capture all the instances in which the extra time might be useful to the government. A member suggested that when revising the proposal, one should also think about mentioning *former* officers and employees. That member also stated that the Reporter’s suggested formulation for determining

whether an individual-capacity suit qualifies for the longer periods is flawed because it specifies that the allegations in question must be “colorable”; such an invitation to the court to second-guess the factual validity of the allegations would give rise to uncertainty concerning the applicability of the longer period. A member suggested that a better formulation would be to ask whether a defendant claims that the act occurred in connection with federal duties. A member suggested that where there is ambiguity concerning the scope of the statute’s 60-day period, it might be appropriate for the rulemakers to amend Rule 4 to clarify that ambiguity.

By consensus, the proposed amendments to Rules 4 and 40 were retained on the Committee’s study agenda.

B. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to update the Committee on developments relating to *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

Bowles’ implications continue to play out in the Supreme Court and in the lower federal courts. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), did not directly concern appeal times; rather, it concerned the statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court’s opinion touched upon *Bowles*. The *John R. Sand & Gravel* Court held that the Court of Federal Claims limitation statute does set a jurisdictional time limit which must therefore be raised by the court *sua sponte*. In the process of distinguishing between limitations periods that are waivable and those that are non-waivable, the Court stated that “Some statutes of limitations ... seek not so much to protect a defendant’s case-specific interest in timeliness as to achieve a broader system-related goal, such as ... promoting judicial efficiency, see, e.g., *Bowles v. Russell*.” This description of *Bowles* is interesting since it seems to depart from the *Bowles* Court’s stress on the statutory nature of the deadline that was at issue in that case.

Jurisdictional issues are also implicated in *Greenlaw v. United States*. *Greenlaw* appealed, and the United States did not cross-appeal. On appeal, not only did the court of appeals reject *Greenlaw*’s challenge to his sentence, it held that the district court had erred in failing to apply a statutory mandatory minimum. It vacated the sentence and remanded for the imposition of a longer sentence. When *Greenlaw* sought Supreme Court review, the United States agreed that the court of appeals erred in increasing *Greenlaw*’s sentence in the absence of a cross-appeal. The U.S. argued, though, that the Court should vacate and remand rather than addressing the question of the nature of the cross-appeal requirement. But the Court granted certiorari and invited separate counsel to brief and argue the case in support of the judgment below. The case will be argued April 15, 2008.

Meanwhile, the courts of appeals are working out *Bowles*' implications in a variety of contexts. Under the developing caselaw, statutorily-backed appeal deadlines are likely to be held jurisdictional. Some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional. And there is a nascent circuit split concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements. Finally, a recent Tenth Circuit decision thoughtfully addresses whether a court can raise a non-jurisdictional deadline *sua sponte*.

C. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to introduce the topic of the proposed amendment to Appellate Rule 7; that amendment would address the question of whether a Rule 7 bond for costs on appeal can include attorney fees. At its November 2007 meeting, the Committee concluded that it needed additional data before deciding whether and how to proceed with such an amendment. Since that time, Andrea Thomson (Judge Rosenthal's rules law clerk) worked with the Reporter to review Rule 7 decisions that were available on Westlaw. James Ishida and Jeffrey Barr conducted research in the PACER system to supplement the information gained through the Westlaw search. Input was also obtained from Daniel Girard (a member of the Civil Rules Committee) concerning Rule 7 bonds in the class-action context. Mr. Girard notes that appeals from class settlement approvals have become routine, and that, as a practical matter, an appeal from a class settlement approval effectively stays the order. He observes that some of the leading cases on the question of attorney fees and Rule 7 bonds arose in the class action context. He concludes, however, that seems to be no reason to treat class suits differently from non-class suits with respect to whether and when attorney fees can and should be included in Rule 7 bonds. Meanwhile, Marie Leary performed a pilot study looking at CM/ECF information from three districts – the Southern District of New York, the Central District of California, and the Eastern District of Michigan – for a period from 1996 to 2006. The Reporter turned to Ms. Leary for a summary of her findings.

Ms. Leary reported that her work thus far yields two conclusions. First, requests for, and orders requiring, Rule 7 bonds are infrequent. Second, the Committee has a choice with respect to further research by the FJC. The Committee could select a small number of districts for an in-depth study (which would include an examination of court filings that are not available on PACER); to further narrow the study, it might be advisable to cut the time period to five rather than ten years. Alternatively, the Committee could select a larger number of districts which could be examined in less depth – i.e., just using the documents that are available from PACER.

Judge Stewart suggested that the option of an in-depth study seems more useful. A member questioned whether there really is a circuit split concerning the propriety of including attorney fees in Rule 7 bonds; he noted that in the two cases on the minority side of the split, the

courts were not confronted with statutes that authorize the award of attorney fees. The Reporter agreed that those two cases did not involve such statutes, but observed that the rationale of the D.C. Circuit's decision in *American President Lines* would seem to foreclose the inclusion of attorney fees in Rule 7 bonds whether or not such fees are authorized by statute. Another member questioned whether the research into this agenda item is worth continuing. Members asked whether the Rule 7 issues differ in the class action context, and whether in that context attorney fees are the only concern – what about the inclusion in a Rule 7 bond of administrative costs attributable to the delay in implementation of a class settlement? A member suggested that Ms. Leary should not proceed with further research at the moment; instead, he suggested, the Committee should seek input from the Civil Rules Committee concerning the role of appeal bonds in class suits. It was also suggested that selected practitioners could help the Committee understand how these questions play out in class litigation.

By consensus, the Committee retained the matter on the study agenda and directed the Reporter to consult Professor Cooper and selected practitioners for their views on the role of appeal bonds in class suits.

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart noted that Mr. Levy had done great work in developing for the Committee's consideration the proposed amendments concerning amicus briefs with respect to rehearing. He invited Mr. Levy to present his proposal.

Mr. Levy noted that he was motivated to make this proposal because he periodically receives inquiries concerning whether amicus briefs can be filed in the rehearing context and, if so, what the requirements are. There are two reasons why courts ought to permit amicus filings in the rehearing context. Such filings can broaden the court's perspective and thus can usefully inform its decision. Moreover, permitting amicus filings can lead would-be amici to feel that the process is fair because they were allowed to be heard. From a practitioner's viewpoint, it does not seem as though permitting such filings would burden the court; those filings would be short and would be filed on a tight time frame. Mr. Levy argued that this issue is appropriate for a nationally uniform rule, and that in comparison to other possible topics for rulemaking, this one does not seem as central to judges' day-to-day work.

The Reporter noted that Fritz Fulbruge had obtained useful feedback from the appellate clerks on the circuits' current practices. Mr. Fulbruge observed that there is a valid reason to have a national rule, in the sense that there is currently disuniformity among the circuits. The proposal could provide helpful clarification.

Mr. Letter questioned whether the proposal should cover amicus filings prior to a court's grant of rehearing. He noted that the United States has in the past made amicus filings in support

of rehearing, but his recollection is that these occurred only in unique areas involving the government, such as supporting rehearing on behalf of a qui tam relator under the False Claims Act. He suggested that an important consideration is what the judges think of the proposal. He asserted that if the court grants rehearing but orders no new briefing by the parties, it would be odd to let amici file briefs at that stage. He raised the broader point that it might be useful to consider whether it would be appropriate to adopt a rule providing that the *parties* will be permitted to submit new briefs once rehearing en banc is granted. Mr. Letter also noted that the DOJ had done an internal study concerning practices with respect to rehearing, and found enormous circuit-to-circuit variations in the likelihood that rehearing en banc will be granted. He questioned whether that variation might weigh against the adoption of a national rule.

A judge observed that amicus filings in the rehearing context could be useful if they help the court to understand whether and why a particular case poses an important issue; but he noted that other judges may well disagree. Another judge remarked that the Eighth Circuit does not encourage amicus filings on rehearing petitions; he noted the concern that having a rule on the subject could encourage more such filings, and he suggested that a national rule would not be helpful.

An attorney member stated that she did not feel strongly about the proposal, but that amicus filings do occur in the rehearing context and that there are always questions as to the permitted length and the time limits for filing. She suggested that it would be useful to provide clarification on such points. She observed, though, that it seems problematic to permit new amici to file at the en banc stage if the court does not permit the parties to file new briefs. A judge noted that the Fifth Circuit always orders new briefing at the en banc stage; he observed that many en bancs in the Fifth Circuit are generated by the judges rather than by the parties. He noted that for judges who were not on the panel that initially heard the appeal, new briefs are helpful. A practitioner observed that the likelihood of rehearing en banc often seems more closely tied to the court's internal dynamics than to the lawyers' arguments.

A judge member stated that the practitioners' discussion of this issue had convinced him that there is a need for clarification of the practices governing amicus filings in the rehearing context. He therefore believes that each circuit should adopt a local rule on the topic. But he would be troubled by the adoption of a national rule because there is so much room for differing views, especially in a circuit that does not often decide to en banc cases. He suggested that the Committee wait and see how the local rules on this point develop. He agreed with a member's earlier observation that amicus briefs in the rehearing context are more useful when they spell out why the decision is an important one. An attorney member agreed that the circuit practices regarding en banc grants vary widely; she asked whether the Committee could encourage the circuits to adopt local rules on point.

A judge observed that the circuits are more likely to adopt such local rules if they hear from attorney groups that the lack of such rules is causing hardship. Mr. Levy suggested that groups such as the American Academy of Appellate Lawyers might be able to help; he stated that he would still prefer a national rule, but that local rules would be better than nothing.

A judge member observed that the Supreme Court's Rule 44.5 prohibits amicus briefs in connection with petitions for rehearing. Mr. Levy responded that the proper analogy, in Supreme Court practice, is not to petitions for rehearing but to petitions for certiorari; and there, amicus briefs are permitted. Another lawyer member observed that one reason why the Supreme Court bars amicus filings in connection with rehearing petitions is that the Court knows it almost never grants petitions for rehearing. Another member observed that the D.C. Circuit – which has a reputation of not granting petitions for rehearing en banc – has now begun to grant such petitions occasionally.

That member stated that he would like to think seriously about adopting a national rule stating that when rehearing en banc is granted, the court will permit further briefing by the parties. A judge responded, though, with a counter-example. In the Tenth Circuit, there is a practice of pre-circulation of panel opinions before they are filed. If the judges who are not on the panel disagree with the panel opinion, the court might decide to en banc the appeal initially. In such a sua sponte grant of en banc consideration, the parties would not have had an opportunity to learn anything from the panel opinion. Another judge expressed reluctance to tie the court's hands; he suggested that there might be instances where the court needs to go en banc (for example, because there is a clearly undesirable circuit precedent) but does not need further input from the parties. An attorney member responded that these concerns could be addressed if the rule requires the court in most instances to permit additional briefing, but allows exceptions to that requirement.

Judge Stewart observed that the proposals concerning further briefing by the parties when en banc rehearing is granted were distinct from the current agenda item concerning amicus filings. On the latter topic, Mr. Levy suggested that as a fallback position he would favor encouraging the adoption of local circuit rules. A judge suggested that this goal might be furthered by inducing an attorney organization to advocate the adoption of such local rules; he also observed that the Committee might gain useful information if judge members called some colleagues in circuits that do not have a local rule on point and asked why not. A member questioned whether the circuits would pay attention to such requests; he wondered whether the Committee might wish to consider circulating a proposal to place a default provision in Rule 29 in order to prompt circuits to take action to opt out; circulating such a proposal to judges on the various courts of appeals might be more likely to focus attention on the need for local rules.

By consensus, the matter was retained on the study agenda. Judge Sutton volunteered to contact selected judges for their views on the local rule question, and Mr. Levy, Mr. Letter and Ms. Mahoney agreed that they would work with the Reporter to contact attorney organizations to encourage them to seek the adoption of local rules.

E. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

Judge Stewart invited the Reporter to introduce Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. The Reporter noted that during the Committee's November 2007 meeting some members voiced support for the proposal; they argued that permitting a response to the petition before court grants en banc consideration would show that the process is fair. Moreover, those members noted that sometimes the court will not permit additional briefing once rehearing en banc is granted; in those instances, the party would find it particularly important to be able to submit a response to the petition for rehearing en banc. Other members, however, questioned the need for an amendment; they observed that in practice, courts generally seem to request a response, so they wondered whether there is a need for the Rules to require courts to permit a response. The Committee also raised the question of whether the proposed change should extend to sua sponte grants of rehearing en banc. Requiring a response before a sua sponte grant of en banc rehearing might be seen as a change from current practice in some circuits, and would cause Rule 35 to work differently than Rule 40 currently does. The Reporter noted that one would also need to decide whether the proposed amendment should cover initial hearings en banc as well as rehearing en banc; if one is going to cover rehearing en banc, it probably makes sense to cover initial hearing en banc also. The agenda materials provide two options for the Committee's consideration – one that would apply only where there is a petition for en banc consideration, and another that would also cover sua sponte en banc consideration.

An attorney member stated that in his experience the court has always asked for a response before granting en banc consideration. Another attorney member agreed that he has not observed a practical problem; he stated, though, that he had been surprised to learn that Rules 35 and 40 do not work the same way on this point, and he suggested that there seems to be no reason not to amend Rule 35 to track Rule 40's approach. He noted, however, that whether to cover sua sponte grants is a harder question. Another attorney member queried whether Judge Smith had reported observing a practical problem in this area. Judge Stewart responded that his impression was that Judge Smith had suggested the change in order to eliminate a lack of parallelism between the two Rules. Mr. Letter observed that the DOJ had not found the current Rule to be problematic. A judge member noted that the proposed amendment would contain an out for the court – because it would merely state that “ordinarily” the court will permit a response – and he questioned the amendment's value. He also noted that each court's en banc traditions vary.

Judge Stewart noted that Judge Smith had not proposed extending the requirement of a response to sua sponte grants of en banc consideration. Rather, Judge Smith's proposal would only apply to petitions for en banc consideration; that approach was reflected in the first of the two options proffered by the Reporter. A motion was made and seconded to adopt the first

option as an amendment to Rule 35. The motion was defeated by a vote of 5 to 2. Judge Stewart stated that he would write to Judge Smith to apprise him of the Committee's decision not to proceed with the proposed amendment.

F. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). At its November 2007 meeting, the Committee discussed the fact that the privacy rules would require immediate changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Committee also discussed other possible changes that might be made in Form 4.

Since that time, the Administrative Office made interim changes to the version of Form 4 that is posted on the AO's website, and Mr. Fulbruge updated his colleagues on the new privacy requirements. But those interim measures do not remove the need to amend the official version of Form 4 to conform to the privacy requirements. The Reporter therefore recommended that the Committee publish for comment a proposed amendment to Form 4 that will make the necessary changes. She also suggested that the Committee retain on its study agenda the question of additional possible changes to Form 4.

The proposed amendment would alter Questions 7 and 13 so that they will no longer request the names of minor dependents or the applicant's full home address and social security number. Question 7 in the interim version posted by the AO reads in part "Name [or, if a minor (i.e., underage), initials only]". That is the approach taken in the proposed amendment provided in the agenda materials. However, Professor Kimble suggests deleting "(i.e., underage)." The Reporter questioned whether such a change would be a style matter; if one believes that "underage" would be easier for i.f.p. applicants to understand than "minor," then one might view this question as one of substance. However, this question can be avoided if the Committee is willing to select a particular age, such as "under 21." Specifying an age would make the form much more user-friendly. There is some question as to what age one should specify. It is unclear what law should define minority for purposes of the privacy rules. The statute which the rules implement does not shed light on this question. It seems that in most states the age of majority is 18; but in a few states the relevant age is higher.

Mr. Fulbruge stated that it would be helpful for the Form to specify an age rather than referring to "minors." Mr. Letter inquired whether the Reporter had looked to federal law for a definition of the age of majority. For example, the Federal Juvenile Delinquency Act uses 18 as

the age of majority. The Reporter stated that she had not surveyed the definitions under federal law; it is unclear what law should govern for the purposes of the privacy rules as they apply to Form 4. State law usually governs the question of parental support obligations.

A member suggested that the Form should read “Name [or, if under 18, initials only].” By consensus, the Committee decided to approve for publication the amendment shown in the agenda materials, subject to the change described in the preceding sentence.

VII. Additional Old Business and New Business

A. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to discuss the Tenth Circuit’s recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007).

Mr. Warren was injured in a car accident and sued American Bankers in federal court in diversity. On June 23, the district court dismissed the complaint but did not set out the judgment in a separate document as required by Civil Rule 58(a). Warren filed a notice of appeal on Monday, July 24; then, on July 28, he filed a motion to reconsider in the district court. The defendant moved to strike the motion for lack of jurisdiction (due to the pending appeal). The district court held that no separate document was required with respect to the dismissal of the complaint, because that dismissal was for lack of subject matter jurisdiction; that the notice of appeal was effective to take the appeal, and that the notice deprived the district court of jurisdiction to consider the motion to reconsider. Warren then amended his notice of appeal to encompass the denial of the motion to reconsider.

On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)’s separate document requirement. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. Next, it held that the “motion to reconsider” was in reality a timely Rule 59(e) motion to alter or amend the judgment. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion “further suspended” the effectiveness of the previously-filed notice of appeal. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion.

The Reporter suggested that the Tenth Circuit was clearly correct in rejecting the district court’s view that the separate document requirement does not apply to dismissals for lack of subject matter jurisdiction. The Tenth Circuit also noted an “exception” to the separate

document requirement where an order contains no analysis; the Reporter was not sure that such an exception comports with the separate document rules, but she noted that the Tenth Circuit caselaw on this predated 2002 and she observed that the rulemakers had not seen fit to address that issue in the 2002 amendments. The Tenth Circuit also suggested in *Warren* that the 2002 amendments superseded the teaching of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), that a party could waive the separate document requirement. On this point, the Tenth Circuit erred. Rule 4(a)(7)(B) provides: “A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.” As the 2002 Committee Note to Rule 4 explains, the 2002 amendments were intended to codify *Mallis*’s holding. Under Rule 4(a)(7)(B), Warren’s appeal was “valid[]” despite the court’s failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. The question is whether, by filing the notice of appeal and thus waiving the separate document requirement, Warren should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23 dismissal. The Reporter suggested that such a conclusion would be flawed; the 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines.

Based on this discussion, Judge Hartz raised a concern that where a separate document is required and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion. To address this problem, Judge Hartz proposed that the Committee consider adopting a time limit – perhaps 10 days after the filing of a notice of appeal, or perhaps some number greater than 10 days – within which tolling motions must be filed even when there has been no provision of a separate document. He explained that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process.

An attorney member responded that in some instances the separate document provides information to the litigant that is relevant to the litigant’s calculations – for example, the separate document might state whether a dismissal is with or without prejudice. Another attorney member asked whether the problem Judge Hartz identified could be addressed by encouraging

better district court compliance with the requirements of Civil Rule 58. Judge Rosenthal suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement.

Judge Hartz noted, however, that the 2002 amendments themselves arose in part from a recognition that noncompliance with the separate document requirement will occur. He stated that in many of the pro se cases in the Tenth Circuit in which the problem arises, it is unlikely that the government defendant will alert the court to the lack of the separate document.

An attorney member noted that the problem for litigants is what to do when judges fail to comply with the requirement; he suggested that 10 days is probably too short a deadline, and that 21 days might be better. Another attorney member suggested that 28 days might be better still; but she also noted that imposing such a cutoff could effectively limit the district court's ability to delay the due date for postjudgment motions (by delaying the provision of a separate document).

Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. The Reporter noted that it would also be advisable to consult the Civil Rules Committee. A judge member suggested that it would be useful for Mr. Fulbruge to survey the circuit clerks for their views. Mr. Fulbruge predicted that the survey will disclose variations in how the circuits handle these issues; he noted that the Fifth Circuit's staff attorney office does a lot of work on pro se appeals.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether,

when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause. On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand.

When the institution has a legal mail system and the inmate uses that system, it may be the case that prepayment of postage is not required. This was the view adopted by the Seventh Circuit in *Ingram*, and the Tenth Circuit's *Ceballos-Martinez* opinion accords with such a view. But a later Tenth Circuit case has questioned this aspect of the *Ceballos-Martinez* court's reasoning. And it could be risky for an inmate to rely on such a view, even in the Seventh Circuit: what if the inmate's assumption that his or her institution's system qualifies as a legal mail system turns out to be incorrect?

As indicated by the Committee's earlier discussion of *Bowles v. Russell*, it is unclear whether courts will consider any postage-prepayment requirements in Rule 4(c)(1) to be jurisdictional. Rule 4(c)(1) itself is not mirrored in any statute. On the other hand, that provision fills a gap in the statutory scheme for civil appeals, by defining timely filing for purposes of 28 U.S.C. § 2107. As noted previously, some Ninth Circuit decisions have viewed similar gap-filling provisions in Rule 4 to be jurisdictional. Thus, it is possible – though certainly not

inevitable – that a court might consider Rule 4(c)(1)’s requirements to be jurisdictional, at least in civil appeals. But the rulemakers have authority to alter those requirements through a rule amendment; as the *Houston* court explained, Section 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers’ authority to adjust the details of Rule 4(c)(1)’s requirements continues to be clear even after *Bowles*.

An attorney member stated that Judge Wood has identified an ambiguity in the Rule, and that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. A judge member agreed that this issue warrants study by the Committee. An attorney member wondered whether prison regulations require the inmate to affix postage to outgoing legal mail. Another attorney member observed that policies vary by institution. Judge Rosenthal observed that the Committee should include in its consideration any rules that may apply to incarcerated aliens. Judge Stewart reported that at the March 2008 Judicial Conference meeting, he attended a session dealing with issues relating to pro se prisoners. He noted that there are a great many pro se prisoner appeals, and that the Committee should also consider immigration appeals. By consensus, the matter was retained on the Committee’s study agenda.

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

Judge Stewart invited the Reporter to discuss Judge Alan Lourie’s proposal concerning word limits on cross-appeals. Judge Lourie has expressed concern that litigants are abusing the cross-appeal briefing length limits set by Appellate Rule 28.1(e), and he asks the Committee to consider amending the Rule to eliminate such abuses.

Appellate Rule 28.1, which took effect December 1, 2005, governs briefing in situations involving cross-appeals. Rule 28.1(e) sets page limits and (alternatively) type-volume limits for the appellant’s principal brief, the appellee’s principal and response brief, the appellant’s response and reply brief, and the appellee’s reply brief. The Rule enlarges the permitted length of the principal-and-response brief and the response-and-reply brief to account for the fact that such briefs serve a double function, but the Rule does not allocate the permitted length as between the two components. This forms the root of Judge Lourie’s concern. He describes instances in which the combined briefs devote almost all of the permitted length to a discussion of the appeal, and use a relatively tiny amount of space to discuss the cross-appeal. He argues that this allows litigants improperly to expand their discussion of issues relating to the appeal. He also suggests that some cross-appeals might be filed in order to obtain additional space in which to discuss the issues relating to the main appeal. Judge Lourie proposes that Rule 28.1 be amended to limit the number of words, in a principal-and-response brief and a response-and-reply brief, that can discuss matters unrelated to the cross-appeal.

Judge Lourie raises a valid concern: The extra length provided for the principal-and-response and response-and-reply briefs ought to be used to discuss the cross-appeal. Moreover, it

certainly would be improper to file a cross-appeal solely to obtain extra length for discussing issues relating only to the main appeal. However, the latter concern seems speculative, because it seems unlikely that a litigant would file a cross-appeal in order to enlarge the briefing limits. By filing a cross-appeal, the cross-appellant would gain an extra five pages, but would give the appellant an extra 15 pages. Theoretically, a crafty litigant could try to secure the status of appellant (thus getting the 15 extra pages) by filing a notice of appeal earlier than its opponent, or – if the litigant is the plaintiff – by filing the notice of appeal on the same day as the opponent. But since the Rule only sets default designations, subject to change by the court, a litigant would not be assured that such strategies would secure it the status of appellant (rather than cross-appellant). In addition, other mechanisms exist to control frivolous appeals, including frivolous cross-appeals.

In any event, the feasibility of Judge Lourie’s proposal is unclear. The Committee considered that question in 2002, when it was discussing the proposal that led to the adoption of Rule 28.1; at that time, concerns were raised that enforcing separate word limits with respect to the appeal and cross-appeal would be impracticable. More recently, Judge Stewart asked Mr. Fulbruge to survey the appellate clerks for their views concerning Judge Lourie’s proposal. The clerks’ responses indicate that they feel that such a provision would be difficult to enforce.

Mr. Fulbruge underscored the clerks’ view that the proposed length limits would be impossible to police. Mr. Letter recalled that the DOJ was very involved in the drafting of Rule 28.1; at the time, the DOJ considered the problem identified by Judge Lourie, but concluded that the problem could not readily be addressed in the rule. Moreover, the DOJ’s view was that such abuses were likely to be infrequent, because most lawyers would realize that abuses of the cross-appeal briefing length limits would hurt the lawyers’ cause by annoying the judges on the panel.

By consensus, the Committee decided not to proceed with the proposed amendment. Judge Stewart stated that he would write to Judge Lourie to let him know of the Committee’s decision.

* * *

One final issue discussed by the Committee was when to seek publication of the amendments that it had just approved. Mr. Rabiej reminded the Committee that the preferred practice is to hold proposed amendments so that they can be published in groups rather than one-by-one. The Committee noted, however, that there is a need to amend Form 4 as soon as possible to comply with the privacy rules. Given that Form 4 should be published for comment in summer 2008, the Committee decided by consensus to seek permission to publish the proposed amendments to Rules 1 and 29 at that time as well.

VIII. Schedule Date and Location of Fall 2008 Meeting

A tentative decision was made to hold the Committee's fall 2008 meeting on November 13 and 14, 2008. The meeting will likely be held on the east coast. More details concerning the meeting's date and location will follow.

IX. Adjournment

The Committee adjourned at 10:20 a.m. on April 11, 2008.

Respectfully submitted,

Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules Table of Agenda Items — May 2008

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
01-03	Amend FRAP 26(a)(2) to clarify interaction with “3-day rule” of FRAP 26(c).	Roy H. Wepner, Esq.	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee
03-02	Amend FRAP 7 to clarify whether reference to “costs” includes only FRAP 39 costs.	Advisory Committee	Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee Discussed and retained on agenda 04/07 Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 calendar days after service of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Approved 04/08 for submission to Standing Committee
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07 Revised FRAP 22 draft approved 04/08, contingent on approval of corresponding amendments to the rules for § 2254 and § 2255 proceedings
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee
07-AP-H	Consider issues raised by <u>Warren v. American Bankers Insurance of Florida</u> , 2007 WL 3151884 (10 th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Awaiting initial discussion
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Awaiting initial discussion
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Awaiting initial discussion
08-AP-E	Amend FRAP 4(a) so that an original NOA encompasses dispositions of any post-trial motions	Public Citizen Litigation Group	Awaiting initial discussion
08-AP-F	Amend FRAP 4(a) so that an original NOA encompasses any post-appeal amendments of the judgment	Members of Seventh Circuit Bar Association	Awaiting initial discussion

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Awaiting initial discussion

**TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice
and Procedure**

**FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules**

DATE: May 12, 2008

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on May 1-2, in Boston.

The Committee seeks approval of two proposals, both for release for public comment:

1. Restyled Evidence Rules 101-415 — with the proviso that these rules, if approved, will be held until all the rules are restyled, so that the restyled rules will be released for public comment in a single package.
2. A proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest, that would extend the corroborating circumstances requirement — currently applicable only to statements offered by criminal defendants — to statements against penal interest offered by the prosecution.

A complete discussion of these matters can be found in the draft minutes of the Fall 2007 meeting, attached as Appendix C to this Report.

II. Action Items

A. Restyled Evidence Rules 101-415

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above will therefore be conducted in three separate stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Committee has established a working principle for whether a change is one of “style” (in which event the final determination is made by the Style Subcommittee) or one of “substance” (in which event the final decision is for the Committee). A change is “substantive” if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a “sacred phrase” — “phrases that have become so familiar as to be fixed in cement.”

At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415). The draft had been approved by the Style Subcommittee of the Standing Committee.

At the meeting, the Committee reviewed each rule to determine whether any of the proposed changes were of substance rather than style. The Committee also reviewed each rule to determine

whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. The Committee determined that a number of proposed changes were substantive, including some changes to Rules 102, 106, 401, 403, 404, 410, 412, and 413-15. The Committee also made a number of style suggestions to the Rules. A complete description of these changes and suggestions can be found in the Minutes of the Spring 2008 Committee meeting, attached to this Report as Appendix C. The Committee also resolved to maintain a list of “global” questions to maintain consistent terminology. Some of the global questions include how to refer to the government and the defendant in a criminal case, and how to use such terms as “case”, “proceeding” and “action”.

After implementing changes of substance and recommending changes of style, the Committee unanimously voted to refer the restyled Rules 101-415 to the Standing Committee, with the recommendation that they be released for public comment when the complete set of Evidence Rules has been restyled.

The proposed restyled Rules 101-415 are attached to this Report as Appendix A — they are presented in a “side-by-side” version, with the existing rule in the left column and the restyled rule in the right.

The template Committee Note to each of the restyled rules will read as follows:

Committee Note

The language of Rule [] has been amended as part of the restyling of the [] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee plans to prepare a more detailed Committee Note to Rule 101, which will provide a short description of the process and the goals of restyling. It will be adapted from the Committee Note to the restyled Civil Rule 1.

Recommendation: The Evidence Rules Committee recommends that the proposed restyled Evidence Rules 101-415 be approved for release for public comment, with the release to occur when all the restyled rules have been prepared.

B. Proposed Amendment to Evidence Rule 804(b)(3)

At its Fall 2007 meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee reviewed a proposed amendment that would extend the corroborating circumstances requirement to declarations against penal interest offered by the prosecution. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, the Committee deferred to a request from the Department of Justice representative to wait before proposing an amendment until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases. Committee members accordingly expressed strong interest in proceeding with the amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?*

Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in Crawford v. Washington? Under Crawford v. Washington, a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that "testimonial"*

declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is “testimonial” when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford*.

3. *Should the amendment resolve some disputes in the courts about the meaning of “corroborating circumstances”?* Committee members noted that there are a few decisions that define “corroborating circumstances” as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of “corroborating circumstances” did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

The proposed amendment to Evidence Rule 804(b)(3), together with the proposed Committee Note, is attached as Appendix B to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Rule 804(b)(3) be approved for release for public comment.

III. Information Item

***Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules**

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And as discussed above, the Court in *Whorton v. Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. At its Fall 2007 meeting, however, the Committee unanimously resolved that there is no need to propose any amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to codify *Crawford* is unwise at this point, given the rapid development of the case law. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

IV. Minutes of the Spring 2008 Meeting

The Reporter's draft of the minutes of the Committee's Spring 2008 meeting is attached to this report as Appendix C. These minutes have not yet been approved by the Committee.

**ADVISORY COMMITTEE
ON EVIDENCE RULES**

<p style="text-align: center;">ARTICLE I. GENERAL PROVISIONS</p> <p style="text-align: center;">Rule 101. Scope</p>	<p style="text-align: center;">ARTICLE I. GENERAL PROVISIONS¹</p> <p style="text-align: center;">Rule 101 — Scope</p>
<p>These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.</p>	<p>These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.</p>

¹ The date of this version is May 15, 2008. It is the later of two versions dated May 15, 2008.

Rule 102. Purpose and Construction	Rule 102 — Purpose
<p>These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.</p>	<p>These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.</p>

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
<p>(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and</p> <p>(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or</p> <p>(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.</p> <p>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>	<p>(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:</p> <p>(1) if the ruling admits evidence, the party, on the record:</p> <p>(A) timely objects or moves to strike; and</p> <p>(B) states the specific ground, unless it was apparent from the context; or</p> <p>(2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.</p> <p>(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>
<p>(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p>(c) Court’s Statements About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.</p>
<p>(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p>(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct the proceedings in a jury trial so that inadmissible evidence is not suggested to the jury by any means.</p>
<p>(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.</p>	<p>(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.</p>

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
<p>(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.</p>	<p>(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.</p>
<p>(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.</p>	<p>(b) Relevancy That Depends on a Fact. When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.</p>
<p>(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.</p>	<p>(c) Matters That the Jury Must Not Hear. A hearing on a preliminary question must be conducted outside the jury's hearing if:</p> <ol style="list-style-type: none"> (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and requests that the jury not be present; or (3) justice so requires.
<p>(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.</p>	<p>(d) Testimony by a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.</p>
<p>(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.</p>	<p>(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.</p>

<p>Rule 105. Limited Admissibility</p>	<p>Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes</p>
<p>When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.</p>	<p>If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.</p>

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
<p>When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.</p>	<p>If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that should in fairness be considered at the same time. This rule applies to a writing or recorded statement in any form.</p>

<p style="text-align: center;">ARTICLE II. JUDICIAL NOTICE</p> <p style="text-align: center;">Rule 201. Judicial Notice of Adjudicative Facts</p>	<p style="text-align: center;">ARTICLE II. JUDICIAL NOTICE</p> <p style="text-align: center;">Rule 201 — Judicial Notice of Adjudicative Facts</p>
<p>(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.</p>	<p>(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.</p>
<p>(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.</p>	<p>(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:</p> <ol style="list-style-type: none"> (1) is generally known within the court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
<p>(c) When discretionary. A court may take judicial notice, whether requested or not.</p> <p>(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.</p>	<p>(c) Taking Notice. At any stage of the proceeding, the court:</p> <ol style="list-style-type: none"> (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
<p>(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.</p>	<p>(d) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.</p>
<p>(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.</p>	
<p>(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.</p>	<p>(e) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.</p>

<p align="center">ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS</p> <p align="center">Rule 301. Presumptions in General in Civil Actions and Proceedings</p>	<p align="center">ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS</p> <p align="center">Rule 301 — Presumptions in a Civil Case Generally</p>
<p>In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.</p>	<p>In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who has it originally.</p>

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption related to a claim or defense for which state law supplies the rule of decision.

<p style="text-align: center;">ARTICLE IV. RELEVANCY AND ITS LIMITS</p> <p>Rule 401. Definition of “Relevant Evidence”</p>	<p style="text-align: center;">ARTICLE IV. RELEVANCY AND ITS LIMITS</p> <p>Rule 401 — Definition of Relevant Evidence</p>
<p>“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.</p>	<p>Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.</p>

<p>Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible</p>	<p>Rule 402 — General Admissibility of Relevant Evidence</p>
<p>All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.</p>	<p>Relevant evidence is admissible unless any of the following provide otherwise:</p> <ul style="list-style-type: none"> • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. <p>Irrelevant evidence is not admissible.</p>

<p>Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>Rule 403 — Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons</p>
<p>Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.</p>	<p>The court may exclude relevant evidence if its probative value is substantially outweighed by one or more of the following: a danger of unfair prejudice, confusing the issues, or misleading the jury, or considerations of undue delay, wasting time, or needlessly presenting cumulative evidence.</p>

<p>Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes</p>	<p>Rule 404 — Character Evidence; Crimes or Other Acts</p>
<p>(a) Character evidence generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:</p> <p>(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;</p> <p>(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;</p> <p>(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</p>	<p>(a) Character Evidence.</p> <p>(1) <i>Prohibited Uses.</i> Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.</p> <p>(2) <i>Exceptions in a Criminal Case.</i> The following exceptions apply in a criminal case:</p> <p>(A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;</p> <p>(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:</p> <p>(i) offer evidence to rebut it; and</p> <p>(ii) offer evidence of the defendant’s same trait; and</p> <p>(C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.</p> <p>(3) <i>Exceptions for a Witness.</i> Evidence of a witness’s character may be admitted under Rules 607, 608 and 609.</p>

<p>(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.</p>	<p>(b) Crimes or Other Acts.</p> <p>(1) <i>Prohibited Uses.</i> Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.</p> <p>(2) <i>Permitted Uses²; Notice.</i> This evidence may be admissible³ for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:</p> <p>(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and</p> <p>(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.</p>
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² Style Subcommittee comment: The Advisory Committee changed this from *Exceptions*. The heading is now not parallel with 404(a)(2) & (3), 408(b), 410(b), and 412(b). Notice the consistent pattern that we have tried to use: the heading to one subpart says *Prohibited Uses*, and the heading to the following subpart says *Exceptions*. We believe that the heading should probably be changed back. For now, this could be added to the list of global issues.

³ Style Subcommittee comment: The Style Subcommittee believes that it's critically important to be consistent in phrasing the court's discretionary authority to admit evidence. See the footnote to Rule 407. In nine other places, the rules now use *the court may admit*: 407, 408(b), 411, 412(b)(1), 412(b)(2)(twice), 413(a), 414(a), and 415(a). The Advisory Committee concluded that *may be admissible* is substantive in 404(b)(2), but we think that decision should be reconsidered.

Professor Capra comment: A majority of the Advisory Committee determined that "may be admissible" is substantive and had to be retained for the following reasons: 1) hundreds of cases have established that Rule 404(b) is a rule of "admissibility" and not exclusion, so any change to the language that could even be conceived as changing or narrowing the existing language threatens this uniform case law; 2) Congress carefully considered this language, revising the original Advisory Committee draft, which had provided that the rule "does not exclude" bad act evidence if offered for a proper purpose. Congress made the change to place "greater emphasis on admissibility." The Committee was reluctant to change the language carefully chosen by Congress; 3) the change was opposed by the Justice Department, as signaling a less generous approach to bad act evidence; and 4) the language of Rule 404(b), as vetted and cited in so many cases, is a "sacred phrase" and therefore substantive under the restyling protocol.

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
<p>(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.</p>	<p>(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by opinion testimony. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.</p>
<p>(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.</p>	<p>(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.</p>

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
<p>Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.</p>	<p>Evidence of a person's habit or an organization's routine practice is relevant to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. This evidence is relevant regardless of whether it is corroborated or whether there was an eyewitness.</p>

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
<p>When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.</p>	<p>When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:</p> <ul style="list-style-type: none"> • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. <p>But the court may admit this evidence⁴ for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.</p>

⁴ Style Subcommittee comment: In the previous draft, this read *this evidence may be admitted*. The Advisory Committee decided that that language did not involve a substantive change. Nevertheless, the Advisory Committee preferred *the court may admit this evidence*, and we have made that change in this rule and in 408(b), 411, 412(b)(1) & (2), 413(a), 414(a), and 415(a). *The court may admit* is preferable to *the court need not exclude* for these reasons:

- It avoids the double negative (*not . . . exclude*).
- It offers a positive contrast to the negative force of (b)(1).
- It achieves the same result in practice. We don't see any semantic difference between the two. The longer one is just the negative version of *the court may admit*.
- The two most important words in our work are *may* and *must* — the so-called words of authority. We have to be consistent in how we use them, without creating various ways of expressing what the court is permitted to do. We want the evidence rules to be internally consistent, and we want them to be consistent with all the other restylings, which use *may* to create permission.
- If we use *may* and *must* consistently in the evidence rules, it will be highly implausible for anyone to read *may admit* as *must admit*.
- Rules 101–415 use *the court may* five times — in 103(c), 201(b), 201(c)(1), 403, and 405. Note 403 in particular: *The court may exclude relevant evidence if . . .*. That can't be read as *The court must*.

Professor Capra comment: There is an argument that the change from "This rule does not require exclusion" to "The court may admit" is substantive because it changes the rule from one of exclusion to one providing a positive grant of admissibility. It is at least a change in tone that may give an unintended signal to practitioners. The Evidence Rules Committee voted, however, that the change was not substantive. But the Committee unanimously voted to suggest to the Style Subcommittee that the original language --- "This rule does not require exclusion" --- be retained.

<p align="center">Rule 408. Compromise and Offers to Compromise</p>	<p align="center">Rule 408 — Compromise Offers and Negotiations</p>
<p>(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:</p> <p style="padding-left: 40px;">(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and</p> <p style="padding-left: 40px;">(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.</p>	<p>(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:</p> <p style="padding-left: 40px;">(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and</p> <p style="padding-left: 40px;">(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office or agency in the exercise of its regulatory, investigative, or enforcement authority.</p>
<p>(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.</p>	<p>(b) Exceptions. The court may admit⁵ this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.</p>

⁵ The change in language from “this rule does not require exclusion” to “the court may admit” is discussed in the footnote to rule 407.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

<p align="center">Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements</p>	<p align="center">Rule 410 — Pleas, Plea Discussions, and Related Statements</p>
<p>Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:</p> <ul style="list-style-type: none"> (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. <p>However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.</p>	<ul style="list-style-type: none"> (a) Prohibited Uses. In any civil or criminal proceeding, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: <ul style="list-style-type: none"> (1) a guilty plea that was later withdrawn; (2) a plea of nolo contendere; (3) a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. (b) Exceptions. A statement described in Rule 410(a)(3) or (4) is admissible: <ul style="list-style-type: none"> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if both statements should in fairness be considered at the same time; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
<p>Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.</p>	<p>Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit⁶ this evidence for another purpose, such as proving agency, ownership, control, or a witness's bias or prejudice.</p>

⁶ The change in language from “this rule does not require exclusion” to “the court may admit” is discussed in the footnote to rule 407.

<p align="center">Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition</p>	<p align="center">Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition</p>
<p>(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):</p> <p style="padding-left: 40px;">(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.</p> <p style="padding-left: 40px;">(2) Evidence offered to prove any alleged victim's sexual predisposition.</p>	<p>(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:</p> <p style="padding-left: 40px;">(1) evidence offered to prove that a victim engaged in other sexual behavior; or</p> <p style="padding-left: 40px;">(2) evidence offered to prove a victim's sexual predisposition.</p>
<p>(b) Exceptions.</p> <p>(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:</p> <p style="padding-left: 40px;">(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;</p> <p style="padding-left: 40px;">(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and</p> <p style="padding-left: 40px;">(C) evidence the exclusion of which would violate the constitutional rights of the defendant.</p> <p>(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.</p>	<p>(b) Exceptions.</p> <p>(1) Criminal Cases. The court may admit the following evidence in a criminal case:</p> <p style="padding-left: 40px;">(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;</p> <p style="padding-left: 40px;">(B) evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and</p> <p style="padding-left: 40px;">(C) evidence whose exclusion would violate the defendant's constitutional rights.</p> <p>(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.</p>

<p>(c) Procedure To Determine Admissibility.</p> <p>(1) A party intending to offer evidence under subdivision (b) must—</p> <p>(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and</p> <p>(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.</p> <p>(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.</p>	<p>(c) Procedure to Determine Admissibility.</p> <p>(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:</p> <p>(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;</p> <p>(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;</p> <p>(C) serve the motion on all parties; and</p> <p>(D) notify the victim or, when appropriate, the victim’s guardian or representative.</p> <p>(2) Hearing. Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and record of the hearing must be and remain sealed.</p>
	<p>(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.</p>

<p align="center">Rule 413. Evidence of Similar Crimes in Sexual Assault Cases</p>	<p align="center">Rule 413 — Similar Crimes in Sexual-Assault Cases</p>
<p>(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.</p>	<p>(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.</p>
<p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>
<p>(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—</p> <ul style="list-style-type: none"> (1) any conduct proscribed by chapter 109A of title 18, United States Code; (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body; (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4). 	<p>(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:</p> <ul style="list-style-type: none"> (1) any conduct prohibited by 18 U.S.C. chapter 109A; (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body; (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

<p>Rule 414. Evidence of Similar Crimes in Child Molestation Cases</p>	<p>Rule 414 — Similar Crimes in Child-Molestation Cases</p>
<p>(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.</p>	<p>(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.</p>
<p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

(d) **Definition of "Child" and "Child Molestation."**
In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

<p>Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation</p>	<p>Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.</p>
<p>(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.</p>	<p>(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.</p>
<p>(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>

FEDERAL RULES OF EVIDENCE

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford*. See, e.g., *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007) (accomplice’s statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 1-2, 2008

Boston, MA

The Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 1st and 2nd 2008 in Boston.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangle, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Elizabeth Shapiro, Esq., Department of Justice
Professor Daniel Coquillette, Reporter to the Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

Opening Business

Judge Hinkle welcomed the Committee's new member, Judge Anita Brody, to her first Committee meeting. Judge Hinkle asked for and received approval of the minutes of the Fall 2007 Committee meeting.

Judge Hinkle then asked Professor Coquillette for a report on the status of proposed Evidence Rule 502, which would provide protections against waiver of privilege and work product. Professor Coquillette noted that Rule 502 was passed unanimously in the Senate in February, but that its prospects of passage in the House are dependent on convincing some staffers and members of Congress that the Rule is well-drafted and that it does not conflict with other pending legislation on protective orders. Recent statements from staffers and House members appear to be positive, and there is a fair possibility that the House will pass the legislation before the end of the year.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415). The draft had been reviewed by the Reporter, who provided suggestions, and it was approved by the Style Subcommittee of the Standing Committee.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules

Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

What follows is a description of the Committee's determinations, rule by rule. **The final version of each rule to be submitted to the Standing Committee is attached (along with the existing rule in a side-by-side presentation) to these Minutes.**

Rule 101

Rule 101 provides an introductory statement about the applicability of the Evidence Rules — the details of Evidence Rule-applicability are found in Rule 1101. The Style Subcommittee draft of Rule 101 referred in some detail to the specific courts to which the Evidence Rules are applicable, including courts of appeals, district courts, and the District Courts of Guam, the Virgin Islands, and the Northern Marianas Islands.

Committee members raised a number of issues, including: 1) does it make sense to state that the Evidence Rules are applicable to the courts of appeals?; 2) should the proposal be amended to apply the Evidence Rules to the Supreme Court?; and 3) why should district courts in general be distinguished from the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands?

On these questions, the Committee determined that 1) Evidence Rules can and do apply to the courts of appeals, for example the rules on judicial notice and preservation of the right to appeal; 2) the Evidence Rules do not apply to the Supreme Court, as the Enabling Act does not authorize the rulemaking process to establish rules that would bind the Supreme Court; and 3) research is needed to determine whether a textual distinction was required to differentiate the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands from other district courts.

The Committee voted unanimously to defer the difficult drafting questions of rule-applicability until it reached Rule 1101. For now, the Committee adopted a simple and general statement of rule-applicability in Rule 101:

These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

Rule 102

Rule 102 provides as follows:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The restyled version presented to the Committee changed the heading of Rule 102 from “Purpose and Construction” to “Purpose”. Committee members noted that the change was problematic because the rule deals mostly with how a court is to construe the Evidence Rules. The Committee asked the Style Subcommittee to consider whether to retain the existing heading, or in the alternative to change it to “Construction” rather than “Purpose.”

The Style Subcommittee changed “shall” to “should”. After discussion, the Committee agreed with this change. One of the goals of the style project is to take out all the “shalls” from the Rules; the reasoning is that “shall” is a vague term that might mean “must”, “may” or “should” among other possibilities. The style change to “should” in Rule 102 was approved because the Rule is hortatory — it does not require a court to apply specific guidelines for construing the rules.

The style draft changed the existing language “proceedings justly determined” to “achieve a just result.” The Committee voted unanimously against this change on substantive grounds. Committee members concluded that a focus on a justly determined proceeding could be construed to mandate an accurate result in every circumstance — a mandate that would be in conflict with the goal of evidence rules and burdens of proof in criminal cases. For the same substantive reason, the Committee unanimously rejected the proposed change from “to the end that the truth be ascertained” to “determine the truth.”

The Committee also unanimously determined that the Style Subcommittee’s deletion of the term “to the end that” would be substantive because it changes the goal of the rule. The existing rule divides the rules of construction and the ultimate goals of construction. The restyled rule simply lumps all the factors together without differentiating rules of construction from goals of construction. So the Committee voted to restore the language “to the end that”.

The Committee corrected the substantive changes and unanimously approved the following restyled version of Rule 102:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end that the truth may be ascertained and proceedings justly determined.

Rule 103

Rule 103 sets forth various rules on objections, offers of proof, preserving claims of error, and related questions. The Evidence Rules Committee unanimously approved the draft prepared by the Style Subcommittee. The Evidence Rules Committee made one suggestion — to take out the word “also” from subdivision (c). Committee members also raised questions about whether the restyled subdivision (d) was correct in mandating that the court conduct proceedings so that inadmissible evidence is not suggested to the jury, to the extent practicable. But the Committee ultimately concluded that the restyled language tracked the existing case law.

Rule 104

Rule 104 covers preliminary questions, including admissibility determinations and conditional relevance. Rule 104(a) provides that in making an admissibility determination, a trial court “is not bound by the rules of evidence except those with respect to privileges.” The Style Subcommittee considered whether there might be rules outside the Evidence Rules that could affect the trial court’s determination of admissibility, and if those rules should also be inapplicable to admissibility determinations. The Subcommittee proposed the term “any evidence rules”; but the Evidence Rules Committee determined that a reference to “any” evidence rules could raise a host of unforeseen issues about the applicability of rules outside the Evidence Rules to preliminary determinations. The Committee decided, as a substantive matter, that the proper reference should be to “evidence rules.”

The Committee next considered the draft’s use of the term “criminal defendant.” All members of the Committee agreed that the term “criminal defendant” was presumptive and pejorative. Six members of the Committee believed that the term “criminal defendant” effectuated a substantive change — much like the difference between “victim” and “alleged victim.” The Committee then discussed what term should be used. It rejected the term “accused” because that term had been used in other rules and courts sometimes misconstrued it to apply to civil defendants accused of misconduct. The Committee tentatively agreed on the term “defendant in a criminal

case.” Professor Kimble, the style consultant, agreed to try to implement that term throughout the restyled rules. The Committee agreed that whatever term is used, it must be used consistently throughout the rules.

The Committee next turned to Rule 104(b), which currently provides that when relevance is conditioned on the existence of a fact, “the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding.” The restyled version changes “shall” to “may”. The DOJ representative suggested that this might be a substantive change because it would give courts more discretion to exclude conditionally relevant evidence than is currently provided. He suggested that the correct word is “should.” But the rest of the Committee disagreed. It determined that the word “may” properly gives the trial court discretion — which exists under the current rule — to rule on conditional relevance immediately or to admit the evidence subject to a connection and rule at a later point.

The Committee voted unanimously to approve the restyled version of Rule 104, with the deletion of “any” before evidence rules and the change of “criminal defendant” to “defendant in a criminal case.”

Rule 105

Rule 105 provides as follows:

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The Style Subcommittee Draft changed the heading to “Limiting Evidence That Is Not Admissible Against All Parties or for All Purposes.” Committee members suggested that the heading was inaccurate because there is no way to determine all the purposes for which evidence might be admissible, at least outside the context of a case. The Committee recognized that the heading did not effectuate a substantive change, but nonetheless suggested that the heading be reconsidered. After discussion, the Committee and Professor Kimble agreed on the following heading:

“Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.”

But the Committee also voted that the best solution was to retain the existing heading: “Limited Admissibility.” The Committee determined that the existing heading accurately and succinctly captures the subject matter of the rule. Finally, the Committee voted 6 to 2 to recommend publication of restyled Rule 105.

Rule 106

Rule 106 provides as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Style Subcommittee draft deleted “may require the introduction” and substituted “may introduce.” The Committee determined, unanimously, that this change was substantive, because it failed to cover all the situations in which Rule 106 currently applies. If the conditions of the existing Rule 106 are met, a party can force an adverse party to introduce completing evidence during its case. Changing the rule to “may introduce” does not cover the situation in which a party can require another party to introduce the completing evidence.

The Committee therefore determined that the term “require the introduction” must be retained. As so retained, the Committee unanimously approved the restyled version of Rule 106.

Rule 201

Rule 201 is the rule on judicial notice. The Committee unanimously approved the Style Committee draft of Rule 201. The Committee, however, discussed a substantive anomaly in the existing rule that is carried over to the restyled rule: the text of the Rule permits an appellate court to judicially notice a fact, but in criminal cases the Constitution prohibits an appellate court from noticing a fact against the defendant if that fact was not noticed below. (This is because of the accused’s constitutional right to jury trial). The Committee asked Professor Broun, consultant to the

Committee, to prepare a memorandum on a possible substantive amendment to Rule 201 that would track the constitutional prohibition on judicial notice on appeal of a criminal case.

Rule 301

Rule 301 governs presumptions. The Subcommittee's restyling draft made a number of changes but kept the basic framework of the rule, i.e., that a presumption imposes the burden of going forward with evidence to rebut, but does not shift the burden of proof, "in the sense of the risk of nonpersuasion." The Committee unanimously approved the Style Subcommittee's draft.

Rule 302

Rule 302 provides as follows:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

The Style Subcommittee draft, among other things, changes "civil actions and proceedings" to "a civil case." The Committee discussed whether this is a substantive change. Some Committee members suggested that the term "proceeding" was broader than "case" but that if there was such a distinction, it would not make a difference for Rule 302. The Committee determined that the proper iteration of "civil case", "civil action" and "civil proceeding" was a global question that might be best treated by a specification in Rule 1101 that the terms would be used interchangeably throughout the Evidence Rules. For now, the Committee resolved to keep track of usages of terms such as "civil action", "civil case" and "civil proceeding" and to work on a global solution as the restyling project goes forward. The Committee unanimously agreed to recommend that the restyled version of Rule 302 be released for public comment.

Rule 401

Rule 401 provides as follows:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Style Subcommittee draft retained the reference to “the action.” Committee members noted that this reference was different from Rule 302, which currently refers to “actions and proceedings,” and the restyled version of Rule 302, which refers to a “case”. Again, this is a global issue that might possibly be resolved by language added to Rule 1101 that would allow those different references to be used interchangeably. The Committee approved for now the reference to “the action.”

Committee members objected, however, to a change from “fact that is of consequence” to “fact that is consequential.” Committee members unanimously agreed that this change could be read to provide a stricter standard for relevance than under the current, permissive rule. In essence, the change could be read to require that the evidence be more important to the action than is required under existing law. Raising even an argument of a substantive change was considered especially problematic given the importance of Rule 401 in the structure of the Evidence Rules. Committee members voted unanimously to restore the current reference to a “fact that is of consequence in determining the action.” With that change, the Committee voted unanimously to approve the Style Committee draft of Rule 401.

Rule 402

Rule 402 provides as follows:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The draft of the Style Subcommittee breaks out the sources of exclusion into bullet points and provides other style improvements. One Committee member suggested that the restyled Rule 401 created a disconnect with Rule 402 because Rule 401 no longer uses the term “relevant evidence” but instead refers to evidence that is relevant. But Committee members, after discussion, determined that no change of substance had been made and that restyled Rules 401 and 402 have the same connection as the existing versions. The Committee voted unanimously to approve the Style Subcommittee draft of Rule 402.

Rule 403

Rule 403 provides as follows:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Among other things, the Style Subcommittee draft changed the heading of Rule 403 to “Exclusion of Relevant Evidence for Specific Reasons.” The Committee unanimously objected to this heading, on the ground that the reference to “specific reasons” was vague and could be read to limit judicial discretion. Professor Kimble suggested that the existing heading was inaccurate because it referred to three reasons for excluding evidence when the rule mentions six. After discussion, the Committee unanimously suggested that the Style Committee consider and adopt the following heading to the restyled Rule 403:

“Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons”

After referring this style suggestion to the Style Subcommittee, the Committee unanimously approved the restyled Rule 403.

Rule 404

Rule 404 generally prohibits the circumstantial use of character evidence; sets forth a number of situations in which character evidence is admissible; and provides that specific acts are excluded if offered to prove character but are not barred by the rule if offered for some not-for-character purpose. The Committee determined that the restyled Rule 404 contained a number of substantive changes from the existing rule. Those substantive changes are as follows:

1. *Character/trait of character*: The existing rule sometimes refers to “character” and other times to “trait of character.” The Style Subcommittee draft generally tried to refer to “character trait” or “trait” and deleted most of the broader references to “character”. The Evidence Rules Committee found these changes to be substantive, because there is a reasoned difference between character and a character trait. In some cases, a party will be arguing that the adversary is making an undifferentiated attack — a character smear. Rule 404 provides protections against these attacks. In other situations, a party may be attempting to introduce a particular aspect of a person’s character, such as honesty or peaceableness. Rule 404 provides other rules to govern this situation. The Committee carefully reviewed the existing Rule and determined that the various uses of “character” and “trait of character” were well considered, and that any change of those usages would be substantive. So the existing references were restored to the restyled draft.

2. *Reference to Rule 607*: Rule 404(a) provides that the bar on character evidence does not apply to evidence of the character of a witness, “as provided in Rules 607, 608, and 609.” The Style Subcommittee asked the Evidence Rules to consider whether the reference to Rule 607 should be deleted as inaccurate, because Rule 607 is not a rule that directly provides for admission of character evidence. The Committee considered this request and decided that deletion of the reference to Rule 607 would be a substantive change. While Rule 607 does not directly govern character evidence, it does allow character evidence (or for that matter impeachment evidence generally) to be introduced in situations that were not permitted before the federal rules were enacted. If the reference to Rule 607 were deleted, it could create the unintended consequence of an argument, or even a holding, that a witness’s character could not be attacked on direct examination.

3. *“Another purpose”*: Rule 404(b) currently provides that bad act evidence, while inadmissible to prove character, “may, however, be admissible” for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” The restyled version states that such evidence “may be admitted for another purpose, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident.” This change raised a number of questions with Committee members, especially

given the heavy use of Rule 404(b) in the courts. One problem raised by the Reporter is that the change from “other purposes” to “another purpose” could lead to an unintended substantive change. Under current law, the government often offers bad act evidence for multiple purposes, and then the evidence is assessed under Rule 403 for its probative value as to all such not-for-character purposes. Changing the language to “another purpose” could be read to permit the articulation of only *one* not-for-character purpose. Professor Kimble responded that the style convention is to use singular rather than plural, and that the use of the singular is not intended to be limiting. He also explained that applying the plural only in this rule could lead to unnecessary arguments about the use of the singular in other rules. After discussion, the Committee voted unanimously that the use of the singular rather than the plural did not create a substantive change. The Committee then voted on whether to recommend to the Style Subcommittee that the plural, “other purposes” be retained. That vote failed by a vote of 5 to 4.

In an email exchange of Committee members after the meeting, the Committee agreed to suggest to the Style Subcommittee that “another purpose” should be changed to “any other purpose.” This change would then track a similar change made to Rules 413-415 (see below); it would not be in conflict with the style rule on singular and plural; and it would clearly allow the proponent to articulate multiple not-for-character purposes for evidence of uncharged misconduct.

4. “*May be admitted*” — The DOJ representative objected to the change from “may, however, be admissible” to “may be admitted” in Rule 404(b). He noted that hundreds of cases had established that Rule 404(b) is a rule of inclusion, not exclusion. He also noted that Congress explicitly changed the Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to “may, however, be admissible.” Under the Style protocol, language in a rule that is a “sacred phrase” is considered substantive and is not to be changed. The DOJ representative argued that the change to “may be admitted” was substantive because it was stricter in tone than “may, however, be admissible”; and that at any rate the Rule 404(b) language was a sacred phrase. A vote was taken on whether the change to “may be admitted” was substantive and a majority (five Committee members) agreed that it was substantive. Under the Style protocol, that means that the change cannot be made by the Style Subcommittee. So “may be admissible” was retained.

5. *Plan/preparation*: The Style Subcommittee switched “plan” and “preparation” in the list of permissible purposes set forth in Rule 404(b). The Reporter objected to this change as an unjustified tinkering with a Rule that has been applied in thousands of cases. The reasoning for the change is that a bad act is planned before it is prepared, and so the style change follows a more logical progression than the current rule. The Reporter’s response was that the list of permissible purposes in Rule 404(b) does not, and is not intended to, follow a logical progression. The Committee voted on whether the list of purposes in Rule 404(b) constituted a “sacred phrase,”

changing which is considered substantive under the restyling protocol. The Committee voted 7 to 2 that the list of purposes was not a “sacred phrase” and therefore the flipping of “plan” and “preparation” was not substantive.

The Committee then voted unanimously to recommend to the Style Subcommittee that it retain the list of purposes as it is in the existing rule, i.e., to keep “preparation” before “plan” in the list.

Finally, a vote was taken to approve the restyled Rule 404, subject to undoing the substantive changes discussed above. The Committee unanimously approved the rule as so modified.

Rule 405

Rule 405 provides the rule on proof of character when such proof is permitted by Rule 404. The Committee reviewed the restyled version of Rule 405. After discussion, the Committee voted unanimously that the Rule must refer both to “character” and “character trait” in both subdivisions of the Rule. This was necessary to properly track the use of “character” and “character trait” in Rule 404. The Committee recognized that the Rule must cover proof of both specific character traits and more general references to character, e.g., “the defendant is a good person.” Thus, the reference in the restyled version to character traits only operated as a substantive change.

After restoring references to character as well as character traits, the Committee unanimously approved the restyled version of Rule 405.

Rule 406

Rule 406 currently provides as follows:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 406 is not strictly necessary, because even without the rule, habit evidence is clearly relevant to show conduct consistent with the habit under Rule 401. But the drafters of Rule 406 reasoned that a specific application of the relevance definition was necessary to abrogate some common law limitations on the use of habit evidence—specifically, the common law held that habit evidence was not relevant unless it was supported by corroborating evidence or eyewitness testimony. Rule 406 rejects those common law limitations.

The Style Subcommittee substituted “admissible” for “relevant”: i.e., “habit is admissible” rather than “habit is relevant.” After discussion, Committee members voted unanimously that the change from “relevant” to “admissible” was substantive. It essentially changed the rule from a particularized definition of relevance to a positive grant of admissibility. As such it went beyond the intent of the drafters of the original rule. The Committee then voted on the restyled version of Rule 406, with “relevant” replacing “admissible”. The Committee unanimously approved the Rule as modified.

Rule 407

Rule 407 currently provides as follows:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Among other changes, the restyled version of Rule 407 provides that evidence “may be admitted” if offered for one of the designated proper purposes in the rule. A number of Committee members argued that this was a change in the tone of the Rule. Current Rule 407 is a rule of exclusion; it becomes inapplicable if the proponent can articulate a purpose for the evidence that is not prohibited by the Rule. Rule 407 is not a rule that admits evidence. Committee members argued that by using the term “may be admitted” the tone of the rule was changed to one that provided a positive grant of admissibility. The Reporter noted that the language “does not require the exclusion of evidence” was carefully chosen by the original Advisory Committee, and carefully vetted by Congress, which changed similar language in Rule 404(b) to provide a broader rule of admissibility, but made no such

change to Rule 407. Professor Kimble argued in response that the phraseology “may be admitted” was to be preferred because it means the same thing and is “tighter” than “need not be excluded.”

The Committee voted on whether the change in approach from “does not require exclusion” to “may be admitted” was a substantive change under the style protocol. Eight members of the Committee were of the view that the change was not substantive; one Committee member dissented from that view.

The Committee then voted on whether to suggest to the Style Subcommittee to return to the original iteration of the rule or some variation, e.g., “the rule does not require exclusion” or “the evidence need not be excluded” — or simply “the rule does not apply.” The Committee voted 6 to 2 in favor of this style recommendation. The Committee’s second choice for a style change was to provide that “a court may admit” rather than “may be admitted.” Committee members reasoned that “a court may admit” seemed less compulsory (and more direct) than “the evidence may be admitted.”

The Committee then voted on whether to approve the restyled Rule 407. It was approved by a vote of 8 to 1.

Rule 408

Like Rule 407, Rule 408 provides that certain evidence — in this instance evidence of compromise — is excluded if offered for certain specified purposes, but the rule “does not require exclusion” i.e., is not applicable, if the evidence is offered for a purpose not specifically barred by the rule. As with Rule 407, the Style Subcommittee changed Rule 408 to provide that evidence “may be admitted” if offered for some purpose not prohibited by the Rule. With respect to this change, Committee members came to the same resolution as was reached under Rule 407: all but one member agreed that the change was stylistic rather than substantive; but a strong majority voted to suggest to the Style Subcommittee that it return to the language of the original rule (which in this case was reaffirmed by an amendment in 2006): the evidence “does not require exclusion” if offered for a purpose not barred by the rule — or some variation of that language, such as “the rule does not apply.” As a less preferred alternative, yet an improvement on the Style draft, the Committee suggested “the court may admit.”

Committee members also suggested that the heading to subdivision (b) should be changed from “Exceptions” to “Permitted Uses.” Professor Kimble agreed to take this suggestion under advisement.

Committee members unanimously approved the restyled version of Rule 408.

Rule 409

The Committee unanimously approved the restyled version of Rule 409.

Rule 410

Rule 410 provides that certain evidence related to plea negotiations is not admissible against the defendant involved in the negotiations. The Committee reviewed the restyled draft and noted that one change was substantive. One subdivision of Rule 412 currently protects “any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” The restyled draft changed “attorney for the prosecuting authority” to “the prosecutor.” Committee members unanimously saw this as a substantive change because Congress specifically chose this language to cover all attorneys acting under prosecutorial authority whether or not they were “prosecutors” in the strict sense. For example, in some jurisdictions private attorneys exercise prosecutorial authority for certain matters, and a change to “prosecutor” may raise doubts about whether discussions with those attorneys are covered by Rule 410.

Committee members voted unanimously that the change from “attorney for the prosecuting authority” to “the prosecutor” was substantive and therefore the original language was to be retained. Committee members then voted unanimously to approve the restyled draft of Rule 410, subject to restoring the language “attorney for the prosecuting authority.”

Rule 411

Rule 411 currently provides as follows:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

As with Rules 407 and 408, the Style Committee draft changes Rule 411 from a rule that “does not require the exclusion of evidence” to a rule providing that evidence “may be admitted” if offered for a purpose not prohibited by the rule. The Committee voted on the restyled draft to Rule 411 in the same way as it did with respect to Rules 407 and 408: the change to “may be admitted” was not substantive, but the Committee suggested that the Style Subcommittee restore the language “does not require exclusion” or some variation such as “the rule does not apply.” As a second alternative, the Committee suggested that the Style Subcommittee use “the court may admit.”

Rule 412

Rule 412 provides that in cases involving sex offenses, evidence of the alleged victim’s other sexual behavior or predisposition is to be admitted only under narrow circumstances. The existing rule provides that such evidence “is admissible, if otherwise admissible under these rules” under the narrow circumstances provided (in separate subdivisions for civil and criminal cases). Both Professor Kimble and the Reporter determined that the language “if otherwise admissible under these rules” should be deleted from the restyled draft because the general principle of all evidence rules is that admissibility under one rule does not guarantee admissibility under others. (For example, a statement that satisfies the hearsay rule may nonetheless be excluded under Rule 403). Moreover, the use of the term “if otherwise admissible under these rules” created an anomaly in criminal cases, where Rule 412 provides that evidence of the victim’s sexual behavior must be admitted if its exclusion would violate the constitutional rights of the defendant. Retaining the language “if otherwise admissible under these rules” would condition a defendant’s constitutional right on those other evidence rules, which is obviously incorrect.

Committee members agreed with the deletion of the two references to “if otherwise admissible under these rules.” Members noted, however, that without this qualifying language, the

term “is admissible” sounded too positive, especially given the substantial limitations on the admissibility of evidence covered by Rule 412. As such the restyled version had made a substantive change. Committee members voted to change “is admissible” to “may be admitted” or “the court may admit”— with the determination of the exact language to be made by the Style Subcommittee.

Committee members and Professor Kimble also agreed to a style change to the notice provision to Rule 412: changing “14 days before the scheduled trial date” to “14 days before trial.”

With these changes, the Committee voted unanimously to approve the restyled draft of Rule 412.

Rule 413

Rule 413 provides in part as follows:

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

The restyled version changed “another offense or offenses” to “another offense.” This was in accord with style rules using the singular rather than the plural. But Committee members noted that this change would allow a defendant to argue that the prosecution could only admit one other sexual assault, even if the defendant had committed more than one. Members noted that such an argument was especially likely to be raised given the sensitive nature of the issues and the stakes involved in cases covered by Rule 413. After discussion, the Committee voted 5 to 4 to make a substantive change to the restyled draft: “another act” was changed to “any other act.”

The Reporter noted that the term “relevant matter” — as used in the restyled draft — was not a term that is recognized under the Evidence Rules. Professor Kimble agreed to return to the language of the existing rule — “on any matter to which it is relevant.”

The DOJ representative raised a possible substantive change in the restyled notice provision, which deleted the term “testimony that is expected to be offered” and replaced it with “summary of the testimony.” The DOJ representative noted that the government could not know with certainty in advance how a witness will testify on the stand. The term “summary of the testimony” could imply some standard of accuracy that the government would not be able to meet, especially compared with the language in the existing rule which refers to “testimony that is *expected* to be offered.” After discussion, the Committee voted unanimously that the deletion of the term “expected” was a substantive change. Accordingly the Committee voted to add the word “expected” before “testimony” in the restyled draft.

Finally, the Committee and Professor Kimble agreed to a change to the notice provision to provide consistent language with the modification made to the notice provision in Rule 412: “before the scheduled trial date” in the restyled draft was changed, by agreement, to “before trial.”

With all the above changes, the Committee voted unanimously to approve the restyled draft of Rule 413.

Rules 414 and 415

Rules 414 and 415 provide the same treatment of evidence of sexual misconduct as Rule 413, but in different types of actions. These Rules present the same restyling issues presented by Rule 413, and the Committee resolved them in the same way: 1. Using “any other” rather than “another” to describe the acts subject to admission; 2. Using “on any matter to which it is relevant” rather than “any relevant matter”; 3. Adding “expected” before “testimony” in the notice provision; and 4. Changing “before the expected trial date” to “before trial” in the notice provision. Subject to these changes, the Committee unanimously approved the restyled draft of Rules 414 and 415.

II. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest in criminal cases. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not. The Department of Justice representative asked the Committee to wait before proposing an amendment, until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?* Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the

Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in Crawford v. Washington?* Under *Crawford v. Washington*, a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that “testimonial” declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is “testimonial” when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford*.

3. *Should the amendment resolve some disputes in the courts about the meaning of “corroborating circumstances”?* Committee members noted that there are a few decisions that define “corroborating circumstances” as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of “corroborating circumstances” did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its

substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

What follows is the proposed amendment and Committee Note as unanimously approved by the Committee:

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused— in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements

offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford*. See, e.g., *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007) (accomplice’s statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

The meeting was adjourned on May 2, 2008. The Fall 2008 Committee meeting is scheduled for October 23 and 24 in Santa Fe.

Respectfully submitted,

Daniel J. Capra
Reporter

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

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To: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

From: Hon. Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Subject: Report of the Advisory Committee on Criminal Rules

Date: May 12, 2008

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure (“the Committee”) met on April 27–28, 2008 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items:

- (1) approval for transmission to the Judicial Conference of published amendments to time computation Rule 45(a) and related amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases;
- (2) approval for transmission to the Judicial Conference of published amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases; and
- (3) approval for publication and comment of proposed amendments to Rules 6, 15, and 32.1.

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Time Computation Rules

The first group of amendments the Committee recommends for transmission to the Judicial Conference are part of the time computation project. No comments specific to the Criminal Rules affected by the time computation project were received during the period for notice and public comment, and the Committee voted unanimously in favor of each of the proposed amendments described below.

1. ACTION ITEM—Rule 45(a)

The Advisory Committee voted unanimously to recommend that Rule 45(a) be amended as part of the time computation project. Only one aspect of the proposed rule deserves special mention. Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as “business days” or “excluding Saturdays, Sundays, and holidays”). At present, it is not clear whether Rule 45(a) applies to statutory time periods. Unlike the comparable provisions in the other rules (such as Fed. R. Civ. P. 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language “any time period” used prior to restyling. Accordingly, the proposed Committee Note recognizes that the new language may broaden the applicability of Rule 45. It states that the general time computations do not apply to Rule 46(h), because that rule is based upon a statute that provides for a different time-counting method.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

The Committee was also unanimous in recommending the following amendments to time periods that are intended to compensate for the change to a “days are days” method of counting time.

2. ACTION ITEM—Rule 5.1

Rule 5.1 requires a preliminary hearing to be held within 10 days after a defendant’s initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The Committee recommends extending these periods to 14 and 21 days if proposed Rule 45(a) is adopted, but notes that the statutory periods are based upon 18 U.S.C. § 3060(b). Because of the statutory basis of the time periods in the current rule, this proposal is contingent upon the adoption of a statutory amendment. If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5.1 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 7

The Committee unanimously concluded that the time for motions for a bill of particulars should be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12.1

Rule 12.1 (alibi defense) establishes time periods for responses and disclosure. The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods for the defendant's response and the government's disclosure under Rule 12.1(a)(2) and (b)(2) should be increased from 10 to 14 days.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM—Rule 12.3

Rule 12.3 (public-authority defense) establishes time periods for responses, requests, and replies. The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods in Rule 12.3 should be increased to 14 days, and the 20 day periods should be increased to 21 days.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be approved as published and forwarded to the Judicial Conference.

6. ACTION ITEM—Rule 29

Rule 29(c)(1) requires motions for post-verdict acquittal to be filed within 7 days after a verdict or the discharge of the jury. The Committee recommends increasing the time to 14 days if proposed Rule 45(a) is adopted. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation. Rather than

increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 29 be approved as published and forwarded to the Judicial Conference.

7. ACTION ITEM—Rule 33

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for a new trial under Rule 33(b)(2).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 33 be approved as published and forwarded to the Judicial Conference.

8. ACTION ITEM—Rule 34

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for arrest of judgment under Rule 34.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 34 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM—Rule 35

Rule 35(a) currently allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules). The Committee concluded that this period should be increased to 14 days if proposed Rule 45(a) is adopted. Sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because Fed. R. App. P. 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

10. ACTION ITEM—Rule 41

Rule 41(e)(2)(A)(i) now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The Committee recommends that the period be increased to 14 days, although it notes that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that warrants not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant. After weighing these various considerations, the Committee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7 rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as published and forwarded to the Judicial Conference.

11. ACTION ITEM—Rule 47

The Committee recommends that the current requirement under Rule 47(c) that motions be served 5 days before the hearing date be increased to 7 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 47 be approved as published and forwarded to the Judicial Conference.

12. ACTION ITEM—Rule 58

Rule 58(g)(2) governs appeals from a magistrate judge's order or judgment in cases involving petty offenses and misdemeanors. The Committee recommends that the time under Rule 58(g)(2) for interlocutory appeals and appeals from a sentence or conviction of a misdemeanor be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

13. ACTION ITEM—Rule 59

The Committee concluded that the 10 day period for objections to dispositive and nondispositive determinations, findings, and recommendations by a magistrate judge under Rule 59(a) and (b) should be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 59 be approved as published and forwarded to the Judicial Conference.

14. ACTION ITEM—Rule 8 of the Rules Governing § 2254 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2254 Proceedings be approved as published and forwarded to the Judicial Conference.

15. ACTION ITEM—Rule 8 of the Rules Governing § 2255 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2255 Proceedings be approved as published and forwarded to the Judicial Conference.

B. Forfeiture Rules

Three of the published amendments—Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture)—concern criminal forfeiture. They were drafted with the assistance of specialists from both the Department of Justice and the private defense bar, and are intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. The Committee recommends approval of each of the rules as published.

1. ACTION ITEM—Rule 7

The amendment removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions. No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 7.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 32

The proposed amendment provides that the presentence report should state whether the government is seeking forfeiture. This is intended to promote timely consideration of issues concerning forfeiture as part of the sentencing process.

No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 32.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 32.2

Several changes to Rule 32.2 are proposed. In subdivision (a) the Committee proposes new language to respond to uncertainty regarding the form of the required notice that the government is seeking forfeiture. The amendment states that the notice should not be designated as a count in an indictment or information, and that it need not identify the specific property or money judgment that is sought. Where additional detail is needed, it is generally provided in a bill of particulars. After extensive consideration in the subcommittee of language that would provide more detail about the use of bills of particulars, the Committee determined that the better course at this point is to leave the matter to further judicial development guided by general comments in the Committee Note.

In subdivision (b)(1) the Committee proposes to add language clarifying the point that the court's forfeiture determination may be based on additional evidence or information accepted by the court in the forfeiture phase of the trial. The amendment also states that the court must conduct a hearing when requested to do so by either party, and notes that in some instances live testimony will be needed. The Committee noted that the present rule, which refers to "evidence or information," does not limit the court to considering evidence that would be admissible under the Rules of

Evidence (which themselves provide that they are not applicable to sentencing). Whether this is a good policy can be debated, but it reflects a decision made in 2000 and the Committee did not seek to reopen the matter.

Proposed subdivision (b)(2) makes two changes. First, it requires the court to enter a preliminary order of forfeiture sufficiently in advance of sentencing to permit the parties to suggest modifications before the order becomes final as to the defendant. Second, it expressly authorizes the court to enter a forfeiture order that is general in nature in cases where it is not possible to identify all of the property subject to forfeiture at the time of sentencing. Recognizing the authority to issue a general order reconciles the requirement that the court make the forfeiture order part of the sentence with Rule 32.2(e)(1)(A), which allows the court on motion of the government to amend the forfeiture order to include property “located and identified” after the forfeiture order was entered. The Committee Note cautions that the authority to enter a general order should be used only in unusual circumstances, and not as a matter of course.

The proposed amendments to subdivisions (b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant (as opposed to third parties whose interests may be affected), what the district court is required to do at sentencing, and how to deal with clerical errors.

Proposed subdivision (b)(5) clarifies the procedure for requesting a jury determination of forfeiture, and requires the government to submit a special verdict form.

Proposed subdivisions (b)(6) and (7) govern technical issues of notice, publication, and interlocutory sale. They are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure.

The only comment received concerned proposed subdivision (b)(2), which provides for the entry of a preliminary order of forfeiture in advance of sentencing. Judge Lawrence Piersol expressed concern that this might delay sentencing because the necessary information may not be available in advance. The Committee concluded that the rule as published provided a mechanism for dealing with such cases, because it provides that a court must enter a preliminary order in advance of sentencing “[u]nless doing so is impractical.” Accordingly, the Committee voted unanimously to recommend the approval of the proposed amendment to Rule 32.2.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 32.2 be approved as published and forwarded to the Judicial Conference.

C. Other Rules

The Committee also recommends that two other rules which were published for public notice and comment be approved and forwarded to the Judicial Conference.

1. ACTION ITEM—Rule 41

The proposed amendment adapts federal warrant procedures to electronically stored information, which is an increasingly important part of criminal cases. The amendment makes two key changes. First, it acknowledges that the very large volume of information which can be stored on computers and other electronic storage media generally requires a two-step process in which the government first seizes the storage medium and then reviews it to determine what information within it falls within the scope of the warrant. In light of the enormous quantities of information that are often involved, as well as the difficulties often encountered involving encryption and booby traps, it is impractical to set a definite time period during which the offsite review must be completed. The Committee Note emphasizes, however, that the court may impose a deadline for the return of the medium or access to the electronically stored information.

The second change relates to the inventory. The amendment provides that in a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied. Similarly, when business papers or other documents are seized, the inventory will often refer to a file cabinet or file drawer, rather than seeking to list each document.

The Committee voted, with one member dissenting, to recommend that Rule 41 be approved as amended and forwarded to the Judicial Conference.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 41 be approved as amended following publication and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The parallel amendments to Rule 11 are intended to make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the Rules Governing § 2254 and § 2255 Proceedings in the District Courts. The amendments also require the district judge to grant or deny the certificate at the time a final order is issued, as now required in the

Third Circuit, *see* 3d Cir. R. 22.2, 111.3, rather than after a notice of appeal is filed.¹ This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

Several public comments were received urging the Committee to consider bifurcating the issuance of the final order and the ruling on the certificate of appealability in order to permit a party requesting a certificate in the district court to respond to the specific reasons given in the final order as well as the specific standards for issuing a certificate. The Committee considered a proposed modification that would accomplish this, but rejected it after much deliberation. The Committee concluded that a single date for the ruling on the certificate and the final order is essential to simplify and expedite appellate review. Bifurcation also increases the risk of confusion among pro se petitioners. In courts where rulings on certificates are not issued at the time of the final order, some pro se petitioners reportedly delay filing a notice of appeal believing that the time period for filing that notice does not begin until the judge rules on the certificate or a motion for reconsideration of a denial of a certificate. Moreover, even without bifurcation in the district court, a petitioner has an opportunity to brief the question whether a certificate of appealability should issue when applying for a certificate in the court of appeals.

Although the Committee rejected bifurcation, it made several changes in the rules as published to respond to the concerns raised in the public comments. First, the Committee recognized that there are some complex cases, such as death penalty cases with numerous claims, in which the district court might benefit from briefing specifically directed to the issuance of a certificate, to assist in narrowing or focusing claims for appeal. The Committee addressed this point by adding a sentence stating that before entering the order the court may direct the parties to submit arguments on whether a certificate should be issued. The Committee also added two sentences at the end of the new section to address points frequently misunderstood by pro se petitioners. The addition states that (1) the district court's denial of a certificate is not separately appealable, but a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

During the Committee's deliberations, there was a great deal of discussion of the confusion among pro se petitioners regarding the relationship between the notice of appeal and the certificate of appealability. The Committee concluded that it would also be desirable to address this issue in the text of the rules with a statement that a notice of appeal must be filed even if the district court issues a certificate of appealability. The Committee proposes to add this language to subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings. In the case of Rule 11 of the Rules

¹Cases filed under § 2254 are governed by Fed. R. App. P. 4(a)(1)(A)'s general 30 day period for filing a notice of appeal in civil cases, but the 60 day period under Fed. R. App. P. 4(a)(1)(B) applies to actions under § 2255 because the United States is a party.

Governing § 2254 Proceedings, there is currently no subdivision addressing appeals. The Committee, therefore, proposes adding a subdivision that mirrors subdivision (b) in the Rules Governing § 2255 Proceedings. In the Committee's view, it is desirable to address this point in the text where it is most likely to be seen by pro se petitioners. This specific point was not, however, included in the text published for public comment.

The Committee voted to recommend that the published amendments be approved as amended and forwarded to the Judicial Conference. Although a number of changes were made to address issues raised by the public comments and in further deliberations regarding these issues, the Committee did not believe these changes required republication of the proposed amendments.

When the Advisory Committee initially proposed these rules for publication, each rule included another subdivision creating an exclusive procedure for seeking reconsideration in the district court of a final order in §§ 2254 and 2255 cases. This aspect of the proposal was intended to replace motions under Fed. R. Civ. P. 60(b) and incorporate the distinction drawn in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), between Rule 60(b) motions that must be treated as second or successive habeas petitions subject to AEDPA's limitations on successive petitions, and Rule 60(b) motions that did not trigger AEDPA's limits. At its June meeting in 2007, the Standing Committee approved publication of the proposed Rule 11 provisions related to certificates of appealability, but remanded the relief-from-final-order portions for further consideration by the Advisory Committee. After extensive discussion, the Advisory Committee voted at its April meeting not to proceed with this aspect of its original proposal, leaving the issues for further development in the courts. Accordingly, the provisions dealing with the procedures for seeking reconsideration in §§ 2254 and 2255 proceedings are not part of the rules being recommended at this time.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be approved as amended following publication and forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules

A. ACTION ITEM—Rule 6

The proposed amendment to Rule 6(f) allows the court to receive the return of an indictment—which generally takes only a few minutes—by video teleconference in order to avoid unnecessary cost and delay.² In sparsely settled districts there may be no judicial officer present in

²Although the present rule on its face requires the return to be made to “a magistrate judge,” any Article III or territorial judge may also receive the return. Rule 1(c) provides that

the courthouse where the grand jury meets. The problem is particularly acute in several districts (Eastern California, Northern West Virginia, Southern Iowa, Southern Florida, Alaska, and Arizona), where judicial officers must travel from 145 to 260 miles each way between courthouses. In some cases, weather conditions can make this travel especially difficult and hazardous. The proposed rule will conserve judicial resources and avoid the risks attendant to this travel. Avoiding delay is also a factor since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of an arrest of an individual to avoid a dismissal of the case.

The amendment retains the general requirement that the indictment be returned “in open court.” Under the amendment, the grand jury (or the foreperson) would appear in the court in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge’s time and safety.

There is of course no historical precedent for the use of video teleconferencing, but the Supreme Court has indicated that it does not regard the historical practice regarding the return of indictments at the time of the adoption of the Fifth Amendment as binding in all respects. When the grand jury clause was adopted, the entire grand jury was required to return the indictment in open court. This provided an opportunity for the individual grand jurors to be polled to determine whether a sufficient number supported each indictment, and also created a record that the defendant had been indicted. By 1912, however, the Supreme Court indicated that Congress need not be bound by this historical practice, and thus might choose to modify the requirement that the grand jury appear as a body. *Breese v. United States*, 226 U.S. 1 (1912).³ The present rules take advantage of this flexibility, allowing the grand jury foreperson or deputy foreperson to return the indictment. The Committee recommends that the rule be amended to authorize the use of modern technology of video teleconferencing when necessary to avoid excessive cost and delay. The Committee Note provides, however, that having the judge in the same courtroom remains the preferred practice, because it promotes the public’s confidence in the integrity and solemnity of federal criminal proceedings.

The Committee voted to recommend that the proposed amendment to Rule 6(f) be published for notice and public comment.

“When these rules authorize a magistrate judge to act, any other federal judge may also act.” Under Rule 1(b)(3) the term “federal judge” includes a magistrate judge, article III judge, and territory judge.

³The Court stated: “The reasons for the requirement, if they ever were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the state of North Carolina, could have done away with it, if it had seen fit to do so instead of remaining silent.” *Breese*, 226 U.S. at 10.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 6(f) be published for public comment.

B. ACTION ITEM—Rule 15

The Committee recommends publication for notice and comment of an amendment to Rule 15 permitting depositions, held outside the United States, at which the defendant cannot be present, provided a showing is made that the case meets a list of strict criteria. This proposal has been under study by the Committee since 2006 when the Department of Justice brought to the Committee's attention problems arising in the prosecution of transnational crimes. In recent years the Department has encountered many instances in which critical witnesses lived in, or had fled to, other countries. Witnesses who are outside the United States are beyond the subpoena power of the federal courts, and it is not always possible to secure their voluntary attendance in the United States for the trial or for a pretrial deposition. In some cases, a witness agrees to be deposed outside the United States, and the defendant can be transported to the deposition. In other cases, however, a witness agrees to be deposed outside the United States, but it is not possible for the defendant to be present at the deposition. This may occur, for example, because the country in which the deposition will be held will not admit the defendant. In other cases, it is not possible to transport a defendant who is in custody to the place of the deposition in a secure fashion.

Although Rule 15 permits depositions of witnesses in certain circumstances, the current Rule does not specifically address cases in which an important witness is not in the United States and it would be impossible to securely transport the defendant to the witness's location for a deposition. Despite the absence of specific authority in Rule 15, several courts of appeals have authorized depositions of foreign witnesses without the defendant being present in limited circumstances. For example, in *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988), a witness held in custody in France was deposed while the defendant was in federal custody in the United States and could not be securely transported abroad. The deposition was completed through several rounds of submitting and translating questions and answers, pursuant to French law, while the defendant was accessible by phone in the United States. *Id.* at 947–48. The Second Circuit found that taking the deposition in this manner did not violate Rule 15 because the Rule is intended “to facilitate the preservation of testimony.” *Id.* at 949–50. The court suggested a dual approach to the application of Rule 15: “In cases involving depositions conducted within the United States—where it is within the power of the court to require the defendant's presence and within the power of the government to arrange it—a strict application of Rule 15(b) may be required.” *Id.* at 949. By contrast, “[i]n the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts, as it did in this case, to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway.” *Id.* at 950.

Similarly, the Third Circuit approved a government requested deposition of two witnesses in Belgium who were unavailable for trial where the defendant had one telephone line that allowed him to listen to the live proceedings and another telephone line that allowed him to speak privately with his attorney, and the proceedings were videotaped. *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990). The court held that an “absolute rule [requiring the defendant’s presence] would transgress the general purpose of Rule 15, which is to preserve testimony ‘whenever due to exceptional circumstances of the case it is in the interest of justice’ to do so.” *Id.* at 265 (quoting Fed. R. Crim. P. 15(a)).

Additionally, the Ninth Circuit held that “[w]hen the government is unable to secure a witness’s presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant’s physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings.” *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998). In that case, the court approved the deposition of Canadian witnesses without the defendant’s presence, because the witnesses refused to voluntarily come to the United States to testify at trial and U.S. officials could not assure the secure transportation of the defendant to and from Canada for the deposition. *Id.*

The Committee concluded that Rule 15 should be amended to deal expressly with the issue raised in these cases. In considering this proposal, the Committee was mindful of the recent history of the 2002 proposal to amend Rule 26 to permit the taking of testimony “[i]n the interests of justice” by contemporaneous two-way video when the court finds there are “exceptional circumstances,” “appropriate safeguards” are used, and the witness is unavailable within the meaning of Fed. R. Evid. 804(a)(4)–(5). The Supreme Court declined to transmit the proposed rule to Congress. Justice Scalia filed a statement in which he concurred. Justice Breyer dissented in a statement joined by Justice O’Connor. These statements are included at the end of this report, along with the Committee’s proposed rule.

Justice Scalia concluded that the Rule 26 proposal was contrary to *Maryland v. Craig*, 497 U.S. 836 (1990), because it did not “limit the use of testimony via video transmission to instances where there has been a ‘case specific finding’ that it is ‘necessary to further an important public policy.’” Statement of Justice Scalia, Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, at 1 (2002). He drew a sharp distinction between virtual confrontation and physical confrontation, commenting that “[v]irtual confrontation might be sufficient to protect virtual confrontation rights; I doubt whether it is sufficient to protect real ones.” *Id.* at 2. He also observed that “serious constitutional doubt” is an appropriate reason for the Court to decline to transmit a recommendation of the Judicial Conference. *Id.* at 1. In response to the argument that the proposed rule admitted video testimony only in cases in which the deposition of an unavailable witness could

be read into the record, Justice Scalia noted that Rule 15 gives a defendant the opportunity for face-to-face confrontation during a deposition.⁴ *Id.* at 2.

The Committee drafted the proposed rule to require “case specific findings” that the deposition is “necessary to further an important public policy.” Specifically, the amendment—which is applicable only to depositions outside the United States—requires the court to find that all of the following criteria are met:

- (1) the witness’s testimony could provide substantial proof of a material fact;
- (2) there is a substantial likelihood that the witness’s attendance at trial cannot be obtained;
- (3) the witness’s presence for a deposition in the United States cannot be obtained;
- (4) the defendant cannot be present for one of the following reasons:
 - (a) the country where the witness is located will not permit the defendant to attend the deposition;
 - (b) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness’s location; or
 - (c) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
- (5) the defendant can meaningfully participate in the deposition through reasonable means.

Although the Advisory Committee recognized that approval by the Supreme Court is by no means certain even with these limitations, the Committee strongly supports the proposal and voted unanimously in favor of recommending it for publication.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be published for public comment.

C. ACTION ITEM—Rule 32.1

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a)—to which the current Rule refers—to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion arose because several subsections of § 3143(a) are ill suited to proceedings involving the revocation of probation or supervised release. See *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

⁴Justice Scalia also drew a distinction between the confrontation clause standards applicable to out-of-court statements and those applicable to live testimony, but that discussion predated the Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

The current rule also provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

The Committee voted, with one dissent, to recommend publication of the proposed amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

IV. Information Items

A. Statutory Provisions Affected By Time Computation

As part of the time computation project, the Advisory Committee worked to evaluate statutes with short time periods that would be affected by the new time computation rules, in order to determine which statutes would be the highest priority for legislative amendment to offset the effect of the changes.

All members of the committee received a complete listing of the statutes identified by Professor Struve, and each member was asked to rate the importance of amending the statutes on a three point scale. The results of the balloting process were compiled and studied by the time computation subcommittee, which produced a draft list of 17 statutes that it recommended for inclusion on the list.

The Advisory Committee endorsed that list at its April meeting. It recommends that most of these statutes be amended to provide for periods of 7 or 14 days. There are, however, a group of statutes that presently provide for very short periods of 3 or 4 days for interlocutory appeals involving the Classified Information Procedure Act and the material support statute. Since those time periods reflected a precise policy-based calibration that might be disturbed by a change to 7 days, and the Committee recommends that legislation be sought that would exclude weekends and holidays from the calculation; this would leave the periods precisely as they are now. The Committee also recommends the same approach be applied to 18 U.S.C. § 3432, which provides that a person charged with treason or another capital offense shall be furnished with a list of veniremen and witnesses “at least three entire days” before trial.

Subsequent to the Advisory Committee meeting, Professor Struve brought to the attention of the reporter and chair the fact that one statute similar to others proposed for amendment was not on the Committee’s list. After determining that this had been an oversight, and that the justification

for amending the 10 day period to 14 days was the same as that for another closely related statute that was being recommended for legislative action, we requested this statute's inclusion on the list.

The list compiled by the Advisory Committee (including the statute noted above) is now being circulated to representatives of the appropriate committees of the American Bar and the National Association of Criminal Defense Lawyers.

B. Rule 32(h)

The Advisory Committee's initial package of *Booker* rules included a proposal to amend Rule 32(h). The current rule states that the court may not "depart from the applicable guideline range on a ground not identified for departure either in the presentence report or a party's prehearing submission" without first giving the parties "reasonable notice that it is contemplating such a departure." The Committee's proposed amendment, which was published for notice and comment, extended the notice requirement to cases in which the court was contemplating giving a sentence not in the advisory sentencing range on the basis of one of the statutory factors under 28 U.S.C. § 3553(a). (These are also called "variances" or *Booker* sentences.) The provision generated some controversy during the comment period, and after making revisions in the language to clarify the proposed amendment, the Advisory Committee recommended to the Standing Committee that it be submitted to the Judicial Conference.

The Standing Committee, noting that the circuits were divided on the closely related issue of the interpretation of current Rule 32(h), requested that the Advisory Committee give the matter further study.

The Advisory Committee has deferred action because the Supreme Court granted certiorari, and has now heard argument, in *Irizarry v. United States*, Docket No. 06-7517, to resolve the issue of the interpretation of Rule 32(h). A subcommittee has been appointed, and it will take up the issue after the decision is issued in *Irizarry*.

C. Limiting Disclosure About Plea Agreements and Cooperating Defendants

The Advisory Committee is aware of the growing problem of disclosure of, and retaliation against, cooperating defendants and the efforts in various districts to limit the release of information about plea and cooperation agreements. Although there is a consensus that no national solution has yet emerged, the Committee is following the issue closely.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE****

Rule 45. Computing and Extending Time

- 1 ~~(a) Computing Time.~~ The following rules apply in
2 computing any period of time specified in these rules,
3 any local rule, or any court order:
- 4 ~~(1) Day of the Event Excluded.~~ Exclude the day of
5 the act, event, or default that begins the period.
- 6 ~~(2) Exclusion from Brief Periods.~~ Exclude
7 intermediate Saturdays, Sundays, and legal
8 holidays when the period is less than 11 days.
- 9 ~~(3) Last Day.~~ Include the last day of the period unless
10 it is a Saturday, Sunday, legal holiday, or day on
11 which weather or other conditions make the clerk's
12 office inaccessible. When the last day is excluded,
13 the period runs until the end of the next day that is

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

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14 not a Saturday, Sunday, legal holiday, or day when
15 the clerk's office is inaccessible.

16 ~~(4) "Legal Holiday" Defined.~~ As used in this rule,
17 "legal holiday" means:

18 ~~(A) the day set aside by statute for observing:~~

19 ~~(i) New Year's Day;~~

20 ~~(ii) Martin Luther King, Jr.'s Birthday;~~

21 ~~(iii) Washington's Birthday;~~

22 ~~(iv) Memorial Day;~~

23 ~~(v) Independence Day;~~

24 ~~(vi) Labor Day;~~

25 ~~(vii) Columbus Day;~~

26 ~~(viii) Veterans' Day;~~

27 ~~(ix) Thanksgiving Day;~~

28 ~~(x) Christmas Day; and~~

29 ~~(B) any other day declared a holiday by the~~
30 ~~President, the Congress, or the state where~~
31 ~~the district court is held.~~

32 ~~(b) Extending Time.~~

33 ~~(1) In General.~~ When an act must or may be done
34 within a specified period, the court on its own may
35 extend the time, or for good cause may do so on a
36 party's motion made:

37 ~~(A) before the originally prescribed or previously~~
38 ~~extended time expires; or~~

39 ~~(B) after the time expires if the party failed to act~~
40 ~~because of excusable neglect.~~

41 ~~(2) Exception.~~ The court may not extend the time to
42 take any action under Rule 35, except as stated in
43 that rule.

44 ~~(c) Additional Time After Service.~~ When these rules
45 permit or require a party to act within a specified period

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46 ~~after a notice or a paper has been served on that party, 3~~
47 ~~days are added to the period if service occurs in the~~
48 ~~manner provided under Federal Rule of Civil Procedure~~
49 ~~5(b)(2)(B), (C), or (D).~~

50 * * * * *

Rule 45. Computing and Extending Time

1 **(a) Computing Time.** The following rules apply in
2 computing any time period specified in these rules, in
3 any local rule or court order, or in any statute that does
4 not specify a method of computing time.

5 **(1) Period Stated in Days or a Longer Unit.** When
6 the period is stated in days or a longer unit of time:

7 **(A) exclude the day of the event that triggers the**
8 **period;**

9 **(B) count every day, including intermediate**
10 **Saturdays, Sundays, and legal holidays; and**

11 (C) include the last day of the period, but if the
12 last day is a Saturday, Sunday, or legal
13 holiday, the period continues to run until the
14 end of the next day that is not a Saturday,
15 Sunday, or legal holiday.

16 (2) ***Period Stated in Hours.*** When the period is stated
17 in hours:

18 (A) begin counting immediately on the
19 occurrence of the event that triggers the
20 period;

21 (B) count every hour, including hours during
22 intermediate Saturdays, Sundays, and legal
23 holidays; and

24 (C) if the period would end on a Saturday,
25 Sunday, or legal holiday, the period continues
26 to run until the same time on the next day that
27 is not a Saturday, Sunday, or legal holiday.

45 (B) for filing by other means, when the clerk's
46 office is scheduled to close.

47 (5) “Next Day” Defined. The “next day” is
48 determined by continuing to count forward when
49 the period is measured after an event and backward
50 when measured before an event.

51 (6) “Legal Holiday” Defined. “Legal holiday” means:

52 (A) the day set aside by statute for observing New
53 Year’s Day, Martin Luther King Jr.’s
54 Birthday, Washington’s Birthday, Memorial
55 Day, Independence Day, Labor Day,
56 Columbus Day, Veterans’ Day, Thanksgiving
57 Day, or Christmas Day; and

58 (B) any other day declared a holiday by the
59 President, Congress, or the state where the
60 district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Criminal Procedure, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to “computing any period of time.” Although the restyled Rule 45(a) referred only to time periods “specified in these rules, any local rule, or any court order,” some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is

provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, the new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal

Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk’s office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk’s office is inaccessible.

Subdivision (a)(3)’s extensions apply “[u]nless the court orders otherwise.” In some circumstances, the court might not wish

a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk’s office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 (“A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.”).

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk’s offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk’s office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and

orders.” A corresponding provision exists in Rule 56(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence “[w]ithin 7 days after sentencing”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rule 47(c) (stating that a party must serve a written motion “at least 5 days before the hearing date”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk’s office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday—no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are “declared a holiday by the President.” For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.2d 1094, 1098 (D.C. Cir. 2003) (executive order provided that “[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001”).

Rule 5.1. Preliminary Hearing

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* * * * *

2 **(c) Scheduling.** The magistrate judge must hold the
 3 preliminary hearing within a reasonable time, but no
 4 later than ~~10~~ 14 days after the initial appearance if the
 5 defendant is in custody and no later than ~~20~~ 21 days if
 6 not in custody.

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Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information

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(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

17 **(2) *Time to Disclose.*** Unless the court directs
18 otherwise, an attorney for the government must
19 give its Rule 12.1(b)(1) disclosure within ~~10~~ 14
20 days after the defendant serves notice of an
21 intended alibi defense under Rule 12.1(a)(2), but
22 no later than ~~10~~ 14 days before trial.

23 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

1 **(a) Notice of the Defense and Disclosure of Witnesses.**

2 * * * * *

3 **(3) *Response to the Notice.*** An attorney for the
4 government must serve a written response on the
5 defendant or the defendant's attorney within ~~10~~ 14
6 days after receiving the defendant's notice, but no

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7 later than ~~20~~ 21 days before trial. The response
8 must admit or deny that the defendant exercised
9 the public authority identified in the defendant's
10 notice.

11 **(4) *Disclosing Witnesses.***

12 (A) *Government's Request.* An attorney for the
13 government may request in writing that the
14 defendant disclose the name, address, and
15 telephone number of each witness the
16 defendant intends to rely on to establish a
17 public-authority defense. An attorney for the
18 government may serve the request when the
19 government serves its response to the
20 defendant's notice under Rule 12.3(a)(3), or
21 later, but must serve the request no later than
22 ~~20~~ 21 days before trial.

23 (B) *Defendant's Response*. Within 7 14 days after
24 receiving the government's request, the
25 defendant must serve on an attorney for the
26 government a written statement of the name,
27 address, and telephone number of each
28 witness.

29 (C) *Government's Reply*. Within 7 14 days after
30 receiving the defendant's statement, an
31 attorney for the government must serve on
32 the defendant or the defendant's attorney a
33 written statement of the name, address, and
34 telephone number of each witness the
35 government intends to rely on to oppose the
36 defendant's public-authority defense.

37 * * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

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(c) After Jury Verdict or Discharge.

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(1) *Time for a Motion.* A defendant may move for a

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judgment of acquittal, or renew such a motion,

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within ~~7~~ 14 days after a guilty verdict or after the

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court discharges the jury, whichever is later.

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* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal

holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 33. New Trial

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2 **(b) Time to File.**

3 * * * * *

4 **(2) Other Grounds.** Any motion for a new trial
5 grounded on any reason other than newly
6 discovered evidence must be filed within ~~7~~ 14 days
7 after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

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Rule 34. Arresting Judgment

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(b) Time to File. The defendant must move to arrest

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judgment within ~~7~~ 14 days after the court accepts a

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verdict or finding of guilty, or after a plea of guilty or

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nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

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4 **(2) *Contents of the Warrant.***

5 (A) *Warrant to Search for and Seize a Person or*
6 *Property.* Except for a tracking-device
7 warrant, the warrant must identify the person
8 or property to be searched, identify any
9 person or property to be seized, and designate
10 the magistrate judge to whom it must be
11 returned. The warrant must command the
12 officer to:

13 (i) execute the warrant within a specified
14 time no longer than ~~10~~ 14 days;

15 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

4 **(2) *From a Magistrate Judge's Order or Judgment.***

5 (A) *Interlocutory Appeal.* Either party may appeal
6 an order of a magistrate judge to a district
7 judge within ~~10~~ 14 days of its entry if a
8 district judge's order could similarly be
9 appealed. The party appealing must file a
10 notice with the clerk specifying the order
11 being appealed and must serve a copy on the
12 adverse party.

13 (B) *Appeal from a Conviction or Sentence.* A
14 defendant may appeal a magistrate judge's
15 judgment of conviction or sentence to a
16 district judge within ~~10~~ 14 days of its entry.
17 To appeal, the defendant must file a notice
18 with the clerk specifying the judgment being
19 appealed and must serve a copy on an
20 attorney for the government.

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Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

1 **(a) Nondispositive Matters.** A district judge may refer to
2 a magistrate judge for determination any matter that
3 does not dispose of a charge or defense. The magistrate
4 judge must promptly conduct the required proceedings
5 and, when appropriate, enter on the record an oral or
6 written order stating the determination. A party may
7 serve and file objections to the order within ~~10~~ 14 days
8 after being served with a copy of a written order or after
9 the oral order is stated on the record, or at some other
10 time the court sets. The district judge must consider
11 timely objections and modify or set aside any part of the
12 order that is contrary to law or clearly erroneous.

48 FEDERAL RULES OF CRIMINAL PROCEDURE

13 Failure to object in accordance with this rule waives a
14 party's right to review.

15 **(b) Dispositive Matters.**

16 * * * * *

17 **(2) Objections to Findings and Recommendations.**

18 Within ~~10~~ 14 days after being served with a copy
19 of the recommended disposition, or at some other
20 time the court sets, a party may serve and file
21 specific written objections to the proposed findings
22 and recommendations. Unless the district judge
23 directs otherwise, the objecting party must
24 promptly arrange for transcribing the record, or
25 whatever portions of it the parties agree to or the
26 magistrate judge considers sufficient. Failure to
27 object in accordance with this rule waives a party's
28 right to review.

29 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

**PROPOSED AMENDMENT TO RULES
GOVERNING SECTION 2254 CASES IN THE
UNITED STATES DISTRICT COURTS**

Rule 8. Evidentiary Hearing

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(b) Reference to a Magistrate Judge. A judge may, under

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28 U.S.C. § 636(b), refer the petition to a magistrate

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judge to conduct hearings and to file proposed findings

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of fact and recommendations for disposition. When they

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are filed, the clerk must promptly serve copies of the

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proposed findings and recommendations on all parties.

8

Within ~~10~~ 14 days after being served, a party may file

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objections as provided by local court rule. The judge

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must determine de novo any proposed finding or

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recommendation to which objection is made. The judge

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may accept, reject, or modify any proposed finding or

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recommendation.

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Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

**PROPOSED AMENDMENT TO RULES
GOVERNING SECTION 2255 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS**

Rule 8. Evidentiary Hearing

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(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

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Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 7. The Indictment and the Information

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(c) Nature and Contents.

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~~(2) **Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

(3) (2) Citation Error. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

* * * * *

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

Committee Note

The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made to the proposed amendment to Rule 7.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32. Sentence and Judgment

1 * * * * *

2 **(d) Presentence Report.**

3 * * * * *

4 **(2) *Additional Information.*** The presentence report
5 must also contain the following information:

6 **(A)** the defendant's history and characteristics,

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- including:
 - (i) any prior criminal record;
 - (ii) the defendant's financial condition; and
 - (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
- (B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;
- (C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;
- (D) when the law provides for restitution, information sufficient for a restitution order;
- (E) if the court orders a study under 18 U.S.C.

4 FEDERAL RULES OF CRIMINAL PROCEDURE

25 § 3552(b), any resulting report and
26 recommendation; and

27 (F) any other information that the court requires,
28 including information relevant to the factors
29 under 18 U.S.C. § 3553(a); and

30 (G) specify whether the government seeks
31 forfeiture pursuant to Rule 32.2 and any other
32 provision of law.

33 * * * * *

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made to the proposed amendment to Rule 32.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32.2. Criminal Forfeiture

- 1 **(a) Notice to the Defendant.** A court must not enter a
2 judgment of forfeiture in a criminal proceeding unless
3 the indictment or information contains notice to the
4 defendant that the government will seek the forfeiture of
5 property as part of any sentence in accordance with the
6 applicable statute. The notice should not be designated
7 as a count of the indictment or information. The
8 indictment or information need not identify the property
9 subject to forfeiture or specify the amount of any
10 forfeiture money judgment that the government seeks.
11 **(b) Entering a Preliminary Order of Forfeiture.**

6 FEDERAL RULES OF CRIMINAL PROCEDURE

12 (1) ~~*In General.*~~ *Forfeiture Phase of the Trial.*

13 (A) *Forfeiture Determinations.* As soon as
14 practical after a verdict or finding of guilty—
15 or after a plea of guilty or nolo contendere is
16 accepted — on any count in an indictment or
17 information on which criminal forfeiture is
18 sought, the court must determine what
19 property is subject to forfeiture under the
20 applicable statute. If the government seeks
21 forfeiture of specific property, the court must
22 determine whether the government has
23 established the requisite nexus between the
24 property and the offense. If the government
25 seeks a personal money judgment, the court
26 must determine the amount of money that the
27 defendant will be ordered to pay.

28 (B) *Evidence and Hearing.* The court's
29 determination may be based on evidence

30 already in the record, including any written
 31 plea agreement, ~~or~~ and on any additional
 32 evidence or information submitted by the
 33 parties and accepted by the court as relevant
 34 and reliable. ~~If~~ if the forfeiture is contested,
 35 on either party's request the court must
 36 conduct a hearing on evidence or information
 37 presented by the parties at a hearing after the
 38 verdict or finding of guilt.

39 (2) ***Preliminary Order.***

40 (A) Contents. If the court finds that property is
 41 subject to forfeiture, it must promptly enter a
 42 preliminary order of forfeiture setting forth
 43 the amount of any money judgment, ~~or~~
 44 directing the forfeiture of specific property,
 45 and directing the forfeiture of any substitute
 46 property if the government has met the
 47 statutory criteria without regard to any third

8 FEDERAL RULES OF CRIMINAL PROCEDURE

48 ~~party's interest in all or part of it.~~ The order
49 must be entered without regard to any third
50 party's interest in the property. Determining
51 whether a third party has such an interest
52 must be deferred until any third party files a
53 claim in an ancillary proceeding under Rule
54 32.2(c).

55 (B) Timing. Unless doing so is impractical, the
56 court must enter the preliminary order of
57 forfeiture sufficiently in advance of
58 sentencing to allow the parties to suggest
59 revisions or modifications before the order
60 becomes final as to the defendant under Rule
61 32.2(b)(4).

62 (C) General Order. If, before sentencing, the
63 court cannot identify all the specific property
64 subject to forfeiture or calculate the total
65 amount of the money judgment, the court

66 may enter a forfeiture order that:

67 (i) lists any identified property;

68 (ii) describes other property in general

69 terms; and

70 (iii) states that the order will be

71 amended under Rule 32.2(e)(1)

72 when additional specific property

73 is identified or the amount of the

74 money judgment has been

75 calculated.

76 (3) ***Seizing Property.*** The entry of a preliminary order
77 of forfeiture authorizes the Attorney General (or a
78 designee) to seize the specific property subject to
79 forfeiture; to conduct any discovery the court
80 considers proper in identifying, locating, or
81 disposing of the property; and to commence
82 proceedings that comply with any statutes
83 governing third party rights. ~~At sentencing—~~or at

10 FEDERAL RULES OF CRIMINAL PROCEDURE

84 ~~any time before sentencing if the defendant~~
85 ~~consents—the order of forfeiture becomes final as~~
86 ~~to the defendant and must be made a part of the~~
87 ~~sentence and be included in the judgment.—The~~
88 court may include in the order of forfeiture
89 conditions reasonably necessary to preserve the
90 property's value pending any appeal.

91 **(4) *Sentence and Judgment.***

92 (A) *When Final.* At sentencing—or at any time
93 before sentencing if the defendant
94 consents—the preliminary order of forfeiture
95 becomes final as to the defendant. If the
96 order directs the defendant to forfeit specific
97 property, it remains preliminary as to third
98 parties until the ancillary proceeding is
99 concluded under Rule 32.2 (c).

100 (B) *Notice and Inclusion in the Judgment.* The
101 district court must include the forfeiture when

102 orally announcing the sentence or must
 103 otherwise ensure that the defendant knows of
 104 the forfeiture at sentencing. The court must
 105 also include the order of forfeiture, directly or
 106 by reference, in the judgment, but the court's
 107 failure to do so may be corrected at any time
 108 under Rule 36.

109 (C) Time to Appeal. The time for a party to file
 110 an appeal from the order of forfeiture, or
 111 from the district court's failure to enter an
 112 order, begins to run when judgment is
 113 entered. If the court later amends or declines
 114 to amend an order of forfeiture to include
 115 additional property under Rule 32.2(e), a
 116 party may file an appeal regarding that
 117 property under Federal Rule of Appellate
 118 Procedure 4(b). The time for that appeal runs
 119 from the date when the order granting or

12 FEDERAL RULES OF CRIMINAL PROCEDURE

120 denying the amendment becomes final.

121 **(4 5) *Jury Determination.***

122 (A) *Retaining the Jury.* Upon a party's request in
123 a case in which a jury returns a verdict of
124 guilty, the jury must In any case tried before
125 a jury, if the indictment or information states
126 that the government is seeking forfeiture, the
127 court must determine before the jury begins
128 deliberating whether either party requests that
129 the jury be retained to determine the
130 forfeitability of specific property if it returns
131 a guilty verdict.

132 (B) *Special Verdict Form.* If a party timely
133 requests to have the jury determine forfeiture,
134 the government must submit a proposed
135 Special Verdict Form listing each property
136 subject to forfeiture and asking the jury to
137 determine whether the government has

138 established the requisite nexus between the
139 property and the offense committed by the
140 defendant.

141 **(6) *Notice of the Order of Forfeiture.***

142 (A) *Publishing and Sending Notice.* If the court
143 orders the forfeiture of specific property, the
144 government must publish notice of the order
145 and send notice to any person who reasonably
146 appears to be a potential claimant with
147 standing to contest the forfeiture in the
148 ancillary proceeding.

149 (B) *Content of the Notice.* The notice must
150 describe the forfeited property, state the times
151 under the applicable statute when a petition
152 contesting the forfeiture must be filed, and
153 state the name and contact information for the
154 government attorney to be served with the
155 petition.

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

Although forfeitures are not charged as counts, the ECF system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought if necessary to enable the defendant to prepare a defense or to avoid unfair surprise. *See, e.g., United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully). *See also United States v. Columbo*, 2006 WL 2012511

* 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. Cf. Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order “sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final.” Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have

no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven days after oral announcement of the sentence. During the seven-day period, corrections are limited to those necessary to correct “arithmetical, technical, or other clear error.” See *United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in “general” terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation’s assets in the United States, permitting the government to continue

discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

Subparagraph (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they

return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that “the government must submit a proposed Special Verdict Form listing each property subject to forfeiture.” Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term “property” throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. Other small stylistic changes (such as the insertion of “the” in subpart titles) were also made to conform to the style conventions.

Additionally, two changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

SUMMARY OF PUBLIC COMMENTS

One comment was received concerning the proposed amendment to Rule 32.2.

Judge Lawrence Piersol expressed concern about the requirement under Rule 32.2(b)(2)(B) that the court “enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications,” because the presentence report may not contain all of the necessary information, and the court may need to take evidence at the time of sentencing. He suggested that this requirement might delay sentencing.

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Rule 41. Search and Seizure

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(e) Issuing the Warrant.

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(2) Contents of the Warrant.

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(B) Warrant to Search for Electronically Stored Information. A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or information, and not to any later off-site copying or review.

17 **(BC)** *Warrant for a Tracking Device.* A tracking-
18 device warrant must identify the person or
19 property to be tracked, designate the
20 magistrate judge to whom it must be
21 returned, and specify a reasonable length of
22 time that the device may be used. The time
23 must not exceed 45 days from the date the
24 warrant was issued. The court may, for good
25 cause, grant one or more extensions for a
26 reasonable period not to exceed 45 days each.
27 The warrant must command the officer to:

28 * * * * *

29 **(f) Executing and Returning the Warrant.**

30 **(1) *Warrant to Search for and Seize a Person or***
31 ***Property.***

32 * * * * *

Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term “electronically stored information” is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.” The 2006 Advisory Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended under Rule 41.

In addition to addressing the two-step process inherent in searches for electronically stored information, the Rule limits the 10 [14]^{***} day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a

^{***}The 10 day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

“one size fits all” presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the “person aggrieved” to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the “person aggrieved” requires access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by case basis can fashion an appropriate remedy, taking into account the time needed to image and search the data and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of

the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the “paper world.” In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words “copying or” were added to the last line of the proposed Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v. Carey*, 172 F.3d 1268, 1272–73 (10th Cir. 1999) (finding that a warrant which only permitted the search of defendant’s computer files for evidence pertaining to the sale and distribution of controlled substances did not extend to computer files which contained child pornography), and *United States v. Fleet Management Ltd.*, 521 F. Supp. 2d 436, 447 (E.D. Pa. 2007) (finding that a warrant was invalid

where it “did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity”), *with United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1112 (9th Cir. 2008) (finding that “the government had no reason to confine its search to ‘key words.’ . . . ‘Computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants’] labeling of the files.”), *and United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

SUMMARY OF PUBLIC COMMENTS

One comment was received from the Jordan Center for Criminal Justice and Penal Reform. The Center opposed the amendment, arguing that in authorizing the seizure of electronic storage media rather than particular stored information, the proposed rule disregarded the particularity requirement of the Fourth Amendment, and that it would allow the seizure of electronic information despite a lack of probable cause as to that information. Second, the Center objected to the absence of controls preventing the government from using copied information for “general intelligence or other unauthorized or illicit purposes.” Finally, the Center argued that the rule should include a set time period within which the government must return seized materials.

**PROPOSED AMENDMENTS TO RULES
GOVERNING § 2254 PROCEEDINGS FOR THE
UNITED STATES DISTRICT COURTS**

Rule 11. Certificate of Appealability; Time to Appeal

1 **(a) Certificate of Appealability.** The district court must
2 issue or deny a certificate of appealability when it enters a
3 final order adverse to the applicant. Before entry of the final
4 order, the court may direct the parties to submit arguments on
5 whether a certificate should issue. If the court issues a
6 certificate, the court must state the specific issue or issues that
7 satisfy the showing required by 28 U.S.C. § 2253(c)(2). A
8 denial of the certificate by the district court may not be
9 appealed, but a certificate may be sought from the court of
10 appeals under Federal Rule of Appellate Procedure 22. A
11 motion for reconsideration of a denial of a certificate does not
12 extend the time to appeal.

13 **(b) Time to Appeal.** Federal Rule of Appellate
14 Procedure 4(a) governs the time to appeal an order entered

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15 under these rules. A timely notice of appeal must be filed
16 even if the district court issues a certificate of appealability.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning COAs more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

Rule 12 H. Applicability of the Federal Rules of Civil Procedure

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* * * * *

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

Finally, a new subdivision (b) was added to mirror the information provided in subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings, directing petitioners to Rule 4 of the appellate rules and indicating that notice of appeal must be filed even if a COA is issued.

Minor changes were also made to conform to style conventions.

SUMMARY OF PUBLIC COMMENTS

Commonwealth of Massachusetts Office of the Attorney General urged the Committee to reject the amendments. First, it would be burdensome for district judges to rule on the COA in cases where the petitioner may never appeal. Second, judges making these rulings would do so without any opportunity for input from petitioners or their counsel, which often narrows the claims on which the court must consider a certificate.

Joseph Luby, Acting Executive Director of the Public Interest Litigation Clinic, argued that the proposed rule denies the petitioner an opportunity to be heard on why a COA should issue, to narrow the claims on which a COA is sought, to raise post-petition developments in the law or factual investigation, or to address the specific reasoning used by the court. These concerns could be addressed by setting a time limit after the final order for seeking a COA.

Gene Vorobyov, Attorney, argued that allowing the COA issue to be decided after the final order instead of at the same time would allow the judge to come at it with a fresh eye and permit additional research by the petitioner, the petitioner should not have to request a COA before the district judge has ruled, and the existing rule works just fine.

Paul R. Bottei, Assistant Federal Public Defender, Middle District of Tennessee, argued that the proposed rule denies the petitioner the opportunity to meet his or her burden of showing entitlement to a COA because there is no opportunity to brief how the court's denial is wrong or debatable. He argued that this issue depended upon not only the precedent in that district but also the precedent from other districts and circuits, which may differ depending upon the ground for denial or dismissal. Providing the first opportunity to brief these points in the court of appeals is inefficient because the appellate court is less familiar with the case. He proposed an alternative rule providing the petitioner be allowed a time certain after the entry of a final order in which to ask for a certificate.

The Jordan Center for Criminal Justice and Penal Reform argued that requiring a COA ruling to be contemporaneous with the final order deprives the parties of the opportunity to be heard on the issue.

**PROPOSED AMENDMENT TO RULES GOVERNING
§ 2255 PROCEEDINGS FOR THE UNITED STATES
DISTRICT COURTS**

Rule 11. Certificate of Appealability; Time to Appeal

1 **(a) Certificate of Appealability.** The district court
2 must issue or deny a certificate of appealability when it enters
3 a final order adverse to the applicant. Before entry of the final
4 order, the court may direct the parties to submit arguments on
5 whether a certificate should issue. If the court issues a
6 certificate, the court must state the specific issue or issues that
7 satisfy the showing required by 28 U.S.C. § 2253(c)(2). A
8 denial of the certificate by the district court may not be
9 appealed, but a certificate may be sought from the court of
10 appeals under Federal Rule of Appellate Procedure 22. A
11 motion for reconsideration of a denial of a certificate does not
12 extend the time to appeal.

13 **(b) Time to Appeal.** Federal Rule of Appellate
14 Procedure 4(a) governs the time to appeal an order entered

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15 under these rules. A timely notice of appeal must be filed
16 even if the district court issues a certificate of appealability.
17 These rules do not extend the time to appeal the original
18 judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA, identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The amendment is designed to make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal. Finally, a sentence indicating that notice of appeal must be filed even if a COA is issued was added to subdivision (b).

Minor changes were also made to conform to style conventions.

SUMMARY OF PUBLIC COMMENTS

Commonwealth of Massachusetts Office of the Attorney General urged the Committee to reject the amendments. First, it would be burdensome for district judges to rule on the COA in cases where the petitioner may never appeal. Second, judges making these rulings would do so without any opportunity for input from petitioners or their counsel which often narrows the claims on which the court must consider a certificate.

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addressed by setting a time limit after the final order for seeking a COA.

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The Jordan Center for Criminal Justice and Penal Reform argued that requiring a COA ruling to be contemporaneous with the final order deprives the parties of the opportunity to be heard on the issue.

Avoiding delay is also a factor since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within 30 days of an arrest of an individual to avoid a dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

Rule 15. Depositions

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(c) Defendant's Presence.

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(1) *Defendant in Custody.* The officer who has

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custody of the defendant must produce the

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defendant at the deposition in the United States

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and keep the defendant in the witness's presence

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during the examination, unless the defendant:

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(A) waives in writing the right to be present; or

9 (B) persists in disruptive conduct justifying
10 exclusion after being warned by the court
11 that disruptive conduct will result in the
12 defendant's exclusion.

13 (2) *Defendant Not in Custody.* A defendant who is
14 not in custody has the right upon request to be
15 present at the deposition in the United States,
16 subject to any conditions imposed by the court. If
17 the government tenders the defendant's expenses
18 as provided in Rule 15(d) but the defendant still
19 fails to appear, the defendant—absent good
20 cause—waives both the right to appear and any
21 objection to the taking and use of the deposition
22 based on that right.

23 (3) *Taking Depositions Outside the United States*
24 *Without the Defendant's Presence.* The
25 deposition of a witness who is outside the United

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26 States may be taken without the defendant's
27 presence if the court makes case-specific findings
28 of all of the following:

29 (A) the witness's testimony could provide
30 substantial proof of a material fact;

31 (B) there is a substantial likelihood that the
32 witness's attendance at trial cannot be
33 obtained;

34 (C) the witness's presence for a deposition in the
35 United States cannot be obtained;

36 (D) the defendant cannot be present for one of
37 the following reasons:

38 (i) the country where the witness is
39 located will not permit the defendant to
40 attend the deposition;

41 (ii) for an in-custody defendant, secure
42 transportation and continuing custody

43 cannot be assured at the witness's
44 location; or
45 (iii) for an out-of-custody defendant, no
46 reasonable conditions will assure an
47 appearance at the deposition or at trial
48 or sentencing; and
49 (E) the defendant can meaningfully participate
50 in the deposition through reasonable means.

51 * * * * *

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses—government and defendant witnesses both—live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness’s attendance at trial cannot be obtained, and it would be impossible to securely transport the defendant or a co-defendant to the witness’s location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a

defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g., United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof—by a preponderance of the evidence—as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g., United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

List of Statutes Proposed By Criminal Rules Committee for Amendment

Objections to Reports or Findings of Magistrate Judge

The Criminal Rules Committee agreed with the Civil Rules Committee that the requirement under **28 U.S.C. § 636(b)** that a party may file written objections to the findings and recommendations of a magistrate “within **ten days** after being served with a copy” of the magistrate’s report should be extended to **14 days**.

Statutes Dealing With Period Between Arraignment and Preliminary Hearing

The Criminal Rules Committee recommends that all of the timing provisions applicable to the period between the initial appearance and the preliminary hearing be extended to 14 days. 18 U.S.C. § 3060(b) and Rule 5.1(c) currently provide that the preliminary hearing must be held within 10 days of arraignment, and a number of other timing provisions related to that preliminary phase of the prosecution are also set at 10 days. These provisions should remain synchronized and all be extended to 14 days. This recommendation is consistent with the Committee’s proposed amendment to Rule 5.1(c), which extends that period to 14 days. The relevant statutes are:

-**18 U.S.C. § 3060(b)** preliminary examinations, except in certain circumstances, “shall be held . . . no later than the **tenth day** following the date of the initial appearance of the arrested person.”

-**18 U.S.C. § 983(j)(3)**; a temporary restraining order with respect to property against which no complaint has yet been filed “shall expire not more than **10 days** after the date on which it is entered.”

-**18 U.S.C. § 1467(c)**; a temporary restraining order with respect to property against which no indictment has yet been filed “shall expire not more than **10 days** after the date on which it is entered.”

-**18 U.S.C. § 1514(a)(2)(C)**; a temporary restraining order “prohibiting harassment of a victim or witness in a Federal criminal case” shall not remain in effect more than “**10 days** from issuance.”

-**18 U.S.C. § 1963(d)(2)**; a restraining order, injunction, or “any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered.”

-**21 U.S.C. § 853(e)(2)**; “a temporary restraining order under this subsection . . . shall expire not more than **ten days** after the date on which it is entered.”

Statutes Providing Very Short Periods For Interlocutory Appeals in Certain National Security and Classified Information Procedure Act Cases

The statutes in this group require that appellate courts hear arguments or render decisions within **4 days** in certain cases involving material support and the Classified Information Procedure Act (CIPA). Although these statutes reflect a Congressional determination that expedited treatment is essential, the subcommittee felt that the new calendar days approach could cause significant problems if the 4 day statutory period encompasses a weekend or holiday. Accordingly, the Criminal Rules Committee favors seeking legislation that would specify that the following time periods **exclude Saturdays, Sundays, and legal holidays**. The Criminal Rules Committee concluded that this would be preferable to seeking a different and longer time period.

-**18 U.S.C. § 2339B(f)(5)(B)(iii)(I)**; if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), “the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-
- **(I)** shall hear argument . . . not later than **4 days** after the adjournment of the trial;”

-**18 U.S.C. § 2339B(f)(5)(B)(iii)(III)**; if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), “the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-
-**(III)** shall render its decision not later than **4 days** after argument on appeal”

-**18 U.S.C. App. 3 § 7(b)(1)**; in an appeal pursuant to the CIPA statute, “the court of appeals shall hear argument . . . within **four days** of the adjournment of the trial.”

-**18 U.S.C. App. 3 § 7(b)(3)**; in an appeal pursuant to CIPA statute, the court of appeals “shall render its decision within **four days** of argument on appeal.”

Other CIPA Appeals

The Criminal Rules Committee supports extending to **14 days** the period for an appeal under another provision of CIPA, **18 U.S.C. App. 3 § 7(b)**, which provides that an “appeal shall be taken within **ten days** after the decision . . . appealed from and the trial shall not commence until the appeal is resolved.” In contrast to the 4 day appeal provisions noted above, which apply to appeals taken during trial, this provision applies to appeals taken before trial. It is important not to shorten the effective time available for the government to take an appeal under this section, because the Department of Justice must first coordinate with other agencies which have responsibility for particular classified information, and then obtain approval for the appeal from the Solicitor General during this period.

Dissolution of a Temporary Restraining Order

18 U.S.C. § 1514(a)(2)(E) provides that “if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . .” The Criminal Rules Committee felt that the approach of **excluding Saturdays, Sundays, and holidays** would also be appropriate here for reasons similar to those discussed in connection with CIPA and material support appeals.

Victim Mandamus

The time for a victim’s motion for a writ of mandamus in the court of appeals to reopen a plea or sentence is **10 days** under 18 U.S.C. § 3771(d). The Criminal Rules Committee supports extending this to **14 days**. Under the proposed amendment to FRAP 4, the defendant’s time to appeal would also be extended from 10 to 14 days.

Other Statutory Periods

The Criminal Rules Committee also supports the extension of several other time periods:

18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child’s testimony to be taken via 2-way closed circuit video “shall apply for such an order at least **5 days** before the trial date.” The Criminal Rules Committee favors extending this period to **7 days** to permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

Under 18 U.S.C. § 2252A(c) a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court “in no event later than **10 days** before the commencement of the trial.” The Criminal Rules Committee favors extending the time for notification to **14 days** to conform to the times provided for notice of other defenses. The committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12.3 (public-authority defense) to 14 days.

Under 18 U.S.C. § 3432 “a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial.” The time computation rules should not diminish the procedural rights of a person facing a charge of treason or a capital crime. The Criminal Rules Committee supports seeking legislation that would **exclude Saturdays, Sundays, and holidays from the three days**. That would ensure that defendants have as much time as they do at present.

Statement of SCALIA, J.

SUPREME COURT OF THE UNITED STATES
AMENDMENTS TO RULE 26(b) OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE

[April 29, 2002]

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

In *Maryland v. Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted). The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma." *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed. Rule Crim. Proc. 15. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 54. Indeed, even this showing is not necessary: the Committee says that video transmission may be used generally as an alternative to depositions. *Id.*, at 57.

This is unquestionably contrary to the rule enunciated in *Craig*. The Committee reasoned, however, that "the use

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of a two-way transmission made it unnecessary to apply the *Craig* standard.” *Id.*, at 55 (citing *United States v. Gigante*, 166 F. 3d 75, 81 (CA2 1999) (“Because Judge Weinstein employed a two-way system that preserved . . . face-to-face confrontation . . . , it is not necessary to enforce the *Craig* standard in this case”), cert. denied, 528 U. S. 1114 (2000)). I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig, supra*, at 846–847, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant’s presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White v. Illinois*, 502 U. S. 346, 358 (1992) (“There is thus no basis for importing the ‘necessity requirement’ announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule”). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc. 15(b) (“The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at

Statement of SCALIA, J.

the examination and keep the defendant in the presence of the witness during the examination . . .”).

JUSTICE BREYER says that our refusal to transmit “denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair.” *Post*, at 3. This is an exaggeration for two reasons: First, because Congress is free to adopt the proposal despite our action. And second, because nothing prevents a defendant who believes this procedure is “more efficient and more fair” from voluntarily waiving his right of confrontation.* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER’s belief that we should forward this proposal despite our constitutional doubts, so that we can “later consider fully any constitutional problem when the Rule is applied in an individual case.” *Post*, at 2. I see no more reason for us to forward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is “anything goes, and litigation will correct our constitutional mistakes.” It seems to me that among the reasons Congress has asked us to vet the Conference’s proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise seri-

* JUSTICE BREYER’s assertion to the contrary notwithstanding, existing Fed. Rule Crim. Proc. 26 does not prohibit the use of video transmission by consent. *United States v. Mezzanatto*, 513 U. S. 196, 201 (1995) (“The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause . . . suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances”).

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ous constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes. But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement.

I would transmit to Congress the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable." The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Fed. Rule Crim. Proc. 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee Notes on Fed. Rule Crim. Proc. 26, p. 53. See Appendix, *infra*, at 5.

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless. And where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply.

JUSTICE SCALIA believes that the present proposal does

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not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland v. Craig*, 497 U. S. 836 (1990). I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland v. Craig* five times. It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case]." It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*, and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States v. Gigante*, 166 F. 3d 75 (CA2 1999), cert. denied, 528 U. S. 1114 (2000); *Harrell v. Butterworth*, 251 F. 3d 926 (CA11 2001), cert. denied, 535 U. S. ____ (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong. Cf. Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity").

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional. Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking. At the same time, that approach would

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permit application of the proposed Rule in those cases in which application is clearly constitutional. And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants, will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf. *ante*, at 3. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, e.g., Fed. Rule Crim. Proc. 26 (testimony must "be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence or other Rules adopted by the Supreme Court"). Others may hesitate to rely on highly general and uncertain sources of legal authority. Cf. *United States v. Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Fed. Rules Crim. Proc. 2 and 57(b)); *United States v. Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 43 (Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video teleconferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule.

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APPENDIX TO STATEMENT OF BREYER, J.

Rule 26. Taking Testimony

(a) *In General.* In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072–2077.

(b) *Transmitting Testimony from a Different Location.* In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used; and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word “orally,” to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be con-

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sidered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. See, e.g., *United States v. Salim*, 855 F. 2d 944, 947-948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address

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possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use “contemporaneous two-way” video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in *Maryland v. Craig*, 497 U. S. 836 (1990) (transmission of one-way closed circuit television of child’s testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are “exceptional circumstances” for using video transmissions, a standard used in *United States v. Gigante*, 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999). While it is difficult to catalog examples of circumstances considered to be “exceptional,” the inability of the defendant and the defense counsel to be at the witness’s location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland v. Craig*, 497 U. S. 836 (1990). In that case the Court indicated that a defendant’s confrontation rights “may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured.” *Craig*, 497 U. S. at 850. In *Gigante*, the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the

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witness to hear and understand each other during questioning. See, e.g., *United States v. Gigante*, 166 F. 3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante, supra*, to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed

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under the rule. See *United States v. Gigante*, 971 F. Supp. 755, 759–760 (E.D.N.Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of “unavailability” as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant’s Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court’s decision in *Maryland v. Craig*, 497 U. S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness’s demeanor. *Id.*, at 847. The Court rejected the notion that a defendant’s Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. See also *United States v. Gigante*, *supra* (use of remote transmission of unavailable witness’s testimony did not violate confrontation clause); *Harrell v. Butterworth*, [251] F. 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses’ testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances

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such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. See *Maryland v. Craig, supra*.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 28-29, 2008

Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the “Committee”) met in Washington, D.C., on April 28-29, 2008. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Also supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department’s Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Ruth E. Friedman, Director of the Federal Defenders’ Capital Habeas Project, attended part of the meeting.

A. Chair's Remarks and Administrative Announcements

After welcoming everyone and making administrative announcements, Judge Tallman recognized Professor King for her years of distinguished service as a Committee member and thanked her for agreeing to serve further in the capacity of Assistant Reporter. Judge Tallman made a request that subcommittee chairs try to begin their work earlier in the period between meetings to ensure that it is completed in time for the next Committee meeting.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2007 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court

Mr. Rabiej reported that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Supreme Court and submitted last week to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2008.

Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

Mr. Rabiej reported no action in Congress on the Crime Victims' Rights Rules Act bill introduced in this session of Congress by Senator Jon Kyl (R-AZ). Judge Tallman noted that the Judicial Conference had voiced strong opposition to this new measure, which would circumvent the federal rulemaking process by directly changing the Federal Rules of Criminal Procedure without affording anyone the opportunity for notice and comment and bypassing the deliberative process that Congress previously established for judicial rulemaking under the Rules Enabling Act. Mr. Rabiej also reported that no responses had yet been received from the 20 or so different groups from which the Committee had requested suggestions for further CVRA-related rule amendments. Judge Tallman noted that, on the recommendation of this Committee and the Standing Committee, Chief Justice John Roberts had recently approved Director Duff's letter to Lewis & Clark Law School Professor Doug Beloof declining his suggestion that a permanent crime victims' advocate position be added to the Advisory Committee on Criminal Rules.

Ms. Hooper provided an update on the Federal Judicial Center's efforts to educate the Judiciary about the CVRA. The Center has produced a DVD, featuring Judge Jones and Judge Zagel, that examines the Act's requirements, the related rules amendments, and the experiences of judges and prosecutors in applying the Act. The Center has updated its monograph, "The Crime Victims' Rights Act of 2004 and the Federal Courts" and will distribute it, along with related materials, at all national workshops for district court judges this year. A panel session on "the CVRA and Issues and Challenges for the Federal Judiciary" will be held at the Sentencing Institute in Long Beach, CA on June 25-27, 2008, to be co-chaired by former Judge Paul Cassell and Benji McMurray. Also, the Center is nearing completion of a report, prepared at the Committee's request, reviewing victims' rights laws in all 50 states, the District of Columbia, and the territories. To understand how victims' rights laws operate in practice, the Center has conducted interviews with state judges, victim coordinators, prosecution staff, and defense counsel in six states, and with professionals from victim assistance organizations.

Ms. Hooper reported a few preliminary findings from the study. First, expansion of criminal proceedings to include greater participation and input from victims does not appear to impede judges' ability to effectively manage their caseloads even when multiple victims wish to participate. Second, although many jurisdictions require only that victims be treated with "fairness and respect," the lack of more detailed legislative guidance has not resulted in a significant increase in litigation seeking to broaden victims' rights. Third, most states allow a victim to be heard orally regarding a plea agreement and at sentencing, and a few permit victims

to speak at a bail or bond hearing or an initial appearance. In practice, though, few victims choose to speak, a phenomenon that some attribute to untimely notice. Fourth, most jurisdictions allow the victim to confer with the prosecutor, but states vary with regard to the type of information that is authorized to be disclosed to the victim by the prosecutor. Only 10 jurisdictions, for instance, allow victims some access to the presentence report — five allow victims to review the report, two allow them to receive copies, and three allow discretionary disclosure by the prosecutor. Fifth, a few jurisdictions have formalized complaint procedures for victims who believe that their rights were violated. Typically, this is done by filing a writ of mandamus, but one jurisdiction allows a nominal monetary damages remedy where there was an intentional failure to afford a victim his rights.

Ms. Hooper reported that the Center is still committed to producing a judge's pocket guide on victims' rights, but wanted to ensure that it would not be duplicative of the materials that have already been prepared. She also noted that the GAO is expected to issue a full report on the effect and efficacy of CVRA implementation in the federal courts by October 2008. If, after reviewing the GAO report, the Committee believes that further research is necessary, the Center is ready to undertake it.

Judge Tallman asked representatives from the Department of Justice whether, in their meetings with crime victims groups, any additional feedback had been obtained. Mr. Wroblewski reported meeting about two months ago with 20-25 people from a dozen or more victims' organizations and explaining the Department's involvement with the rules committees. Although the Department had not yet received any suggestions or comments, Mr. Wroblewski said that these meetings would continue to be held on a regular basis. Judge Tallman mentioned that he had recently been asked about the Department's efforts at automating victim notification. Mr. Wroblewski reported that the Department sends out millions of notices to victims each year through the computerized Victim Notification System.

B. Additional CVRA-Related Proposed Amendments

Mr. Rabiej noted that the three additional CVRA-related rule amendments had been approved for public notice and comment and would be published on August 15, 2008. Public hearing dates on each coast would be tentatively scheduled for sometime in January 2009.

Rule 5. Initial Appearance. The proposed amendment directs a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.

Rule 12.3. Notice of Public-Authority Defense. The proposed amendment provides that for security and privacy the victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.

Rule 21. Transfer for Trial. The proposed amendment requires consideration of the convenience of victims in determining whether to transfer the proceedings to another district for trial.

Professor Beale pointed out that the Style Consultant had slightly modified the original wording of these proposed amendments. Also, the Standing Committee had agreed that the arguably unnecessary statement in proposed Rule 5(d)(3) should be retained to underscore that, in making the determination on bail and release, “the court must consider any statute or rule that protects a victim from the defendant.”

C. Proposed Forfeiture Rule Amendments

The Committee discussed the following three proposed rule amendments governing forfeiture that had been published for public comment.

Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Professor Beale reported that the proposals had elicited a single comment, from Judge Lawrence Piersol of the District of South Dakota, who voiced concern that the proposed Rule 32.2 amendment could cause sentencing delays. But, she said, Proposed Rule 32.2(b)(2)(B) specifies that courts must enter preliminary forfeiture orders before sentencing “[u]nless doing so is impractical.” Proposed Beale added that two changes to the published version were recommended: standardizing the references to “assets” and “property,” and eliminating the bracketed language. A member pointed out that the “and” at the end of proposed Rule 32(d)(2)(E) on page 43, line 6, of the agenda book requires deletion.

There was discussion about the phrase “either party’s request” in proposed 32.2(b)(1)(B), on page 46, lines 30-31, and the phrase “the date when the order granting or denying the amendment becomes final” in proposed Rule 32.2 (b)(4)(C) on page 51, lines 101-102. Clarification was also requested regarding the phrase “the government must submit a proposed Special Verdict Form.” Following Committee discussion, it was decided that these various phrases should be retained as drafted.

Judge Zagel moved to approve the forfeiture rule amendments as revised.

The Committee voted unanimously to send the proposed forfeiture rule amendments, as revised, to the Standing Committee.

D. Proposed Rule 41 Amendment on Seizure of Electronically Stored Information

The Committee discussed the proposed Rule 41 changes recently published. Judge Battaglia, chair of the Electronically Stored Information Subcommittee, reported that one public comment had been received. The Jordan Center for Criminal Justice and Penal Reform had suggested that, by authorizing the “seizure of electronic storage *media*” rather than “*information*,” the proposed change would violate the Fourth Amendment’s particularity requirement by allowing information to be seized without establishing probable cause. Another objection was the absence of controls to prevent the government from using copied information for “general intelligence or other unauthorized or illicit purposes.” The Jordan Center also recommended that the rule require that the seized materials be returned within a set time period.

Judge Battaglia reported that the subcommittee had decided to address those concerns by adding a clarification to the Committee Note that the “amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving this and the application of other constitutional standards to ongoing case law development.” The subcommittee also proposed adding “copying or” to the last line of Rule 41(e)(2)(B) to clarify that copying, not just review, may take place off-site. Professor King noted the typographical error, the third “the,” on page 63, line 11, which would be fixed.

The Committee discussed the proposed elimination of all case citations, for style reasons, from the Rule 41 Committee Note. Mr. Rabiej noted that certain members of the Standing Committee had strong views on how detailed Committee Notes should be. Judge Tallman said that, because this area of the law was evolving, it would be wise where possible to omit citations to cases that might soon be out of date.

One member raised concern about government handling of seized electronic media and the delay in the return of the media. Judge Tallman suggested that these issues were best left to case law development. After further discussion, Judge Wolf moved that the Committee Note’s reference on page 65 to “other constitutional standards to ongoing case law development” be changed to “other constitutional standards concerning both the seizure and the search to ongoing case law development.”

The motion was unanimously approved.

In response to a member’s inquiry, Judge Tallman confirmed that the Jordan Center’s suggestion that controls be added to prevent the government from using copied information for “general intelligence or other unauthorized or illicit purposes” had been declined because it would be a substantive change of law that should instead be the subject of case law development or congressional action.

Judge Keenan moved that the Committee send the proposed Rule 41 amendment, as revised, to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 41 amendment, as revised, to the Standing Committee.

E. Proposed Time Computation Rule Amendments

Professor Beale reported that no public comments had been received in response to publication of the following proposed time computation rule amendments.

Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.

Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Cases. Amendments to these rules are intended to adjust the deadlines in light of the new time computation principles.

Judge Rosenthal explained that the Criminal Rules Committee was the last of four advisory committees meeting to finalize this coordinated effort. She noted that the goal was to achieve seamless synchronization with Congress so that the rule amendments, statutory changes, and local rule changes all take effect on December 1, 2009. She said that congressional staff, many of whom were former law firm associates, had expressed general approval in recent meetings for simplifying time computation across the board. There was discussion whether the rule amendments should be made conditional on the proposed statutory changes or whether they should take effect even if Congress declined to enact the statutory changes. The consensus of the Committee seemed to be that every effort should be made to have the proposed time computation rule amendments take effect at the same time as the proposed statutory changes. Mr. Cunningham moved that the proposed rule amendments be approved.

The Committee voted unanimously to approve the proposed time computation rule amendments.

III. CONTINUING AGENDA ITEMS

A. Proposed Time Computation Statutory Amendments

The Committee discussed which statutes Congress should be asked to amend in light of the proposed time computation changes. Judge Tallman noted that unless statutes were changed, the rules committees' effort to simplify time computations would have the opposite effect, adding a new layer of complexity. Judge Rosenthal explained that there was a desire, first, not to have the rules be inconsistent with the statutes, and second, not to disadvantage practitioners by shortening their deadlines. One member pointed out that the rules expressly apply the new time computation approach to statutes unless a statute specifies a different approach. To increase the

probability of passage in Congress, Judge Rosenthal noted that an effort was being made to keep all proposed statutory changes uncontroversial and outcome neutral.

The Committee discussed the report submitted by the Committee's Time Computation Subcommittee. The subcommittee was asked to explain why it was deviating from the "days are days" approach and recommending instead that Congress simply exclude Saturdays, Sundays, and legal holidays from the four-day periods set forth in 18 U.S.C. § 2339B(f)(5)(B)(iii)(I) and (III) and 18 U.S.C. App. 3 § 7(b)(1) and (3) within which appellate courts must hear arguments or render decisions in certain cases involving material support and the Classified Information Procedure Act. Judge Rosenthal explained that the Department of Justice had voiced significant concerns with converting these periods to seven calendar days and that keeping the proposed statutory changes uncontroversial was critical to the project's success. Assistant Attorney General Fisher said that these procedures had been used in the case of convicted terrorism conspirator Zacarias Moussaoui. Professor Beale noted that the subcommittee recommended a similar approach for the two-day deadline for dissolution of a temporary restraining order in 18 U.S.C. § 1514(a)(2)(E).

With respect to the current 10-day period in 18 U.S.C. App. 3 § 7(b) within which an interlocutory appeal in a CIPA case "shall be taken" after the trial court renders a decision, however, the Department supported recommending its extension to 14 calendar days. Ms. Fisher explained that this provision typically applied when a court is ordering the government to turn over classified information or sanctioning the government for not turning over classified information, in which case consulting with the applicable agencies sometimes took time.

Professor Beale reported subcommittee support for the following recommendations:

- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 3771(d) within which a victim must file a motion for a writ of mandamus in the court of appeals to reopen a plea or sentence;
- extending to seven calendar days the current period of five days before trial in 18 U.S.C. § 3509(b)(1)(A) within which an order for a child's testimony to be taken via two-way closed circuit video must be sought; and
- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 2252A(c) within which a defendant seeking to utilize certain affirmative defenses against child pornography charges must notify the court.

The Committee discussed the current three-day period in 18 U.S.C. § 3432: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial." Ms. Fisher said that the Department had no strong preference, but would recommend retaining the three days and only excluding Saturdays, Sundays, and legal holidays. One member noted that the three-day deadline in 18 U.S.C. § 3432 was important to prosecutors not in capital cases, but in non-capital cases, because it allows prosecutors to argue that if the deadline is three days in capital cases, it should be no greater in

ordinary, non-capital cases. Judge Tallman suggested that the Department's compromise offer was probably advisable, given the witness security concerns.

It was noted that these proposed statutory changes were going to be published and, if problematic, might elicit public comment. Following further discussion, a motion was made to recommend retaining the current three-day period in 18 U.S.C. § 3432 within which a person charged with treason must be furnished with a copy of the indictment and a list of the jurors and witnesses, but to recommend excluding Saturdays, Sundays, and holidays from the three days.

The motion was approved, with minimal dissent.

A motion was made to recommend extending to 14 calendar days the current 10-day period in 18 U.S.C. App. 3 § 7(b) for interlocutory appeals of a trial court's ruling in a Classified Information Procedure Act case.

The motion was approved unanimously.

Judge Battaglia moved that the Committee recommend that the Standing Committee send to Congress the other proposed time computation statutory changes set forth on pages 123-125 of the agenda book.

The Committee voted unanimously to recommend that the Standing Committee send to Congress the other proposed time computation statutory changes.

B. Proposed Amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

The Committee discussed the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases to, among other things, require a judge to grant or deny the certificate of appealability at the time a final ruling is issued. Professor King noted that the proposal had been submitted by the Department originally after the Supreme Court decided *Gonzalez v. Crosby*, 545 U.S. 524 (2005). After considering the five public comments received on proposed Rule 11(a), all opposing the published proposal, the Writ Subcommittee, chaired by Mr. McNamara, concluded that the proposal required modification, but split 3-2 over how to modify it.

Two alternative drafts were included in the agenda book for the Committee's consideration. The majority retained the published proposed requirement that the certificate of appealability be ruled on "at the same time" as an adverse final order, but recommended adding the phrase, "unless the judge directs the parties to submit arguments on whether or not a certificate should issue." Also, the majority proposed adding the following sentence: "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order." The minority proposed requiring only that motions for certificate of appealability be filed 14 days following a final order adverse to the applicant, a time frame that the minority contended was necessary for

counsel to consider the final order. Judge Tallman thanked the subcommittee for working so diligently over the course of several months on this challenging area, whose numerous minefields for unwary petitioners had sometimes resulted in meritorious claims being procedurally barred.

Mr. Wroblewski said that the Department preferred the published version of Rule 11(a), designed to codify existing practice as explained in *Gonzalez*. One member said that requiring simultaneous rulings would not codify the practice in his own circuit, but that he considered it nonetheless desirable because judges would have to deal with a case only once, ruling on the certificate of appealability at the same time as the final order rather than long afterward. Another member said he favored the simultaneous ruling requirement because it gave judges a way to inform the parties when issuing the final order that they had struggled in reaching certain decisions. A motion was made to require the judge in Rule 11(a) to rule on the certificate of appealability “at the same time” as the judge enters a final order adverse to the applicant.

The Committee decided, with minimal dissent, to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the final order.

Judge Tallman recommended making clear in the rule that filing a motion for reconsideration of the denial of a certificate of appealability does not toll the statute of limitation for filing the appeal — a point that has proven to be a trap for the unwary. Another member expressed concern about including a reference in the habeas rule to a motion for reconsideration because it could also pose a trap for the unwary and it would likely mislead pro se litigants into thinking that they needed to file them in every case. After extensive discussion, Judge Molloy moved that Rule 11(a) begin as follows: “The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant. The judge may direct the parties to submit arguments on whether or not a certificate should issue prior to entry of the final order.”

The Committee decided unanimously to approve the proposed language at the beginning of Rule 11(a).

Judge Jones moved to eliminate the second sentence of the majority Rule 11(a) proposal on page 143, lines 6-9 — “If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order” — and to change “motion for reconsideration” in line 12 to “certificate of appealability.” Several members voiced concern that, unless it was stated in the text of the rule that filing a motion for reconsideration did not toll the statute of limitation for filing the appeal, meritorious habeas claims would continue to be procedurally barred for lack of a timely appeal. After extensive discussion, Judge Tallman suggested taking a vote on Judge Jones’ motion.

The Committee decided unanimously to eliminate the second sentence of the majority Rule 11(a) proposal and to change line 12 as proposed.

After additional discussion, Judge Tallman moved to add the following to the end of the majority Rule 11(a) proposal on page 143, line 15: “A motion for reconsideration of the denial of a certificate of appealability does not extend the time for filing a notice of appeal.”

The Committee decided by a clear majority to add the proposed sentence to the end of the majority Rule 11(a) proposal.

Professor King described the changes to Rule 11(b) and (c) of the Rules Governing §§ 2254 and 2255 Cases recommended by a majority of the Writ Subcommittee. First, to prevent confusion in light of the previous subdivision’s reference to an unrelated motion for reconsideration (i.e., of the denial of a certificate of appealability), it recommended changing the title of Rule 11(b) from “Motion for Reconsideration” to “Motion for Relief from Final Order.” Second, the subcommittee suggested expanding the definition of permitted grounds for obtaining relief from a final order, beyond “a defect in the integrity of the § 2255 proceeding,” to include “an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits.” Third, it was thought that the proposed rule amendment should expressly supplant not only motions brought under Rule 60(b), but also those under Rule 52(b) and Rule 59. Fourth, the subcommittee sought to clarify that Rule 11(b) does not require a separate certificate of appealability. Finally, it recommended stating expressly that a timely notice of appeal is required even if a certificate of appealability is issued under Rule 11(a).

Professor King also summarized the objections raised by the Writ Subcommittee’s minority: (1) the proposed change is unnecessary; (2) it unduly and unnecessarily shrinks the filing period to 30 days; (3) it bars certain grounds for relief still available post-*Gonzales*; (4) it bars other currently existing routes for relief, such as Rules 52 and 59, which were not addressed in *Gonzales*; and (5) it purports to make a significant policy change that the rules committees lack the authority to make under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

Ms. Ruth Friedman, director of the Federal Defenders Capital Habeas Project, said that by eliminating Rules 52 and 59 as avenues for relief, the proposed Rule 11(b) amendment would be going far beyond merely codifying *Gonzales*. She recommended against conflating Rules 52 and 60(b), two very different provisions. She suggested instead requiring that Rule 59 motions for correction of errors be filed within 10 days and that Rule 60(b) motions for addressing fairness issues be filed within a year. Asked whether the Department intended anything beyond codifying *Gonzales*, Mr. Wroblewski responded that the objective was simply to regularize the process and to lay out in the text of the Rules Governing §§ 2254 and 2255 Cases what was supposed to happen following entry of a final order. One member suggested that the proposal was premature and that additional time was needed for post-*Gonzales* case law to develop. The Department moved to approve for publication the Rule 11(b) amendment as drafted by the subcommittee majority.

The motion failed by a vote of 4 to 8.

One member explained that he had voted against the majority proposal for Rule 11(b) because eliminating Rules 52 and 59 as avenues for relief extinguished substantive rights. Professor King suggested that although *Gonzales* did not specifically deal with Rule 52 and 59, its rationale implied that other rules could not be used to circumvent the successive petition bar. Ms. Fisher moved to approve the proposed Rule 11(b) amendment for publication, omitting the references to Rules 52 and 59. After brief discussion, however, Ms. Fisher retracted her motion, explaining that the Department required additional time to consider the matter further.

The Committee turned its attention to the proposed Rule 11(c) amendment. It was noted that it would need to be redesignated as Rule 11(b). Judge Tallman expressed approval for Judge Molloy's earlier suggestion that "issues" in line 14 be changed to "issues or denials." A motion was made to approve proposed Rule 11(c) — now 11(b) — for publication as revised.

The Committee decided unanimously to approve proposed Rule 11(c), now 11(b), for publication as revised.

C. Proposed Amendment to Rule 15

The Committee discussed the Department's proposed amendment of Rule 15 to authorize depositions in a limited category of cases to take place outside the defendant's physical presence. Professor Beale noted that the current proposal included a few changes recommended by the Rule 15 Subcommittee, chaired by Judge Keenan. The scope of the proposed rule amendment is now restricted to situations where the witness is outside the United States. In subparagraph (c)(3)(A), the proposed authorization to hold depositions outside the defendant's presence under limited situations now applies to all witnesses, not just government witnesses. The existing case law standard for witness unavailability — "there is a substantial likelihood the witness's attendance at trial cannot be attained" — is reflected in proposed Rule (c)(3)(A)(ii). Proposed Rule (c)(3)(A)(iii) makes clear that a deposition outside the U.S. can only take place without the defendant present only when "it is not possible to obtain the witness's presence in the United States for a deposition." The Committee Note was revised to specify the applicable burden of proof and to clarify that the proposed rule amendment does not supersede statutes that independently authorize depositions outside the defendant's physical presence, such as certain cases involving child victims and witnesses identified in 18 U.S.C. § 3509.

Following extensive discussion regarding proposed Rule 15(c)(3)(B) and whether it should be placed in the Committee Note rather than in the rule, Judge Keenan moved to revise the proposed provision in the rule to read: "Nothing in this rule creates a right for the defendant to be present at a deposition of his/her witness that takes place outside the United States." After further discussion, though, Judge Keenan withdrew his motion.

Judge Zagel moved to approve in principle the proposed Rule 15(c)(3)(B) amendment. Ms. Fisher urged adoption of the proposed rule amendment as a way to correct a problem with Rule 15 depositions. She stressed that defendants must not be able to allege that they need to

depose a critical witness in, say, Pakistan and to claim a right to be transported to Pakistan to attend the deposition. Judge Zagel requested a vote on his motion to publish the rule as drafted.

The motion failed by a vote of 5 to 6.

Judge Wolf moved to add “in the United States” on page 185 to proposed Rule 15(c)(1), line 7, and to (c)(2), line 20, to delete “Except as provided in paragraph (3)” from lines 4-5 and 18, and to delete (c)(3)(B).

The motion was approved, with one dissent.

To avoid the double use of the word “outside,” Judge Molloy moved to change the title of proposed Rule 15(c)(3) to “Limited Authority to Hold Depositions Outside the United States Without the Defendant’s Presence.”

The motion was approved unanimously.

It was suggested that the situation covered by proposed Rule 15(c)(3)(B) could be addressed in the Committee Note. Professor Beale promised to circulate a draft by email after the meeting for Committee approval. Mr. Wroblewski noted that the bracketed language in the Note on page 188, lines 27-46, had been intended only for the benefit of the Committee and the Standing Committee and would not be part of the actual note. It was suggested and agreed that the Note not cite simply to cases decided before *Crawford v. Washington*, 541 U.S. 36 (2004). There was also consensus that the sentence on page 189, lines 8-13, should be deleted. Mr. Wroblewski moved to approve the proposed Rule 15 amendment, as revised, and forward it to the Standing Committee for publication.

The Committee voted unanimously to approve Rule 15, as revised, for publication.

D. Proposed Amendment to Rule 6(f)

The Committee discussed the proposed Rule 6(f) amendment, copies of which were distributed as a handout. The proposal would permit courts to receive the return of a grand jury indictment by video conference. Judge Battaglia, chair of the Rule 6(f) Subcommittee, noted that judges have sometimes had to travel up to 250 miles one-way to attend a 30-second proceeding. The subcommittee had two recommendations. The first was that the “open court” requirement be retained as a safeguard against the infamous Star Chambers proceedings. The second was that the “good cause” threshold be replaced with a showing that video conferencing is needed “to avoid unnecessary cost or delay.” Professor Beale added that it was emphasized in the Committee Note that having the judge and grand jury in the same courtroom remained the preferred practice. She also noted that all “magistrate judge” references in the rules, such as in lines 4 and 10, include district judges by definition. There was agreement that line 5 should also refer to “magistrate judge” instead of “judge.” It was also agreed that the characterization of a district as “unpopulated” in lines 26-27 of the Note was unnecessary and should be revised. The

Committee also agreed to replace the phrase “in the court” in line 32 with “in a courtroom.” Judge Battaglia moved to approve the proposed Rule 6(f) amendment for publication.

The Committee voted unanimously to send the proposed Rule 6(f) amendment to the Standing Committee for publication.

E. Proposed Amendment to Rule 12

Judge Wolf, appointed at the last meeting to chair the Rule 12 Subcommittee, reported that the group had conferred in several teleconferences, but that additional time was needed to formulate a recommendation. A report would be presented at the Committee’s next meeting.

F. Proposed Amendments to Rules 32.1 and 46

Professor Beale said that the proposed amendments to Rules 32.1 and 46 had been deferred until the October 2008 meeting so that additional input could be obtained from the Criminal Law Committee and the Office of Probation and Pretrial Services.

G. Proposed Amendment to Rule 32.1(a)(6)

Professor Beale briefly reviewed the history of Magistrate Judge Robert Collings’ suggestion that Rule 32.1(a)(6) be amended to clarify its reference to 18 U.S.C. § 3143(a) and to specify that the applicable burden of proof is clear and convincing evidence. Judge Battaglia emphasized that this was not a substantive change and that numerous courts have concluded, after extensive analysis, that only § 3143(a)(1) applies to the situation in the rule. Following a discussion of whether clear and convincing was indeed the appropriate burden of proof for alleged violations of the conditions of supervised release under Rule 32.1(a)(6), Judge Battaglia moved to send the proposed amendment to the Standing Committee for publication.

The Committee voted, with one dissent, to send the proposed Rule 32.1(a)(6) amendment to the Standing Committee for publication.

H. Rule 32(h)

Professor Beale explained that the proposed Rule 32(h) amendment had originally been part of the package of amendments proposed in the wake of *United States v. Booker*, 543 U.S. 220 (2005). But because the Supreme Court had granted certiorari and heard oral arguments in *Irizarry v. United States*, No. 06-7517, to resolve a circuit split, and because a decision was expected by June, the Rule 32(h) Subcommittee was deferring consideration of the proposed rule change. The Department noted that after *Booker*, the Constitution Project had proposed certain changes to Rule 32, which the American Bar Association was currently considering, to reform sentencing procedures and increase their transparency. Ms. Felton reported that, during oral argument in *Irizarry*, the Justices had asked counsel why the Supreme Court should not defer to the rulemaking process. Professor Beale promised to distribute copies of the *Irizarry* oral

argument transcript and the *Irizarry* amicus brief filed by Catholic University of America Law Professor Peter B. Rutledge and Ohio State University Law Professor Douglas A. Berman.

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Proposal to Amend Rule 7

Judge Battaglia described his proposal to amend Rule 7(b) to permit a defendant to waive indictment by video conference. Several members voiced concern that recent rule amendment proposals authorizing court proceedings by video conference seemed to be on a slippery slope. Professor Coquillate suggested adding restrictive language similar to that used in the proposed Rule 6(f) amendment: "To avoid unnecessary cost or delay." He also noted that rule changes normally required empirical evidence of a problem. One member suggested perhaps examining the Criminal Rules more comprehensively and assessing which proceedings should and should not be conducted by video conference. After significant discussion, Judge Battaglia moved to send the proposed Rule 7 amendment to the Standing Committee for publication.

The motion failed by a vote of 3-8.

It was suggested that Judge Battaglia's Rule 6(f) Subcommittee, perhaps under a new name, undertake a comprehensive look at how video conferencing is used in the courts and at which Criminal Rules should and should not permit its use. Judge Tallman agreed and requested the Federal Judicial Center's assistance in collecting relevant empirical data. Justice Edmunds asked if he could be replaced on the subcommittee, explaining that he would be unusually busy in coming months seeking re-election. Professor Leipold agreed to take his place.

B. Consent Calendar Suggestions:

Earlier in the meeting, Judge Tallman had drawn the Committee's attention to five suggested rule amendments included in the agenda book as consent calendar items:

03-CR-C: On April 1, 2003, attorney Carl Person suggested that each federal judge require, as a condition to approving plea agreements, that the prosecutor agree that one out of every 10 cases involving a plea bargain be selected at random to go to trial. Once the system is in place, he recommended adjusting the percentage of cases that must be randomly selected for trial based on the percentage of the defendants in randomly selected cases who are acquitted. Mr. Person reasoned that such a system would create an incentive for federal prosecutors to bring a smaller number of cases and prepare them more carefully. There were concerns that this proposal would burden the judicial system with trials in a way that might violate the substantive rights of criminal defendants.

03-CR-F: On November 5, 2003, attorney Steve Allen suggested that Rule 9(a) of the Rules Governing § 2254 Cases be amended to refer to a claim, not to a petition. He cited *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003), which construed the one-year statute

of limitation in 28 U.S.C. § 2244(d)(1) as applicable to all claims in a habeas petition, thereby reviving claims that might have otherwise been time-barred. In 2004, subdivision (a), to which Mr. Allens's proposal relates, was deleted as unnecessary in light of the one-year statute of limitation for § 2254 actions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d).

05-CR-C: On December 14, 2004, Judge James F. McClure, Jr., suggested that the Committee revise Rule 10 to permit waiver of arraignment. This proposal was discussed briefly at the Committee's October 2005 meeting in Charleston, but was tabled after several Committee members noted that during the general restyling of the Criminal Rules in 2002, the Committee had declined to allow waiver of the arraignment itself because it serves as a triggering event for several other rules.

05-CR-F: On November 2, 2005, Judge Michael Baylson suggested that the Committee discuss the increase in petitioner litigation under *Gonzalez*. Judge Baylson's recommendation is closely related to the work of the Writ Subcommittee, including the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

07-CR-C: On October 2, 2007, Mr. Kelly D. Warfield suggested that "the one-year statute of limitation under 28 U.S.C. 2244 (d) should be rescind[ed]." The Rules Enabling Act, however, does not authorize the rules committees to rescind statutes.

It was moved that the Committee decline to take action on these suggestions.

The Committee decided unanimously not to take action on these suggestions.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, AND OTHER COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Judge Tallman summarized the legislation pending in Congress that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some districts are forfeiting bonds if the defendant violates other conditions of release and is rearrested, a scenario that corporate bail bondsmen want to see eliminated. Mr. Rabiej noted that the proposed Bail Bond Fairness Act would amend Rule 46(f) directly, thereby bypassing the rulemaking process. The Judiciary has opposed this legislation for 15 years, and the Department of Justice had recently sent a letter to Congress also opposing the bill. Nonetheless, the House passed it, and some Senators, including Senate Majority Leader Harry Reid, are supporting it.

B. Other Matters

1. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants

Professor Beale reported that the Committee on Court Administration and Case Management (CACM) had declined to recommend adoption of a national policy at this time on internet access to plea agreements and other case docket information revealing defendant cooperation with the government. The 68 public comments received in response to CACM's September 2007 publication in the *Federal Register* of the proposed removal of all plea agreements from the internet were 4-to-1 against the proposal. Courts have been experimenting with various ways of addressing the problem posed by websites such as www.whosarat.com. Professor Coquillette mentioned that the Standing Committee had established a task force to study how cases under seal are, and should be, docketed. One member noted that sealing requirements vary from circuit to circuit. Another member added that there is not yet public consensus on the proper balance between government transparency and individual privacy.

2. Questions Involving Implementation of Rule 49.1

Mr. Rabiej noted that the Administrative Office had received a variety of queries from courts regarding the proper implementation of Rule 49.1. Most involved the nine Rule 49.1(b) exemptions from the redaction requirement, which were resulting in the public having internet access to unredacted personal identifiers contained in the exempted documents. What was gained by requiring painstaking redaction of the names of all minors who are crime victims from most filings in a case, courts asked, if Rule 49.1(b)(9) allows those names to appear unredacted in, say, the criminal complaint? Ms. Fisher said that, to her knowledge, the government is diligently redacting personal identifiers from all court filings unless, for instance, the personal identifier is the subject of a warrant or part of the caption. If mistakes are indeed being made, she said, it may simply represent a training issue. Judge Tallman noted that Rule 49.1(d) and (e) offer courts a way to address those situations, albeit it only on a case by case basis.

3. Draft Revisions of Civil and Criminal AO Forms

Mr. McCabe reported that the Forms Working Group of judges and clerks had revised several forms in light of the new federal rules on privacy and to restyle their language in simple, modern English. He drew the members' attention to the draft revisions of 33 civil and criminal forms prepared by the working group, included in the agenda book for member comment.

4. Chart of Rule Amendment Activity by Committee

Mr. Rabiej explained the significance of several distributed charts showing the number of rule amendments by each advisory rules committee over the past 25 years. Judge Tallman suggested that the committees should generally take a conservative approach to changing rules given the significant increase of late in the number of proposed rule changes.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

After noting that the next meeting would be held on October 20-21, 2008, at the Biltmore Hotel in Phoenix, Judge Tallman adjourned the meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
REPORT TO STANDING COMMITTEE
MAY 14, 2008
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 14, 2008

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 27-28, 2008, at St. Michaels, Maryland.

The Advisory Committee considered public comments on the Time-Computation amendments proposed for Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033. The Committee received numerous comments on the proposed amendment to Rule 8002 that would change the deadline for filing a notice of appeal from 10 days to 14 days, as well as comments in response to the Committee's inquiry as to whether the appeal time should be extended further to 30 days. We also received several comments on the proposed amendments to Rule 9006(a) which revises the method for computing time periods. We received no comments on the bulk of these rules amendments that simply substituted a multiple of seven days for time periods of less than 30 days in this package of amendments.

The Advisory Committee also considered public comments regarding the preliminary draft of proposed amendments to Bankruptcy Rules 4008, 7052 and 9021, and proposed new

Bankruptcy Rules 1017.1 and 7058, as well as comments received on proposed amendments to Official Form 8 and proposed new Official Form 27, all of which were published in August 2007.

Since no person who submitted a written comment requested to appear at the public hearings scheduled for January 16 and 25, 2008, the hearings were canceled.

The Advisory Committee withdraws proposed Bankruptcy Rule 1017.1 and recommends that the Standing Committee approve the remaining amendments and additions to the Bankruptcy Rules and Official Forms and transmit them to the Judicial Conference. In connection with the withdrawal of proposed Rule 1017.1, the Advisory Committee recommended approval of a revision of the amendment to Exhibit D to Official Form 1 which was published in August 2006 and approved by the Standing Committee in June 2007. The Advisory Committee also recommends that the Standing Committee approve proposed technical amendments to Bankruptcy Rules 2016, 7052, 9006, 9015, and 9023 and Official Forms 9F, 10, and 23 without publication. The proposed amendments and additions and the comments received thereon are set out below in the Action Items section of this report.

The Advisory Committee also studied a number of proposals to amend the Bankruptcy Rules. After careful consideration, the Advisory Committee resolved to recommend that the Standing Committee approve for publication a preliminary draft of proposed amendments to Bankruptcy Rules 1014, 1015, 1018, 5009, and 9001, and proposed new Bankruptcy Rules 1004.2 and 5012. The Style Consultants to the Standing Committee offered a number of suggestions that were considered by the Advisory Committee's Style Subcommittee, and the proposals set out below in the Action Items section of the report reflect those joint efforts.

II Action Items

- A. Proposed Amendments to Bankruptcy Rules 9006, 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference to Implement the Time-Computation Project.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the proposed amendments to Bankruptcy Rules 9006, 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 for submission to the Judicial Conference to implement the Time-Computation Project as set out below. These amendments are to become effective on December 1, 2009.

1. *Public Comment.*

The preliminary draft of proposed amendments to Bankruptcy Rules 9006, 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 were published for

comment in August 2007. A public hearing on the preliminary draft of the Time-Computation Amendments was scheduled for January 16, 2008, but there were no requests to appear at the hearings.

The Advisory Committee received comments on Rule 9006(a) and the Time-Computation Rule Template as set out immediately after Rule 9006. The only other Time-Computation Amendment on which the Committee received comments was the proposed amendment to Rule 8002, on which we received 40 comments. Again, those comments are described below immediately after Rule 8002.¹

2. *Synopsis of Proposed Amendments to Implement the Time-Computation Project.*

- (a) **Rule 9006(a) (Time Computation Template Rule)** replaces subdivision (a) with the template being adopted throughout the Federal Rules for computing time. There are minor differences from the template in the Committee Note that include changes specific to bankruptcy law and practice. The amendment is offered in conjunction with proposed amendments to the deadlines set out

1

In addition to the description of the individual comments on the proposed amendment to Rule 8002, attached to this report is a spreadsheet that compiles the comments according to the status of the person submitting the comment (judge, practitioner, association) and the preferred notice of appeal deadline (10, 14, or 30 days).

in 39 rules. Those amendments include changes only in the time periods.

(b) **Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033** are each amended to make the deadlines under the rules multiples of seven days for any period less than 30 days. The various deadlines in these rules are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

The changes to the Bankruptcy Rules to implement the Time-Computation project, other than the changes to Rule 9006(a), are limited to changes in the deadlines as set out above.

3. *Text of Proposed Bankruptcy Rules Amendments to Implement the Time-Computation Project.*

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

Rule 9006. Computing and Extending Time

1 ~~(a) COMPUTATION.~~

2 ~~• In computing any period of time prescribed or allowed~~
3 ~~by these rules or by the Federal Rules of Civil Procedure~~
4 ~~made applicable by these rules, by the local rules, by~~
5 ~~order of court, or by any applicable statute, the day of~~
6 ~~the act, event, or default from which the designated~~
7 ~~period of time begins to run shall not be included. The~~
8 ~~last day of the period so computed shall be included,~~
9 ~~unless it is a Saturday, a Sunday, or a legal holiday, or,~~
10 ~~when the act to be done is the filing of a paper in court,~~
11 ~~a day on which weather or other conditions have made~~
12 ~~the clerk's office inaccessible, in which event the period~~
13 ~~runs until the end of the next day which is not one of the~~
14 ~~mentioned days. When the period of time~~
15 ~~prescribed or allowed is less than 8 days, intermediate~~
16 ~~Saturdays, Sundays, and legal holidays shall be excluded~~
17 ~~in the computation. As used in this rule and in Rule~~
18 ~~5001(c), "legal holiday" includes New Year's Day,~~
19 ~~Birthday of Martin Luther King, Jr., Washington's~~

20 ~~Birthday, Memorial Day, Independence Day, Labor Day,~~
21 ~~Columbus Day, Veterans Day, Thanksgiving Day,~~
22 ~~Christmas Day, and any other day appointed as a holiday~~
23 ~~by the President or the Congress of the United States, or~~
24 ~~by the state in which the court is held.~~

25 (a) COMPUTING TIME. The following rules apply in
26 computing any time period specified in these rules, in
27 the Federal Rules of Civil Procedure, in any local rule or
28 court order, or in any statute that does not specify a
29 method of computing time.

30 (1) *Period Stated in Days or a Longer Unit.* When the
31 period is stated in days or a longer unit of time:

32 (A) exclude the day of the event that triggers the
33 period;

34 (B) count every day, including intermediate
35 Saturdays, Sundays, and legal holidays; and

36 (C) include the last day of the period, but if the
37 last day is a Saturday, Sunday, or legal
38 holiday, the period continues to run until the
39 end of the next day that is not a Saturday,
40 Sunday, or legal holiday.

41 (2) *Period Stated in Hours.* When the period is stated

42 in hours:

43 (A) begin counting immediately on the

44 occurrence of the event that triggers the

45 period;

46 (B) count every hour, including hours during

47 intermediate Saturdays, Sundays, and legal

48 holidays; and

49 (C) if the period would end on a Saturday,

50 Sunday, or legal holiday, then continue the

51 period until the same time on the next day

52 that is not a Saturday, Sunday, or legal

53 holiday.

54 (3) *Inaccessibility of Clerk's Office.* Unless the court

55 orders otherwise, if the clerk's office is

56 inaccessible:

57 (A) on the last day for filing under Rule

58 9006(a)(1), then the time for filing is

59 extended to the first accessible day that is not

60 a Saturday, Sunday, or legal holiday; or

61 (B) during the last hour for filing under Rule

62 9006(a)(2), then the time for filing is

63 extended to the same time on the first

64 accessible day that is not a Saturday, Sunday,
65 or legal holiday.

66 (4) "Last Day" Defined. Unless a different time is set
67 by a statute, local rule, or order in the case, the last
68 day ends:

69 (A) for electronic filing, at midnight in the court's
70 time zone; and

71 (B) for filing by other means, when the clerk's
72 office is scheduled to close.

73 (5) "Next Day" Defined. The "next day" is _____
74 determined by continuing to count forward when
75 the period is measured after an event and backward
76 when measured before an event.

77 (6) "Legal Holiday" Defined. "Legal holiday" means:

78 (A) the day set aside by statute for observing New
79 Year's Day, Martin Luther King Jr.'s
80 Birthday, Washington's Birthday, Memorial
81 Day, Independence Day, Labor Day, _____
82 Columbus Day, Veterans' Day, Thanksgiving
83 Day, or Christmas Day; and

84 (B) any other day declared a holiday by the _____
85 President, Congress, or the state where the

86 district court is located. (In this rule, “state”
87 includes the District of Columbia and any
88 United States commonwealth, territory, or
89 possession.)

* * * * *

COMMITTEE NOTE

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Bankruptcy Procedure, a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Bankruptcy Rule 9029(a), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period

set by a statute if the statute specifies a method of computing time. *See, e.g.*, 11 U.S.C. § 527(a)(2) (debt relief agencies must provide a written notice to an assisted person “not later than 3 business days” after providing bankruptcy assistance services).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Federal Rule of Civil Procedure 60(b) made applicable to under Rule 9024. Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 9006(a), a period of eight days or more was computed differently than a period of less than eight days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 9006(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results.

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply

to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than eight days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., Rules 2008 (trustee’s duty to notify court of acceptance of the appointment within five days is extended to seven days); 6004(b) (time for filing and service of objection to proposed use, sale or lease of property extended from five days prior to the hearing to seven days prior to the hearing); and 9006(d) (time for giving notice of a hearing extended from five days prior to the hearing to seven days).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. See, e.g., Rules 1007(h) (10 day period to file supplemental schedule for property debtor becomes entitled to acquire after the commencement of the case is extended to 14 days); 3020(e) (10 day stay of order confirming a chapter 11 plan extended to 14 days); 8002(a) (10 day period in which to file notice of appeal extended to 14 days). A 14-day period also has the advantage that the final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting seven-day periods to replace some of the periods set at less than 10 days, 21-day periods to replace 20-day periods, and 28-day periods to replace 25-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the

computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Bankruptcy Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk’s office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk’s office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Bankruptcy Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A

corresponding provision exists in Rule 5001(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Bankruptcy Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rules 1007(c) (the schedules and statements, other than the statement of intention, shall be filed by the debtor within 14 days after entry of the order for relief.”); 1019(b)(ii) (“the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account”); and 7012(a) (“If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court.”).

A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rules 6004(b) (“an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action”); 9006(d) (“A written motion, other than one which may be heard *ex parte*, and notice of any hearing shall be served not later than five days before the time specified for such hearing”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing

is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Bankruptcy Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are “declared a holiday by the President.” For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that “[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001”). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term “state” – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)’s definition of “legal holiday,” “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Public Comment on Proposed Amendments to Rule 9006(a):

1. **07-BK-004: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York (“EDNY Committee”).** The EDNY Committee writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee’s proposals to lengthen specific Civil Rules deadlines. The EDNY Committee also makes some suggestions for improving the project if it goes forward.

- Overall cost/benefit analysis. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.
- Incompleteness of offsetting changes. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected

statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

- Business-day provisions in local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days.
- Backward-counted time periods. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York.

2. 07-BR-015: Chief Judge Frank H. Easterbrook.

Chief Judge Easterbrook writes in support of the time-computation proposals. He suggests that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by our

preference for setting periods in multiples of seven days.

3. **07-BK-007: Walter W. Bussart.** Mr. Bussart states generally that the proposed amendments are helpful and that he supports their adoption.

4. **07-BK-008: Jack E. Horsley** Overall, Mr. Horsley views the proposed amendments with favor.

5. **07-BK-010: Stephen P. Stoltz** Mr. Stoltz generally supports the time-computation proposals. He argues, however, that the time-counting rules should define the “last day” as ending “at 11:59:59 p.m.” rather than “at midnight.” He suggests this because “[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time.” He warns that if the time-counting rules provide that the “last day” of a period ends “at midnight,” there will be confusion and courts may conclude that a “deadline is actually the day (or evening) before the particular day.”

6. **07-BK-011: Robert J. Newmeyer.** Mr. Newmeyer is an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California. Mr. Newmeyer stresses that the 10-day period set by 28 U.S.C. § 636(b)(1) must be lengthened to 14 days. This statute will presumably be on the short list of statutory periods that Congress should be asked to lengthen, so this suggestion is in line with the Project’s current scheme.

Mr. Newmeyer further suggests that it would be worthwhile to consider setting an even longer period for filing objections to case-dispositive rulings by magistrate judges. This suggestion seems to fall within the Civil Rules Committee’s jurisdiction rather than that of the Time-

Computation Project.

Mr. Newmeyer also expresses confusion as to whether the Civil Rule 6(a) time-computation proposals affect the “three-day rule.” As you know, the time-computation project does not propose to change the three-day rule, and it seems unlikely that there will be confusion on this score in the event that the time-computation proposals are adopted (Mr. Newmeyer’s confusion probably springs from the fact that the time-computation rules as published include only provisions in which a change is proposed, and thus omit Civil Rule 6(d)). In any event, Mr. Newmeyer suggests that the three-day rule should be deleted. This suggestion, like Chief Judge Easterbrook’s suggestion, is one that the Advisory Committees may well wish to add to their agendas, but is not one that seems appropriate for resolution in connection with the time-computation project itself.

7. **07-BK-012: Carol D. Bonifaci.** Ms. Bonifaci, a paralegal at a Seattle law firm, expresses confusion concerning the proposed time-computation rules’ treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count forward to Monday.

Ms. Bonifaci observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., “no later than November 1, 2008”) is not covered by the proposed time-computation rules, and she suggests that this should also be stated in the text of the proposed Rules.

8. **07-BK-014: Robert M. Steptoe, Jr.** Mr. Steptoe, a partner at Steptoe & Johnson, expresses concern “that the proposed time-computation rules would govern a number of

statutory deadlines that do not themselves provide a method for computing time,” and that the proposed rules “may cause hardship if short time periods set in local rules are not adjusted.” Therefore, he urges that the time-computation proposals “not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification.”

9. **07-BK-018: FDIC.** Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, writes to urge that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act. He explains that banking agencies such as the FDIC already “employ calendar days in their computations of time to respond to regulatory and enforcement decisions” – thus indicating that no adjustment is necessary or appropriate in connection with the time-computation project. Since no participant in the time-computation project has suggested that the FDIA provisions should be included on the short list of statutory periods that Congress should be asked to change in light of the time-computation project, it seems fair to say that Mr. Osterman’s suggestion accords with the approach that the project is already taking.

Mr. Osterman also suggests that Civil Form 3 be amended to “include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21 days you are proposing. This language is absent from the current summons form.” This suggestion concerns the Civil Rules Committee rather than the Time-Computation Subcommittee. (The version of Form 3 that is currently in effect does include an italicized parenthetical that

states: “(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)”

10. **07-BK-019: DOJ.** Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns “about the interplay of the proposed amendment with both existing statutory periods and local rules.” The DOJ argues that “changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable.” Otherwise, the DOJ fears that the purposes of some statutes “may be frustrated.” The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create “confusion and uncertainty” to have two different time-counting regimes (one for rules and one for statutes).

Mr. Morford does not specifically state the DOJ’s position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee’s identification of “some 168 statutes ... that contain deadlines that would require lengthening.”

The DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules.

11. **07-BR-036: Rules and Practice Committee of the Seventh Circuit Bar Association.** Thomas J. Wiegand

writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." He also notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future." One member of the group suggested that if the deadline for filing a notice of appeal under Rule 8002(a) were to be changed, it should be reduced to 7 days rather than extended to 14.

12. 07-BR-026; 07-BK-009: Alan N. Resnick. Professor Resnick previously served as first the Reporter to and then a member of the Bankruptcy Rules Committee. Of particular relevance to the overall Time-Computation Project, Professor Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006. He points out that a days-are-days approach would result in "the shortening of some state and federal statutory time periods."

Professor Resnick stresses that if time periods set by the Bankruptcy Rules and the Civil Rules are altered, care must be taken to adjust the Bankruptcy Rules so that newly-lengthened Civil Rules time periods are not inappropriately incorporated into the Bankruptcy Rules. In particular, Professor Resnick notes that the Bankruptcy Rules Committee should consider altering Bankruptcy Rule 9023's incorporation of Civil Rule 59's provisions if Civil Rule 59 is amended to change current 10-day time limits to 30 days. Professor Resnick also adds his voice to those that oppose the lengthening of Bankruptcy Rule 8002's ten-day appeal period.

But if Rule 8002's ten-day period is lengthened, then Professor Resnick points out other time periods in the Bankruptcy Rules that he argues should be corresponding lengthened.

13. 07-BK-013; 07-BR-029: Judge Philip H. Brandt.

Judge Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

14. 07-BK-015: Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee") writes in opposition to the time-computation proposals. The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

The ABCNY Bankruptcy Committee's objections to the time-computation proposals are very similar to those stated by the EDNY Committee; in sum, the ABCNY Bankruptcy Committee believes that the costs of the time-computation proposals strongly outweigh their benefits. This summary highlights those aspects of the ABCNY Bankruptcy Committee's comments that differ from those of the EDNY

Committee. The ABCNY Bankruptcy Committee suggests, among other problems, that “some local courts might decide to retain the present computational approach through the promulgation of local rules,” which would compound the resulting confusion. The ABCNY Bankruptcy Committee also suggests that “[m]idnight’ is often defined as 12:00 a.m., or the beginning of a given day.” Thus, the Committee “believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day.”

15. 07-BK-022: National Bankruptcy Conference.

Richard Levin writes on behalf of the National Bankruptcy Conference (“NBC”), which “strongly endorses and supports” the comments previously submitted by Professor Alan Resnick. The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests “that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further”

Changes Made After Publication:

The reference to Rule 6(a)(1) in subdivision (a)(3)(A) at line 50 of the rule as it was published was corrected by referring instead to Rule 9006(a)(1).

Rule 1007. Lists, Schedules and Statements; Time Limits**

- 1 (a) LIST OF CREDITORS AND EQUITY SECURITY
- 2 HOLDERS, AND CORPORATE OWNERSHIP
- 3 STATEMENT.

** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

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(2) *Involuntary Case.* In an involuntary case, the debtor shall file within ~~15~~ 14^{***} days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

(3) *Equity Security Holders.* In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within ~~15~~ 14 days after entry of the order for relief a list of the debtor’s equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

* * * * *

(c) TIME LIMITS. In a voluntary case, the schedules statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within ~~15~~ 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within ~~15~~ 14

*** The Committee on Practice and Procedure has approved for publication in August 2008 an amendment to this deadline. Under the proposal, the 14 day period will become a seven day period.

26 days of the entry of the order for relief. In a voluntary case,
27 the documents required by paragraphs (A), (C), and (D) of
28 subdivision (b)(3) shall be filed with the petition. Unless the
29 court orders otherwise, a debtor who has filed a statement
30 under subdivision (b)(3)(B), shall file the documents required
31 by subdivision (b)(3)(A) within ~~15~~ 14 days of the order for
32 relief. In a chapter 7 case, the debtor shall file the statement
33 required by subdivision (b)(7) within 45**** days after the first
34 date set for the meeting of creditors under § 341 of the Code,
35 and in a chapter 11 or 13 case no later than the date when the
36 last payment was made by the debtor as required by the plan
37 or the filing of a motion for a discharge under § 1141(d)(5)(B)
38 or § 1328(b) of the Code. The court may, at any time and in
39 its discretion, enlarge the time to file the statement required
40 by subdivision (b)(7). The debtor shall file the statement
41 required by subdivision (b)(8) no earlier than the date of the
42 last payment made under the plan or the date of the filing of
43 a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or
44 1328(b) of the Code. Lists, schedules, statements, and other
45 documents filed prior to the conversion of a case to another
46 chapter shall be deemed filed in the converted case unless the
47 court directs otherwise. Except as provided in § 1116(3), any
48 extension of time to file schedules, statements, and other

**** The Committee on Practice and Procedure has approved for publication in August 2008 an amendment to this deadline. Under the proposal, the 45 day deadline will become a 60 day deadline.

49 documents required under this rule may be granted only on
50 motion for cause shown and on notice to the United States
51 trustee, any committee elected under § 705 or appointed under
52 § 1102 of the Code, trustee, examiner, or other party as the
53 court may direct. Notice of an extension shall be given to the
54 United States trustee and to any committee, trustee, or other
55 party as the court may direct.

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57 (f) STATEMENT OF SOCIAL SECURITY NUMBER.

58 An individual debtor shall submit a verified statement that
59 sets out the debtor's social security number, or states that the
60 debtor does not have a social security number. In a voluntary
61 case, the debtor shall submit the statement with the petition.
62 In an involuntary case, the debtor shall submit the statement
63 within ~~15~~ 14 days after the entry of the order for relief.

64 * * * * *

65 (h) INTERESTS ACQUIRED OR ARISING AFTER
66 PETITION. If, as provided by § 541(a)(5) of the Code, the
67 debtor acquires or becomes entitled to acquire any interest in
68 property, the debtor shall within ~~10~~ 14 days after the
69 information comes to the debtor's knowledge or within such
70 further time the court may allow, file a supplemental schedule
71 in the chapter 7 liquidation case, chapter 11 reorganization
72 case, chapter 12 family farmer's debt adjustment case, or
73 chapter 13 individual debt adjustment case. If any of the

74 property required to be reported under this subdivision is
75 claimed by the debtor as exempt, the debtor shall claim the
76 exemptions in the supplemental schedule. The duty to file a
77 supplemental schedule in accordance with this subdivision
78 continues notwithstanding the closing of the case, except that
79 the schedule need not be filed in a chapter 11, chapter 12, or
80 chapter 13 case with respect to property acquired after entry
81 of the order confirming a chapter 11 plan or discharging the
82 debtor in a chapter 12 or chapter 13 case.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. Each deadline in the rule of fewer than 30 days is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 1011. Responsive Pleading or Motion in Involuntary

and Cross-Border Cases *****

* * * * *

1 (b) DEFENSES AND OBJECTIONS; WHEN
2 PRESENTED. Defenses and objections to the petition shall
3 be presented in the manner prescribed by Rule 12 F.R.Civ.P.
4 and shall be filed and served within ~~20~~ 21 days after service
5 of the summons, except that if service is made by publication
6 on a party or partner not residing or found within the state in
7 which the court sits, the court shall prescribe the time for
8 filing and serving the response.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods

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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer’s Debt Adjustment Case, or Chapter 13 Individual’s Debt Adjustment Case to Chapter 7 Liquidation Case

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(5) *Filing Final Report and Schedule of Postpetition Debts.*

(A) Conversion of Chapter 11 or Chapter 12 Case. Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than ~~15~~ 14 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

17 (B) Conversion of Chapter 13 Case. Unless
18 the court directs otherwise, if a chapter 13 case is converted
19 to chapter 7,

20 (i) the debtor, not later than ~~15~~ 14 days
21 after conversion of the case, shall file a schedule of unpaid
22 debts incurred after the filing of the petition and before
23 conversion of the case, including the name and address of
24 each holder of a claim; and

25 (ii) the trustee, not later than 30 days
26 after conversion of the case, shall file and transmit to the
27 United States trustee a final report and account;

28 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 1020. Small Business Chapter 11 Reorganization Case*****

1 (a) SMALL BUSINESS DEBTOR DESIGNATION. In
2 a voluntary chapter 11 case, the debtor shall state in the
3 petition whether the debtor is a small business debtor. In an
4 involuntary chapter 11 case, the debtor shall file within ~~15~~ 14
5 days after entry of the order for relief a statement as to
6 whether the debtor is a small business debtor. Except as
7 provided in subdivision (c), the status of the case as a small
8 business case shall be in accordance with the debtor's
9 statement under this subdivision, unless and until the court
10 enters an order finding that the debtor's statement is incorrect.

11 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

12 indenture trustees not less than ~~25~~ 28 days notice by mail of
13 the time fixed (1) for filing objections and the hearing to
14 consider approval of a disclosure statement or, under §
15 1125(f), to make a final determination whether the plan
16 provides adequate information so that a separate disclosure
17 statement is not necessary; and (2) for filing objections and
18 the hearing to consider confirmation of a chapter 9, chapter
19 11, or chapter 13 plan.

20 * * * * *

21 (o) NOTICE OF ORDER FOR RELIEF IN
22 CONSUMER CASE. In a voluntary case commenced by an
23 individual debtor whose debts are primarily consumer debts,
24 the clerk or some other person as the court may direct shall
25 give the trustee and all creditors notice by mail of the order
26 for relief within ~~20~~ 21 days from the date thereof.

27 (q) NOTICE OF PETITION FOR RECOGNITION OF
28 FOREIGN PROCEEDING AND OF COURT'S INTENTION
29 TO COMMUNICATE WITH FOREIGN COURTS AND
30 FOREIGN REPRESENTATIVES.

31 (1) *Notice of Petition for Recognition.* The clerk,
32 or some other person as the court may direct, shall forthwith
33 give the debtor, all persons or bodies authorized to administer

34 foreign proceedings of the debtor, all entities against whom
35 provisional relief is being sought under § 1519 of the Code,
36 all parties to litigation pending in the United States in which
37 the debtor is a party at the time of the filing of the petition,
38 and such other entities as the court may direct, at least ~~20~~ 21
39 days' notice by mail of the hearing on the petition for
40 recognition of a foreign proceeding. The notice shall state
41 whether the petition seeks recognition as a foreign main
42 proceeding or foreign nonmain proceeding.

* * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2003. Meeting of Creditors or Equity Security

Holders *****

1 (a) DATE AND PLACE. Except as otherwise provided
2 in § 341(e) of the Code, in a chapter 7 liquidation or a chapter
3 11 reorganization case, the United States trustee shall call a
4 meeting of creditors to be held no fewer than ~~20~~ 21 and no
5 more than 40 days after the order for relief. In a chapter 12
6 family farmer debt adjustment case, the United States trustee
7 shall call a meeting of creditors to be held no fewer than ~~20~~
8 21 and no more than 35 days after the order for relief. In a
9 chapter 13 individual's debt adjustment case, the United
10 States trustee shall call a meeting of creditors to be held no
11 fewer than ~~20~~ 21 and no more than 50 days after the order for
12 relief. If there is an appeal from or a motion to vacate the
13 order for relief, or if there is a motion to dismiss the case, the
14 United States trustee may set a later date for the meeting. The
15 meeting may be held at a regular place for holding court or at
16 any other place designated by the United States trustee within
17 the district convenient for the parties in interest. If the United
18 States trustee designates a place for the meeting which is not
19 regularly staffed by the United States trustee or an assistant

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20 who may preside at the meeting, the meeting may be held not
21 more than 60 days after the order for relief.

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23 (d) REPORT OF ELECTION AND RESOLUTION OF
24 DISPUTES IN A CHAPTER 7 CASE.

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26 (2) *Disputed Election.* If the election is disputed,
27 the United States trustee shall promptly file a report stating
28 that the election is disputed, informing the court of the nature
29 of the dispute, and listing the name and address of any
30 candidate elected under any alternative presented by the
31 dispute. No later than the date on which the report is filed,
32 the United States trustee shall mail a copy of the report to any
33 party in interest that has made a request to receive a copy of
34 the report. Pending disposition by the court of a disputed
35 election for trustee, the interim trustee shall continue in office.
36 Unless a motion for the resolution of the dispute is filed no
37 later than ~~10~~ 14 days after the United States trustee files a
38 report of a disputed election for trustee, the interim trustee
39 shall serve as a trustee in the case.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2006. Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases

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(c) AUTHORIZED SOLICITATION.

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(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting

11 of which all creditors having claims of over \$500 or the 100
12 creditors having the largest claims had at least ~~five~~ seven days
13 notice in writing and of which meeting written minutes were
14 kept and are available reporting the names of the creditors
15 present or represented and voting and the amounts of their
16 claims; or (D) a bona fide trade or credit association, but such
17 association may solicit only creditors who were its members
18 or subscribers in good standing and had allowable unsecured
19 claims on the date of the filing of the petition.

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* * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2007. Review of Appointment of Creditors'

Committee Organized Before Commencement of the Case

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(b) SELECTION OF MEMBERS OF COMMITTEE.

The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over \$1,000 or the 100 unsecured creditors having the largest claims had at least ~~five~~ seven days notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;

* * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status*****

1 (a) TRUSTEE OR DEBTOR IN POSSESSION. A
2 trustee or debtor in possession shall:

3 * * * * *

4 (6) in a chapter 11 small business case, unless the
5 court, for cause, sets another reporting interval, file and
6 transmit to the United States trustee for each calendar month

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

7 after the order for relief, on the appropriate Official Form, the
8 report required by § 308. If the order for relief is within the
9 first 15 days of a calendar month, a report shall be filed for
10 the portion of the month that follows the order for relief. If
11 the order for relief is after the 15th day of a calendar month,
12 the period for the remainder of the month shall be included in
13 the report for the next calendar month. Each report shall be
14 filed no later than ~~20~~ 21 days after the last day of the calendar
15 month following the month covered by the report. The
16 obligation to file reports under this subparagraph terminates
17 on the effective date of the plan, or conversion or dismissal of
18 the case.

19 * * * * *

20 (d) FOREIGN REPRESENTATIVE. In a case in which
21 the court has granted recognition of a foreign proceeding
22 under chapter 15, the foreign representative shall file any
23 notice required under § 1518 of the Code within ~~15~~ 14 days
24 after the date when the representative becomes aware of the
25 subsequent information.

26 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection

with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
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- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2015.1. Patient Care Ombudsman *****

1 (a) REPORTS. Unless the court orders otherwise, a
2 patient care ombudsman, at least ~~10~~ 14 days before making a
3 report under § 333(b)(2) of the Code, shall give notice that the
4 report will be made to the court. The notice shall be
5 transmitted to the United States trustee, posted conspicuously
6 at the health care facility that is the subject of the report, and
7 served on: the debtor; the trustee; all patients; and any
8 committee elected under § 705 or appointed under § 1102 of
9 the Code or its authorized agent, or, if the case is a chapter 9

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

10 municipality case or a chapter 11 reorganization case and no
11 committee of unsecured creditors has been appointed under
12 § 1102, on the creditors included on the list filed under Rule
13 1007(d); and such other entities as the court may direct. The
14 notice shall state the date and time when the report will be
15 made, the manner in which the report will be made, and, if the
16 report is in writing, the name, address, telephone number,
17 email address, and website, if any, of the person from whom
18 a copy of the report may be obtained at the debtor's expense.

19 (b) AUTHORIZATION TO REVIEW
20 CONFIDENTIAL PATIENT RECORDS. A motion by a
21 health care ombudsman under § 333(c) to review confidential
22 patient records shall be governed by Rule 9014, served on the
23 patient and any family member or other contact person whose
24 name and address has been given to the trustee or the debtor
25 for the purpose of providing information regarding the
26 patient's health care, and transmitted to the United States
27 trustee subject to applicable nonbankruptcy law relating to
28 patient privacy. Unless the court orders otherwise, a hearing
29 on the motion may not be commenced earlier than ~~15~~ 14 days
30 after service of the motion.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2015.2. Transfer of Patient in Health Care Business Case

1 Unless the court orders otherwise, if the debtor is a
2 health care business, the trustee may not transfer a patient to
3 another health care business under § 704(a)(12) of the Code
4 unless the trustee gives at least ~~10~~ 14 days' notice of the
5 transfer to the patient care ombudsman, if any, the patient,
6 and any family member or other contact person whose name
7 and address has been given to the trustee or the debtor for the
8 purpose of providing information regarding the patient's

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

9 health care. The notice is subject to applicable nonbankruptcy
10 law relating to patient privacy.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 2015.3. Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest*****

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2 (b) TIME FOR FILING; SERVICE. The first report
3 required by this rule shall be filed no later than ~~five~~ seven
4 days before the first date set for the meeting of creditors under

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

5 § 341 of the Code. Subsequent reports shall be filed no less
6 frequently than every six months thereafter, until the effective
7 date of a plan or the case is dismissed or converted. Copies
8 of the report shall be served on the United States trustee, any
9 committee appointed under § 1102 of the Code, and any other
10 party in interest that has filed a request therefor.

11 * * * * *

12 (e) NOTICE AND PROTECTIVE ORDERS. No later
13 than ~~20~~ 21 days before filing the first report required by this
14 rule, the trustee or debtor in possession shall send notice to
15 the entity in which the estate has a substantial or controlling
16 interest, and to all holders— known to the trustee or debtor in
17 possession—of an interest in that entity, that the trustee or
18 debtor in possession expects to file and serve financial
19 information relating to the entity in accordance with this rule.
20 The entity in which the estate has a substantial or controlling
21 interest, or a person holding an interest in that entity, may
22 request protection of the information under § 107 of the Code.

23 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection

8 § 329 of the Code including whether the attorney has shared
9 or agreed to share the compensation with any other entity.
10 The statement shall include the particulars of any such sharing
11 or agreement to share by the attorney, but the details of any
12 agreement for the sharing of the compensation with a member
13 or regular associate of the attorney's law firm shall not be
14 required. A supplemental statement shall be filed and
15 transmitted to the United States trustee within ~~15~~ 14 days
16 after any payment or agreement not previously disclosed.

17 (c) DISCLOSURE OF COMPENSATION PAID OR
18 PROMISED TO BANKRUPTCY PETITION PREPARER.
19 Every bankruptcy petition preparer for a debtor shall file a
20 declaration under penalty of perjury and transmit the
21 declaration to the United States trustee within ~~10~~ 14 days after
22 the date of the filing of the petition, or at another time as the
23 court may direct, as required by § 110(h)(1). The declaration
24 must disclose any fee, and the source of any fee, received
25 from or on behalf of the debtor within 12 months of the filing
26 of the case and all unpaid fees charged to the debtor. The
27 declaration must describe the services performed and
28 documents prepared or caused to be prepared by the

29 bankruptcy petition preparer. A supplemental statement shall
30 be filed within ~~10~~ 14 days after any payment or agreement not
31 previously disclosed.

32 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 3001. Proof of Claim

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2 (e) TRANSFERRED CLAIM.

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4 (2) *Transfer of Claim Other than for Security after*
5 *Proof Filed.* If a claim other than one based on a publicly
6 traded note, bond, or debenture has been transferred other
7 than for security after the proof of claim has been filed,

8 evidence of the transfer shall be filed by the transferee. The
9 clerk shall immediately notify the alleged transferor by mail
10 of the filing of the evidence of transfer and that objection
11 thereto, if any, must be filed within ~~20~~ 21 days of the mailing
12 of the notice or within any additional time allowed by the
13 court. If the alleged transferor files a timely objection and the
14 court finds, after notice and a hearing, that the claim has been
15 transferred other than for security, it shall enter an order
16 substituting the transferee for the transferor. If a timely
17 objection is not filed by the alleged transferor, the transferee
18 shall be substituted for the transferor.

19 * * * * *

20 (4) *Transfer of Claim for Security after Proof*
21 *Filed.* If a claim other than one based on a publicly traded
22 note, bond, or debenture has been transferred for security after
23 the proof of claim has been filed, evidence of the terms of the
24 transfer shall be filed by the transferee. The clerk shall
25 immediately notify the alleged transferor by mail of the filing
26 of the evidence of transfer and that objection thereto, if any,
27 must be filed within ~~20~~ 21 days of the mailing of the notice or
28 within any additional time allowed by the court. If a timely

29 objection is filed by the alleged transferor, the court, after
30 notice and a hearing, shall determine whether the claim has
31 been transferred for security. If the transferor or transferee
32 does not file an agreement regarding its relative rights
33 respecting voting of the claim, payment of dividends thereon,
34 or participation in the administration of the estate, on motion
35 by a party in interest and after notice and a hearing, the court
36 shall enter such orders respecting these matters as may be
37 appropriate.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt

Adjustment Case

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(b) CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within ~~15~~ 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within ~~15~~ 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

* * * * *

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than ~~20~~ 21 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed

21 modification. A copy of the notice shall be transmitted to the
22 United States trustee. A copy of the proposed modification,
23 or a summary thereof, shall be included with the notice. If
24 required by the court, the proponent shall furnish a sufficient
25 number of copies of the proposed modification, or a summary
26 thereof, to enable the clerk to include a copy with each notice.
27 Any objection to the proposed modification shall be filed and
28 served on the debtor, the trustee, and any other entity
29 designated by the court, and shall be transmitted to the United
30 States trustee. An objection to a proposed modification is
31 governed by Rule 9014.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

**Rule 3017. Court Consideration of Disclosure Statement
in a Chapter 9 Municipality or Chapter 11
Reorganization Case**

1 (a) HEARING ON DISCLOSURE STATEMENT AND
2 OBJECTIONS. Except as provided in Rule 3017.1, after a
3 disclosure statement is filed in accordance with Rule 3016(b),
4 the court shall hold a hearing on at least ~~25~~ 28 days' notice to
5 the debtor, creditors, equity security holders and other parties
6 in interest as provided in Rule 2002 to consider the disclosure
7 statement and any objections or modifications thereto. The
8 plan and the disclosure statement shall be mailed with the
9 notice of the hearing only to the debtor, any trustee or
10 committee appointed under the Code, the Securities and
11 Exchange Commission, and any party in interest who requests
12 in writing a copy of the statement or plan. Objections to the
13 disclosure statement shall be filed and served on the debtor,
14 the trustee, any committee appointed under the Code, and any
15 other entity designated by the court, at any time before the
16 disclosure statement is approved or by an earlier date as the
17 court may fix. In a chapter 11 reorganization case, every
18 notice, plan, disclosure statement, and objection required to

19 be served or mailed pursuant to this subdivision shall be
20 transmitted to the United States trustee within the time
21 provided in this subdivision.

22 * * * * *

23 (f) NOTICE AND TRANSMISSION OF
24 DOCUMENTS TO ENTITIES SUBJECT TO AN
25 INJUNCTION UNDER A PLAN. If a plan provides for an
26 injunction against conduct not otherwise enjoined under the
27 Code and an entity that would be subject to the injunction is
28 not a creditor or equity security holder, at the hearing held
29 under Rule 3017(a), the court shall consider procedures for
30 providing the entity with:

31 (1) at least ~~25~~ 28 days' notice of the time fixed for
32 filing objections and the hearing on confirmation of the plan
33 containing the information described in Rule 2002(c)(3); and

34 (2) to the extent feasible, a copy of the plan and
35 disclosure statement.

36 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of

seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 5 day periods become 28 day periods

Rule 3019. Modification of Accepted Plan in a Chapter 9 Municipality or Chapter 11 Reorganization Case*****

* * * * *

1 (b) MODIFICATION OF PLAN AFTER
2 CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If the
3 debtor is an individual, a request to modify the plan under
4 § 1127(e) of the Code is governed by Rule 9014. The request
5 shall identify the proponent and shall be filed together with
6 the proposed modification. The clerk, or some other person
7 as the court may direct, shall give the debtor, the trustee, and
8 all creditors not less than ~~20~~ 21 days' notice by mail of the

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

9 time fixed to file objections and, if an objection is filed, the
10 hearing to consider the proposed modification, unless the
11 court orders otherwise with respect to creditors who are not
12 affected by the proposed modification. A copy of the notice
13 shall be transmitted to the United States trustee, together with
14 a copy of the proposed modification. Any objection to the
15 proposed modification shall be filed and served on the debtor,
16 the proponent of the modification, the trustee, and any other
17 entity designated by the court, and shall be transmitted to the
18 United States trustee.

19

* * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9

Municipality or Chapter 11 Reorganization Case

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(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of ~~10~~ 14 days after the entry of the order unless the court orders otherwise.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

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

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(a) RELIEF FROM STAY; PROHIBITING OR

24 than ~~±5~~ 14 days after service of the motion. If the motion so
25 requests, the court may conduct a hearing before such ~~±5~~ 14
26 day period expires, but the court may authorize the obtaining
27 of credit only to the extent necessary to avoid immediate and
28 irreparable harm to the estate pending a final hearing.

29 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 4002. Duties of Debtor^{*****}

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***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

2 (b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE
3 DOCUMENTATION.

4 * * * * *

5 (4) *Tax Returns Provided to Creditors.* If a
6 creditor, at least ~~15~~ 14 days before the first date set for the
7 meeting of creditors under § 341, requests a copy of the
8 debtor's tax return that is to be provided to the trustee under
9 subdivision (b)(3), the debtor, at least 7 days before the first
10 date set for the meeting of creditors under § 341, shall provide
11 to the requesting creditor a copy of the return, including any
12 attachments, or a transcript of the tax return, or provide a
13 written statement that the documentation does not exist.

14 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 10 day periods become 14 day periods
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- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case—Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts

- 1 Except to the extent that relief is necessary to avoid
2 immediate and irreparable harm, the court shall not, within ~~20~~
3 21 days after the filing of the petition, grant relief regarding
4 the following:
- 5 (a) an application under Rule 2014;
- 6 (b) a motion to use, sell, lease, or otherwise incur an
7 obligation regarding property of the estate, including a motion
8 to pay all or part of a claim that arose before the filing of the
9 petition, but not a motion under Rule 4001; and
- 10 (c) a motion to assume or assign an executory contract
11 or unexpired lease in accordance with § 365.

COMMITTEE NOTE

The rule is amended to implement changes in connection

with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 6004. Use, Sale, or Lease of Property*****

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(b) OBJECTION TO PROPOSAL. Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than ~~five~~ seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.

* * * * *

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

10 (d) SALE OF PROPERTY UNDER \$2,500.
11 Notwithstanding subdivision (a) of this rule, when all of the
12 nonexempt property of the estate has an aggregate gross value
13 less than \$2,500, it shall be sufficient to give a general notice
14 of intent to sell such property other than in the ordinary course
15 of business to all creditors, indenture trustees, committees
16 appointed or elected pursuant to the Code, the United States
17 trustee and other persons as the court may direct. An
18 objection to any such sale may be filed and served by a party
19 in interest within ~~15~~ 14 days of the mailing of the notice, or
20 within the time fixed by the court. An objection is governed
21 by Rule 9014.

22 * * * * *

23 (g) SALE OF PERSONALLY IDENTIFIABLE
24 INFORMATION.

25 * * * * *

26 (2) *Appointment.* If a consumer privacy
27 ombudsman is appointed under § 332, no later than 5 seven
28 days before the hearing on the motion under § 363(b)(1)(B),
29 the United States trustee shall file a notice of the appointment,
30 including the name and address of the person appointed. The
31 United States trustee's notice shall be accompanied by a

32 verified statement of the person appointed setting forth the
33 person's connections with the debtor, creditors, any other
34 party in interest, their respective attorneys and accountants,
35 the United States trustee, or any person employed in the office
36 of the United States trustee.

37 (h) STAY OF ORDER AUTHORIZING USE, SALE,
38 OR LEASE OF PROPERTY. An order authorizing the use,
39 sale, or lease of property other than cash collateral is stayed
40 until the expiration of ~~10~~ 14 days after entry of the order,
41 unless the court orders otherwise.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease

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(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under Sec. 365(f) is stayed until the expiration of ~~10~~ 14 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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- 25 day periods become 28 day periods

Rule 6007. Abandonment or Disposition of Property

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(a) NOTICE OF PROPOSED ABANDONMENT OR

2 DISPOSITION; OBJECTIONS; HEARING. Unless
3 otherwise directed by the court, the trustee or debtor in
4 possession shall give notice of a proposed abandonment or
5 disposition of property to the United States trustee, all
6 creditors, indenture trustees, and committees elected pursuant
7 to § 705 or appointed pursuant to § 1102 of the Code. A party
8 in interest may file and serve an objection within ~~15~~ 14 days
9 of the mailing of the notice, or within the time fixed by the
10 court. If a timely objection is made, the court shall set a
11 hearing on notice to the United States trustee and to other
12 entities as the court may direct.

13 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods

- 25 day periods become 28 day periods

Rule 7004. Process; Service of Summons, Complaint

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(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. If service is made pursuant to Rule 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons and complaint within ~~10~~ 14 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within ~~10~~ 14 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

1 (a) WHEN PRESENTED. If a complaint is duly
2 served, the defendant shall serve an answer within 30 days
3 after the issuance of the summons, except when a different
4 time is prescribed by the court. The court shall prescribe the
5 time for service of the answer when service of a complaint is
6 made by publication or upon a party in a foreign country. A
7 party served with a pleading stating a cross-claim shall serve
8 an answer thereto within ~~20~~ 21 days after service. The
9 plaintiff shall serve a reply to a counterclaim in the answer
10 within ~~20~~ 21 days after service of the answer or, if a reply is
11 ordered by the court, within ~~20~~ 21 days after service of the
12 order, unless the order otherwise directs. The United States
13 or an officer or agency thereof shall serve an answer to a
14 complaint within 35 days after the issuance of the summons,
15 and shall serve an answer to a cross-claim, or a reply to a
16 counterclaim, within 35 days after service upon the United

17 States attorney of the pleading in which the claim is asserted.
18 The service of a motion permitted under this rule alters these
19 periods of time as follows, unless a different time is fixed by
20 order of the court: (1) if the court denies the motion or
21 postpones its disposition until the trial on the merits, the
22 responsive pleading shall be served within ~~10~~ 14 days after
23 notice of the court's action; (2) if the court grants a motion for
24 a more definite statement, the responsive pleading shall be
25 served within ~~10~~ 14 days after the service of a more definite
26 statement.

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COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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Rule 8001. Manner of Taking Appeal; Voluntary

Dismissal; Certification to Court of Appeals*****

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(f) CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS.

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(3) *Request for Certification; Filing; Service; Contents.*

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(D) A party may file a response to a request for certification or a cross request within ~~10~~ 14 days after the notice of the request is served, or another time fixed by the court.

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(4) *Certification on Court's Own Initiative.*

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(B) A party may file a supplementary short statement of the basis for certification within ~~10~~ 14 days after the certification.

***** Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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Rule 8002. Time for Filing Notice of Appeal

1 (a) ~~FEN~~14-DAY PERIOD. The notice of appeal shall
 2 be filed with the clerk within ~~10~~ 14 days of the date of the
 3 entry of the judgment, order, or decree appealed from. If a
 4 timely notice of appeal is filed by a party, any other party may
 5 file a notice of appeal within ~~10~~ 14 days of the date on which
 6 the first notice of appeal was filed, or within the time
 7 otherwise prescribed by this rule, whichever period last
 8 expires. A notice of appeal filed after the announcement of a
 9 decision or order but before entry of the judgment, order, or
 10 decree shall be treated as filed after such entry and on the day

32 8001, to amend a previously filed notice of appeal. A party
33 intending to challenge an alteration or amendment of the
34 judgment, order, or decree shall file a notice, or an amended
35 notice, of appeal within the time prescribed by this Rule 8002
36 measured from the entry of the order disposing of the last
37 such motion outstanding. No additional fees will be required
38 for filing an amended notice.

39 (c) EXTENSION OF TIME FOR APPEAL.

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41 (2) A request to extend the time for filing a notice
42 of appeal must be made by written motion filed before the
43 time for filing a notice of appeal has expired, except that such
44 a motion filed not later than ~~20~~ 21 days after the expiration of
45 the time for filing a notice of appeal may be granted upon a
46 showing of excusable neglect. An extension of time for filing
47 a notice of appeal may not exceed ~~20~~ 21 days from the
48 expiration of the time for filing a notice of appeal otherwise
49 prescribed by this rule or ~~10~~ 14 days from the date of entry of
50 the order granting the motion, whichever is later.

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by

which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

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Public Comment on Proposed Amendments to Rule 8002:

1. **07-BR-001 Matt McKee (Charlotte, NC attorney).**

Mr. McKee states quite simply that a 30 day deadline is his preference. He says that the change will not have a material impact in most cases.

2. **07-BR-002 Bankruptcy Judge Judith Wizmur (D.N.J.).** Judge Wizmur supports the 14 day deadline and suggests that the Committee might consider whether some matters should be governed by a 30 day deadline and others by the 14 day deadline.

3. **07-BR-003 Bankruptcy Judge Margaret Dee McGarity (E.D. Wis.)** Judge McGarity slightly favors the 14 day deadline over the 30 day deadline. She notes that she does not feel particularly strongly about this, but notes that the 10 day period “can sometimes be problematic.”

4. **07-BR-004 Niki Heller (Senior Staff Attorney,**

Tenth Circuit) Ms Heller states that from an appellate perspective, she prefers 30 days which would make it consistent with other federal appeal deadlines. She did not mention the 10 day appeal time in federal criminal cases.

5. **07-BR-005 Bankruptcy Judge Roger Efremsky (N.D. Cal.)** Judge Efremsky suggests that the 14 day deadline “is a reasonable accommodation between the two other deadlines.

6. **07-BR-006 Bankruptcy Judge Terry Myers (D. Ida.)** Judge Myers believes that the 14 day deadline would not make too much difference from the current deadline, but he does not find the arguments in support of the longer 30 day deadline persuasive.

7. **07-BR-007 Max Tucker (Dallas, TX attorney)** Mr. Tucker supports the extension of the deadline. His preference is to allow 30 days. He is unpersuaded by arguments that the bankruptcy process must move more quickly because in his experience, when a bankruptcy appeal is filed, resolution of that appeal often takes quite some time. He also cites the doctrine of equitable mootness as a means to “weed out appeals where the delay results in prejudice.”

8. **07-BR-008 Bankruptcy Judge G. Harvey Boswell (W.D. Tenn.)** Judge Boswell supports the 14 day deadline and sees no negative impact.

9. **07-BR-009 Bankruptcy Judge Henry Boroff (D. Mass.)** Judge Boroff prefers to keep the 10 day deadline for filing a notice of appeal. He states that making it 14 days will still present the prospect of catching the non-bankruptcy

attorney unaware of the deadline, and he rejects the adoption of the 30 day deadline as inconsistent with the need for “prompt final dispositions in bankruptcy cases.”

10. **07-BR-010 Bankruptcy Judge Christopher Sontchi (D. Del.)** Judge Sontchi approves the idea of a 14 day deadline, but he strongly opposes a 30 day deadline. He notes that the interdependence of the orders in cases, particularly chapter 11 cases, requires an appeal deadline of shorter than 30 days.

11. **07-BR-011 Bankruptcy Judge Raymond Lyons (D. N.J.)** Judge Lyons generally favors a 30 day deadline, at least for adversary proceedings. Other orders, including those governed by §§ 363(m) and 364(e) would be governed by a shorter deadline (he does not indicate a preference for either 10 or 14 days). He also notes that some parties are unwilling to rely on the doctrine of equitable mootness to proceed with a transaction.

12. **07-BR-012 Bankruptcy Judge Judith Fitzgerald (W.D. Pa.)** Judge Fitzgerald opposes any change from the current 10 day limit on the filing of a notice of appeal. She asserts that the quest for consistency between the civil and bankruptcy rules is an insufficient reason to move to the 30 day deadline. She also believes that persons could become confused by a 14 day deadline especially if there is a 10 day deadline for filing a motion for reconsideration. Finally, she notes that bankruptcy cases generally operate on a “compressed time frame” that properly requires a shorter time for filing an appeal. Also, the presence of CM/ECF provides

nearly immediate notice to parties. This effectively provides even more notice than parties have received in the past.

13. **07-BR-013 Bankruptcy Judge Robert Kressel (D. Minn.)** Judge Kressel, a former member of the Committee, noted the difficulties faced when Rule 9006(a) was amended in the 1980s. He also stated that the extension of the deadline to 30 days would promote consistency between the rules and would protect the uninitiated who are unfamiliar with the short deadline and would discourage the filing of “protective” notices of appeal by the initiated.

14. **07-BR-014 Bankruptcy Judge Douglas Dodd (M.D. La.)** Judge Dodd notes that the change from 10 to 14 would not help the person who mistakenly believed that the appeal deadline was 30 days. He also does not believe that the deadline for filing a notice of appeal in a bankruptcy case should change from the 10 day deadline currently in Rule 8002.

15. **07-BR-015 Circuit Judge Frank Easterbrook (7th Cir.)** Judge Easterbrook did not offer a comment on Rule 8002, other than to state his general support for the time computation amendments.

16. **07-BR-016 Bankruptcy Judge Jerry Brown (E.D. La.)** Judge Brown supports the 14 day deadline, but he strongly opposes extending the deadline to 30 days. He states that the longer period would substantially delay both sales of property and ordinary bankruptcy procedures.

17. **07-BR-017 Bankruptcy Judge David Adams (E.D. Va.)** Judge Adams supports the 14 day period but

opposes the 30 day period. He is concerned that the longer period would lead to irreparable harm accruing during that waiting time.

18. **07-BR-018 Bankruptcy Judge Bruce McCullough (W.D. Pa.)** Judge McCullough sees no reason to change from the 10 day period that has governed the bankruptcy appeal time for a century. He notes that time is both jobs and money, and extension of the deadline would have an adverse impact on the process.

19. **07-BR-019 Bankruptcy Judge Benjamin Goldgar (N.D. Ill.)** Judge Goldgar noted that prior to his service as a judge, he was an appellate lawyer for the State of Illinois and served a term as the President of the Illinois Appellate Lawyers Association. He supports the increase of the deadline to 14 days because it would not materially disrupt bankruptcy practice. He does not, however, support the expansion of the deadline to 30 days. In his view, the pace of bankruptcy is too brisk to permit such an extension. Moreover, he has observed that parties await the passage of the appeal time even in the face of § 363(m), equitable mootness, and other protections. Finally, he states that he is unpersuaded by the argument that the rule should be 30 days to protect those who are unfamiliar with the bankruptcy appellate process because “appellate lawyers are the most rule conscious members of the bar.”

20. **07-BR-020 Bankruptcy Court Clerk Margaret Grammar Gay (D.N.M.)** Ms. Grammar Gay supports the 14 day deadline and states that it would not disrupt bankruptcy

practice. She notes, however, that if there is any likelihood that the 14 day deadline is just a brief stop on the road to a 30 day deadline, the change should be made to 30 days in the first instance.

21. **07-BR-021 Bankruptcy Judge James Starzynski (D.N.M.)** Judge Starzynski supports the 30 day deadline so as to avoid this deadline being a trap for the unwary. He notes as well that once the appeal is taken, the final decision in the appeal will not be materially later because an additional 20 days was added to the time for filing a notice of appeal. He recognizes that there may be a concern that the time to file a notice in some appeals should be shortened, so he proposed that the rules allow for the shortening of the period by a specific and prominently ordered reduction in the time.

22. **07-BR-022 Bankruptcy Judge Timothy Mahoney (D. Neb.)** Judge Mahoney believes that the current 10 day period is insufficient and supports an extension of that time period. He notes that 14 is better than 10, but he would prefer that the time be lengthened to 30 days. He states that this is especially important for persons who do not participate through ECF, a group that is often likely not to be represented by counsel.

23. **07-BR-023 Walter Bussart (Lewisburg, Tenn. attorney)** Mr. Bussert supports all of the time computation amendments, but he does not mention Rule 8002.

24. **07-BR-024 Richard Rogan (San Francisco attorney)** Mr. Rogan, a long time bankruptcy practitioner, urges the retention of the 10 day time limit for filing a notice

of appeal. He states that the added delay would be detrimental to sales and plans of reorganization. Also, he notes that 10 days is ample time to file the notice.

25. **07-BR-025 Heather Lennox (Cleveland, Oh. attorney)** Ms. Lennox opposes the expansion of the time to file a notice of appeal beyond the 10 days in the current rule. She notes that the filing of a notice of appeal is relatively simple, and a 10-day period is more than adequate. She also points out that Congress has just amended the Code to expedite both large and small chapter 11 cases, so it would be contrary to that Congressional intent to expand the time allowed for filing a notice of appeal.

26. **07-BR-026 Prof. Alan Resnick (New York attorney and professor)** Professor Resnick, former Reporter to the Committee, strongly opposes the change in Rule 8002 from 10 days to either 14 or 30 days. He notes the general need for matters to proceed quickly in bankruptcy cases, and he states as well that the filing of a notice of appeal does not require any significant amount of time. Further, he argues that the presence of an additional layer of appeals in bankruptcy cases provides another reason not to add to the delay in the case. He also points out that the 1987 change to Rule 9006(a) that effectively extended the appeal time was not well received and led to its almost immediate repeal when the bar fully understood its implications. To that end, he also notes that a change in the rules to make the appeal time 14 days would likely catch some or many bankruptcy practitioners unaware of the change, and vulnerable to appeals

taken after they acted to close a transaction on the 11th day after the entry of the relevant order. Finally, he notes that the “uniformity” argument for changing the rule to allow 30 days for appeals is in fact not uniform. Criminal appeals must be taken in 10 days under the current rule (14 under the proposed revision to Appellate Rule 4). Professor Resnick also submitted recommendations regarding other Bankruptcy Rules that he believes may need to be revised. In particular, he notes that Rule 9023 should be amended to prevent the proposed amendment to Civil Rule 59 to circumvent the deadline for filing a notice of appeal in a bankruptcy case. Rule 59, as amended, would allow a party 30 days after entry of an order to file a motion for new trial or a motion to alter or amend a judgment. Although not mentioned in the comment, similar issues could arise under proposed Civil Rule 50 which is made applicable by Bankruptcy Rule 7050. Professor Resnick also argues that if the 10 day appeal time is to remain in effect, the 10 day periods in Rules 3002(e), 4001(a)(3), 6004(g), and 6006(d) should not be changed to 14 days as proposed in the Time Computation changes. He notes that these deadlines are comparable to the notice of appeal deadline, and they should be the same in each of these rules. Professor Resnick makes a similar argument regarding Rules 7062 and 9033.

27. **07-BR-027 Bankruptcy Judge Barry Schermer (E.D. Mo.)******* Judge Schermer opposes the expansion of the deadline to file a notice of appeal to either 14 or 30 days, and instead argues that the current deadline is both appropriate and necessary. He states that the extension

***** The other Bankruptcy Judges in the District, Judges Surratt-States, McDonald, and Rendlen joined in this comment, as did Dana McWay, the Clerk of the Court.

of the deadline will increase uncertainty in the process that will lead to additional costs to the parties and the process. Many parties are affected by decisions in bankruptcy cases, including the debtor, the debtor's employees, and creditors. The comment also suggests that the rule is not difficult to read or understand, so that anyone who takes the time to read the rule would not be "unwary" of the deadline. Moreover, he notes that the rules already permit some extensions of the appeal time under Rule 8002(c). He concludes that the need for uniformity does not outweigh the harm that would follow from the proposed extension of the deadline. He also suggests that it is unnecessary, and perhaps even counterproductive, to protect unwary practitioners.

28. **07-BR-028 American Bankruptcy Institute** The ABI conducted a survey of its membership (approximately 11,000) as to the proposed changes to Rule 8002. The members were asked whether the change from 10 to 14 days would have a significantly detrimental or significantly beneficial impact on bankruptcy cases, or whether there would be no significant impact from such a change. There were 183 responses, and 45% thought there would be no significant impact, and 27% each thought the impact would be significantly detrimental or beneficial. As to the impact of making the appeal time 30 days, 70% said it would be significantly detrimental, and 23% responded that it would be significantly beneficial. Only 8% said that the 30 day deadline would not have a significant effect. The respondents identifying themselves as practicing in business bankruptcy cases were far more likely to find the changes from 10 days to be significantly detrimental.

29. **07-BR-029 Bankruptcy Judge Philip Brandt (W.D. Wash.)** Judge Brandt opposes any change from the 10 day deadline set out in current Rule 8002. He states that many orders are not implemented until a day or two after the expiration of the appeal deadline. In many cases, the daily costs could be extensive, so extending the deadline even 4 days could have a negative impact on many cases. Judge Brandt also noted that the pending proposed amendment to Civil Rule 59 would create problems when it is incorporated into the Bankruptcy Rules through Rule 9023, and he cautioned against permitting those problems to arise.

30. **07-BR-030 Business Law Section of the State Bar of Michigan** The Business Law Section and the Debtor/Creditors' Rights Committee of the State Bar oppose the extension of the deadline for filing a notice of appeal beyond the 10 days already provided for in current Rule 8002.

31. **07-BR-031 Bankruptcy Judge Martin Teel and Nancy Mayer-Whittington, Clerk (D.D.C.)*******
Judge Teel and Ms. Mayer-Whittington support the change in the appeal time from 10 to 14 days. They note that the order being appealed from is effective unless it is stayed, no matter what the deadline may be for filing the appeal. They also suggest that the deadline might be set at 28 days. They express a concern that the 10 day period is sometimes too short to decide whether to appeal, particularly if a few days pass before the parties receive notice of the underlying order.

***** This comment is listed under the name Patti Meador. Ms. Meador submitted the comment on behalf of Judge Teel and Ms. Mayer-Whittington.

32. **07-BR-032 Business Law Section of the State Bar of California** The Insolvency Law Committee of the Business Law Section opposes the change in the deadline for filing a notice of appeal. The Committee notes that the courts in chapter 11 cases enter numerous orders that relate to the operation of the debtor's business, and additional time for appeals would inject additional uncertainty and delay into the process. It notes that the 10 day appeal time has worked well since 1898 and does not need to be changed.

33. **07-BR-033 Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York** The Committee states that the extension of the appeal time would cause a material disruption in the operation of bankruptcy practice. These disruptions also outweigh any benefits that might be obtained by making the appeal deadline consistent with the deadline for an appeal in a civil case. The Committee points out that in civil litigation, courts almost always are adjudicating disputes about past conduct, while many matters that bankruptcy courts resolve provide the debtor with authority to go forward in its business activities either specifically or generally. Many parties rely on these orders, and they must be implemented with dispatch given the potential for changing market conditions and the like. The Committee also points out that other Bankruptcy Rules such as Rules 3020(e), 6004(g) and 6006(d) provide specific stay relief from certain orders that are appealed, and that this recent judgment of the Rules Committee shows that protection is available in those instances where it is particularly important, and no further protection is necessary. The Committee also noted the

potential problems that could arise if Civil Rules 52 and 59 are amended and incorporated into the Bankruptcy Rules without change.

34. 07-BR-034 Commercial Law League of America.

The CLLA has no comment on the proposal to extend the 10 day deadline in Rule 8002 to 14 days. It does, however, oppose the extension of the deadline to 30 days. It points out that bankruptcy cases impact the interests of a number of parties, and the delays that are created would have a negative effect on those parties. It also notes that the added delays would undermine the debtor's fresh start as well as delay the distribution of assets in cases. The CLLA also expresses some sympathy for the unwary, occasional bankruptcy practitioner, but it asserts that it is an insufficient justification for the proposed amendment.

35. 07-BR-035 Bankruptcy Appeals Clerk Alesia Wallace (W.D.N.C.) Ms. Wallace states that the extension of the deadline to 14 days would have little or no impact on the court, but that an extension to 30 days would impact deadlines for closing bankruptcy cases and may lead to more frivolous appeals.

36. 07-BR-036 Seventh Circuit Bar Association The Association opposes the extension of the deadline for filing a notice of appeal in a bankruptcy case, and even suggested that if there was a need to restate the deadline in a multiple of 7 days, then the deadline should perhaps be 7 days rather than 14.

37. 07-BR-037 American Bar Association The Association opposes the amendment and urges that the 10 day

deadline for filing a notice of appeal be retained. It states that the deadline has been in place for over 100 years, and it questions whether there is any empirical support for the idea that the rule has operated to trap the unwary. It further asserts that the short deadline is necessary in bankruptcy cases where parties usually demand that no action be taken until the appeal deadline has passed. The Association notes that neither equitable mootness nor the statutory protections in §§ 363 and 364 are sufficient to protect a party who acts prior to the conclusion of the appeal period. Thus, the Association proposes that the 10 day limit be retained. This position was also adopted by the State Bar of Michigan and the State Bar of California responses in Comment 07-BR-030 and 07-BR-033, respectively.

38. 07-BK-002 Kenneth Klee (Los Angeles attorney and professor) Mr. Klee opposes extending the deadline from 10 to 30 days. He notes that the added costs resulting from the 20 additional days to wait for an order to be final is very costly. He also notes that the rules already permit an extension of the time to file a notice of appeal in many cases.

39. 07-BK-003 Bankruptcy Judge Paul Mannes (D. Md.) Judge Mannes, a former Chair of the Committee, asserts that the 10 day deadline has worked well, but he would grudgingly support the extension to 14 days for the sake of uniformity. He opposes any additional extension.

40. 07-BK-022 National Bankruptcy ConferenceThe Conference endorses and supports the comment of Professor

12 (c) APPEAL IMPROPERLY TAKEN REGARDED AS
13 A MOTION FOR LEAVE TO APPEAL. If a required
14 motion for leave to appeal is not filed, but a notice of appeal
15 is timely filed, the district court or bankruptcy appellate panel
16 may grant leave to appeal or direct that a motion for leave to
17 appeal be filed. The district court or the bankruptcy appellate
18 panel may also deny leave to appeal but in so doing shall
19 consider the notice of appeal as a motion for leave to appeal.
20 Unless an order directing that a motion for leave to appeal be
21 filed provides otherwise, the motion shall be filed within ~~10~~
22 14 days of entry of the order.

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COMMITTEE NOTE

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Rule 8006. Record and Issues on Appeal

1 Within ~~10~~ 14 days after filing the notice of appeal as
2 provided by Rule 8001(a), entry of an order granting leave to
3 appeal, or entry of an order disposing of the last timely
4 motion outstanding of a type specified in Rule 8002(b),
5 whichever is later, the appellant shall file with the clerk and
6 serve on the appellee a designation of the items to be included
7 in the record on appeal and a statement of the issues to be
8 presented. Within ~~10~~ 14 days after the service of the
9 appellant's statement the appellee may file and serve on the
10 appellant a designation of additional items to be included in
11 the record on appeal and, if the appellee has filed a cross
12 appeal, the appellee as cross appellant shall file and serve a
13 statement of the issues to be presented on the cross appeal and
14 a designation of additional items to be included in the record.
15 A cross appellee may, within ~~10~~ 14 days of service of the
16 cross appellant's statement, file and serve on the cross
17 appellant a designation of additional items to be included in
18 the record. The record on appeal shall include the items so
19 designated by the parties, the notice of appeal, the judgment,

20 order, or decree appealed from, and any opinion, findings of
21 fact, and conclusions of law of the court. Any party filing a
22 designation of the items to be included in the record shall
23 provide to the clerk a copy of the items designated or, if the
24 party fails to provide the copy, the clerk shall prepare the copy
25 at the party's expense. If the record designated by any party
26 includes a transcript of any proceeding or a part thereof, the
27 party shall, immediately after filing the designation, deliver to
28 the reporter and file with the clerk a written request for the
29 transcript and make satisfactory arrangements for payment of
30 its cost. All parties shall take any other action necessary to
31 enable the clerk to assemble and transmit the record.

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Rule 8009. Briefs and Appendix; Filing and Service

1 (a) BRIEFS. Unless the district court or the bankruptcy
2 appellate panel by local rule or by order excuses the filing of
3 briefs or specifies different time limits:

4 (1) The appellant shall serve and file a brief within
5 ~~15~~ 14 days after entry of the appeal on the docket pursuant to
6 Rule 8007.

7 (2) The appellee shall serve and file a brief within
8 ~~15~~ 14 days after service of the brief of appellant. If the
9 appellee has filed a cross appeal, the brief of the appellee shall
10 contain the issues and argument pertinent to the cross appeal,
11 denominated as such, and the response to the brief of the
12 appellant.

13 (3) The appellant may serve and file a reply brief
14 within ~~10~~ 14 days after service of the brief of the appellee,
15 and if the appellee has cross-appealed, the appellee may file
16 and serve a reply brief to the response of the appellant to the
17 issues presented in the cross appeal within ~~10~~ 14 days after
18 service of the reply brief of the appellant. No further briefs
19 may be filed except with leave of the district court or the

20 bankruptcy appellate panel.

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Rule 8015. Motion for Rehearing

1 Unless the district court or the bankruptcy appellate
2 panel by local rule or by court order otherwise provides, a
3 motion for rehearing may be filed within ~~10~~ 14 days after
4 entry of the judgment of the district court or the bankruptcy
5 appellate panel. If a timely motion for rehearing is filed, the
6 time for appeal to the court of appeals for all parties shall run
7 from the entry of the order denying rehearing or the entry of

8 a subsequent judgment.

COMMITTEE NOTE

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Rule 8017. Stay of Judgment of District Court or Bankruptcy Appellate Panel

1 (a) AUTOMATIC STAY OF JUDGMENT ON
2 APPEAL. Judgments of the district court or the bankruptcy
3 appellate panel are stayed until the expiration of ~~10~~ 14 days
4 after entry, unless otherwise ordered by the district court or
5 the bankruptcy appellate panel.

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COMMITTEE NOTE

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Rule 9006. Time

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(d) FOR MOTIONS—AFFIDAVITS. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than ~~five~~ seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the

12 court permits them to be served at some other time.

13

* * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 9027. Removal

1

* * * * *

2

(e) PROCEDURE AFTER REMOVAL.

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(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that

10 the proceeding is non-core, it shall state that the party does or
11 does not consent to entry of final orders or judgment by the
12 bankruptcy judge. A statement required by this paragraph
13 shall be signed pursuant to Rule 9011 and shall be filed not
14 later than ~~10~~ 14 days after the filing of the notice of removal.
15 Any party who files a statement pursuant to this paragraph
16 shall mail a copy to every other party to the removed claim or
17 cause of action.

18 * * * * *

19 (g) APPLICABILITY OF PART VII. The rules of Part
20 VII apply to a claim or cause of action removed to a district
21 court from a federal or state court and govern procedure after
22 removal. Repleading is not necessary unless the court so
23 orders. In a removed action in which the defendant has not
24 answered, the defendant shall answer or present the other
25 defenses or objections available under the rules of Part VII
26 within ~~20~~ 21 days following the receipt through service or
27 otherwise of a copy of the initial pleading setting forth the
28 claim for relief on which the action or proceeding is based, or
29 within ~~20~~ 21 days following the service of summons on such
30 initial pleading, or within ~~five~~ seven days following the filing

31 of the notice of removal, whichever period is longest.

32 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Rule 9033. Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings

1 * * * * *

2 (b) OBJECTIONS: TIME FOR FILING. Within ~~10~~ 14
3 days after being served with a copy of the proposed findings
4 of fact and conclusions of law a party may serve and file with
5 the clerk written objections which identify the specific
6 proposed findings or conclusions objected to and state the
7 grounds for such objection. A party may respond to another
8 party's objections within ~~10~~ 14 days after being served with

9 a copy thereof. A party objecting to the bankruptcy judge's
10 proposed findings or conclusions shall arrange promptly for
11 the transcription of the record, or such portions of it as all
12 parties may agree upon or the bankruptcy judge deems
13 sufficient, unless the district judge otherwise directs.

14 (c) EXTENSION OF TIME. The bankruptcy judge may
15 for cause extend the time for filing objections by any party for
16 a period not to exceed ~~20~~ 21 days from the expiration of the
17 time otherwise prescribed by this rule. A request to extend
18 the time for filing objections must be made before the time for
19 filing objections has expired, except that a request made no
20 more than ~~20~~ 21 days after the expiration of the time for filing
21 objections may be granted upon a showing of excusable
22 neglect.

23 * * * * *

COMMITTEE NOTE

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

- B. Proposed Amendments to Bankruptcy Rules 4008, 7052 and 9021, and Proposed New Bankruptcy Rule 7058, Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the proposed amendments to Bankruptcy Rules 4008, 7052 and 9021, and proposed new Bankruptcy Rule 7058 for submission to the Judicial Conference. These amendments and addition to the Rules are to become effective on December 1, 2009.

1. *Public Comment.*

The preliminary draft of proposed amendments to Bankruptcy Rules 4008, 7052 and 9021, and proposed new Bankruptcy Rules 1017.1 and 7058, were published for comment in August 2007. A public hearing on the preliminary draft of the amendments and additions to the Bankruptcy Rules was scheduled for January 25, 2008, but there were no requests to appear at the hearing.

We received comments on many of the proposed additions and amendments, and the Advisory Committee reviewed these comments and, with the exception of proposed Rule 1017.1, approved the amendments to the rules either as published or with slight changes that are described in the Changes Made After Publication section.

The Advisory Committee received five comments on proposed new Rule 1017.1, which would have revised the

process for granting an extension of time to complete the credit counseling requirement for individual debtors. The comments asserted that the rule is unnecessary because very few cases have arisen in which there was any request for an extension, and each of those cases was filed shortly after the effective date of the 2005 amendments to the Bankruptcy Code. The commentators noted that individual debtors and their attorneys seem to have adjusted to the new process, and the nearly universal availability of credit counseling briefing services has made the need for the time extensions almost nonexistent. Therefore, the Committee concluded that there is no need for the rules to adopt a process for these matters, and it withdraws proposed new Rule 1017.1.

2. *Synopsis of Proposed General Amendments:*

- (a) **Rule 4008** is amended to insert a requirement that the Official Form of a reaffirmation cover sheet be filed with the court along with the reaffirmation agreement. The cover sheet will include the information necessary to assist the court in determining what action to take regarding the proposed reaffirmation.
- (b) **Rule 7052** is amended to clarify that entry of judgment in an adversary proceeding means the entry of a judgment or order under the Bankruptcy Rules rather than under the Federal Rules of Civil Procedure.

- (c) **Rule 7058** is new, and it makes Rule 58 of the Federal Rules of Civil Procedure applicable in adversary proceedings.
- (d) **Rule 9021** is amended in connection with the addition of Rule 7058. Since that rule governs in adversary proceedings, Rule 9021 no longer needs to make Rule 58 of the Federal Rules of Civil Procedure applicable in those actions. This amendment and the addition of Rule 7058 results in the explicit adoption of the separate document requirement for judgments in adversary proceedings, while the effectiveness of an order or judgment in other actions within the case is determined under Rule 5003 which does not include the separate document requirement.

3. *Text of Proposed Amendments to Rules 4008, 7052, and 9021, and New Rule 7058.*

Rule 4008. Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement²¹

- 1 (a) FILING OF REAFFIRMATION AGREEMENT. A
- 2 reaffirmation agreement shall be filed no later than 60 days

²¹ Incorporates amendments approved by the Supreme Court that are due to take effect on December 1, 2008, if Congress takes no action to the contrary.

3 after the first date set for the meeting of creditors under §
4 341(a) of the Code. The reaffirmation agreement shall be
5 accompanied by a cover sheet, prepared as prescribed by the
6 appropriate Official Form. The court may, at any time and in
7 its discretion, enlarge the time to file a reaffirmation
8 agreement.

9 * * * * *

COMMITTEE NOTE

Subdivision (a) of the rule is amended to require that the entity filing the reaffirmation agreement with the court also include Official Form 27, the Reaffirmation Agreement Cover Sheet. The form includes information necessary for the court to determine whether the proposed reaffirmation agreement is presumed to be an undue hardship for the debtor under § 524(m) of the Code.

Public Comment on Proposed Amendment to Rule 4008:

No comments were received on this proposed amendment.

Changes Made After Publication:

No changes since publication.

Rule 7052. Findings by the Court²²

1 Rule 52 F. R. Civ. P. applies in adversary proceedings. In
2 these proceedings, the reference in Rule 52 F. R. Civ. P. to the
3 entry of judgment under Rule 58 F. R. Civ. P. shall be read as a
4 reference to the entry of a judgment or order under Rule 5003(a).

COMMITTEE NOTE

The rule is amended to clarify that the reference in Rule 52 F. R. Civ. P. to Rule 58 F. R. Civ. P. and its provisions is construed as a reference to the entry of a judgment or order under Rule 5003(a).

Public Comment on Proposed Amendments to Rule 7052:

1. **Comment 07-BK-013** (also numbered **07-BR-029**) was submitted by Hon. Philip H. Brandt (Bankr. W.D. Wa.). Judge Brandt recommended that the phrase “shall be read as a reference to” be replaced with “means.”

Changes Made After Publication:

No changes since publication.

²² In addition, the Advisory Committee on Bankruptcy Rules has recommended approval of a proposed technical amendment to Rule 7052, which also would take effect on December 1, 2009, if the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court approve and if Congress takes no action to the contrary. The proposed technical amendment is set out in Part II.D of this report.

Rule 7058. Entry of Judgment

1 Rule 58 F. R. Civ. P. applies in adversary proceedings. In
2 these proceedings, the reference in Rule 58 F. R. Civ. P. to the civil
3 docket shall be read as a reference to the docket maintained by the
4 clerk under Rule 5003(a).

COMMITTEE NOTE

This rule makes Rule 58 F. R. Civ. P. applicable in adversary proceedings and is added in connection with the amendments to Rule 9021.

Public Comment on Proposed New Rule 7052:

1. **Comment 07-BK-013** (also numbered **07-BR-029**) was submitted by Hon. Philip H. Brandt (Bankr. W.D. Wa.). Judge Brandt recommended that the phrase “shall be read as a reference to” be replaced with “means.”

Changes Made After Publication:

No changes since publication.

Rule 9021. Entry of Judgment

1 Except as otherwise provided herein, Rule 58 F. R. Civ. P.
2 applies in cases under the Code. Every judgment entered in an
3 adversary proceeding or contested matter shall be set forth on a
4 separate document. A judgment or order is effective when entered
5 as provided in under Rule 5003. The reference in Rule 58 F. R.
6 Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to
7 Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended in connection with the amendment that adds Rule 7058. The entry of judgment in adversary proceedings is governed by Rule 7058, and the entry of a judgment or order in all other proceedings is governed by this rule.

Public Comment on Proposed Amendments to Rule 9021:

No comments were received on these proposed amendments.

Changes Made After Publication:

No changes since publication.

C. Proposed Amendments to Official Forms 1 and 8, and Proposed New Official Form 27 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the proposed amendments to Official Forms 1 and 8, and Proposed New Official Form 27 for submission to the Judicial Conference. The amendments to Official Forms 1 and 8 are to become effective on December 1, 2008. Proposed new Official Form 27 is to become effective on December 1, 2009, in conjunction with a proposed amendment to Bankruptcy Rule 4008.

1. *Synopsis of Proposed Amendments to Exhibit D of Official Form 1 and Official Form 8, and Proposed New Official Form 27.*

- (a) **Exhibit D to Official Form 1** is amended to delete any reference to a requirement that the debtor file a motion to obtain an order to permit the debtor to complete the required credit counseling briefing after the commencement of the case. It is also amended to clarify that the debtor still must complete the briefing even if the request is granted. It also warns the debtor that the case may be dismissed if the court concludes that no postponement of the obligation is warranted.
- (b) **Official Form 8** is amended to resolve

ambiguities in the form and to implement changes to the Code in 2005 by adding a section covering personal property subject to an unexpired lease.

- (c) **New Official Form 27** requires the disclosure and certification of information necessary for the court to make its determination under §524(m) as to whether the reaffirmation agreement creates a presumption of undue hardship.

- 2. *Text of Proposed Amendments to Exhibit D of Official Form 1 and Official Form 8, and Proposed New Official Form 27.*

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____
Debtor

Case No. _____
(if known)

EXHIBIT D - INDIVIDUAL DEBTOR'S STATEMENT OF COMPLIANCE WITH CREDIT COUNSELING REQUIREMENT

Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file. If that happens, you will lose whatever filing fee you paid, and your creditors will be able to resume collection activities against you. If your case is dismissed and you file another bankruptcy case later, you may be required to pay a second filing fee and you may have to take extra steps to stop creditors' collection activities.

Every individual debtor must file this Exhibit D. If a joint petition is filed, each spouse must complete and file a separate Exhibit D. Check one of the five statements below and attach any documents as directed.

1. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, and I have a certificate from the agency describing the services provided to me. *Attach a copy of the certificate and a copy of any debt repayment plan developed through the agency.*

2. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. *You must file a copy of a certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 15 days after your bankruptcy case is filed.*

3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made my request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now.

[Summarize exigent circumstances here.] _____

If your certification is satisfactory to the court, you must still obtain the credit counseling briefing within the first 30 days after you file your bankruptcy petition and promptly file a certificate from the agency that provided the counseling, together with a copy of any debt management plan developed through the agency. Failure to fulfill these requirements may result in dismissal of your case. Any extension of the 30-day deadline can be granted only for cause and is limited to a maximum of 15 days. Your case may also be dismissed if the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing.

4. I am not required to receive a credit counseling briefing because of: *[Check the applicable statement.] [Must be accompanied by a motion for determination by the court.]*

Incapacity. (Defined in 11 U.S.C. § 109(h)(4) as impaired by reason of mental illness or mental deficiency so as to be incapable of realizing and making rational decisions with respect to financial responsibilities.);

Disability. (Defined in 11 U.S.C. § 109(h)(4) as physically impaired to the extent of being unable, after reasonable effort, to participate in a credit counseling briefing in person, by telephone, or through the Internet.);

Active military duty in a military combat zone.

5. The United States trustee or bankruptcy administrator has determined that the credit counseling requirement of 11 U.S.C. § 109(h) does not apply in this district.

I certify under penalty of perjury that the information provided above is true and correct.

Signature of Debtor: _____

Date: _____

COMMITTEE NOTE

Paragraph 3 of Exhibit D is amended to delete any reference to a requirement that a debtor file a motion with the court to obtain an order approving a request for the postponement of the debtor's obligation to obtain a credit counseling briefing prior to the commencement of the case. The paragraph immediately following numbered paragraph 3 is also amended to reflect the deletion of the need for a separate motion beyond the completion of the certification itself. That paragraph continues to warn the debtor that the case may be dismissed if the court does not find that a postponement is warranted. It also advises the debtor that, even if the court concludes that postponement of the obligation is appropriate, the debtor still must complete the briefing within the time allowed under the Code.

PART B – Personal property subject to unexpired leases. (All three columns of Part B must be completed for each unexpired lease. Attach additional pages if necessary.)

Property No. 1		
Lessor's Name:	Describe Leased Property:	Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2): YES _____ NO _____

Property No. 2 (if necessary)		
Lessor's Name:	Describe Leased Property:	Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2): YES _____ NO _____

Property No. 3 (if necessary)		
Lessor's Name:	Describe Leased Property:	Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2): YES _____ NO _____

_____ continuation sheets attached (if any)

I declare under penalty of perjury that the above indicates my intention as to any property of my estate securing a debt and/or personal property subject to an unexpired lease.

Date: _____

Signature of Debtor

Signature of Joint Debtor

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION
(Continuation Sheet)

PART A - Continuation

Property No. __	
Creditor's Name:	Describe Property Securing Debt:
Property will be (check one): <input type="checkbox"/> Surrendered <input type="checkbox"/> Retained	
If retaining the property, I intend to (check at least one): <input type="checkbox"/> Redeem the property <input type="checkbox"/> Reaffirm the debt <input type="checkbox"/> Other. Explain _____ (for example, avoid lien using 11 U.S.C. § 522(f)).	
Property is (check one): <input type="checkbox"/> Claimed as exempt <input type="checkbox"/> Not claimed as exempt	

PART B - Continuation

Property No. __		
Lessor's Name:	Describe Leased Property:	Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2): YES _____ NO _____

Property No. __		
Lessor's Name:	Describe Leased Property:	Lease will be Assumed pursuant to 11 U.S.C. § 365(p)(2): YES _____ NO _____

FORM 8

COMMITTEE NOTE

The form is amended to conform to § 362(h), which was added to the Code, and § 521(a)(2), which was amended, by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), by expanding the questions directed to the debtor regarding leased personal property and property subject to security interests. The form is also amended and reformatted to require the debtor to complete a series of statements describing the property and setting out what actions the debtor intends to take for each listed asset. The amended form is intended to elicit more complete information about the debtor's intentions with regard to property subject to security interests and personal property leases than has been obtained under the current version of the form.

In addition, the form is amended to add a space for the joint debtor's signature and to specify that, as required by Rule 1008, the signature of the debtor or joint debtor is a declaration made under penalty of perjury. A continuation page has been provided for use if necessary. The Declaration of Non-Attorney Bankruptcy Petition Preparer has been deleted from the form as duplicative of Form 19, Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer. Form 19 contains both the petition preparer's declaration and signature and the notice the petition preparer is required to give to the debtor under § 110 of the Code.

United States Bankruptcy Court

District Of _____

In re _____,
Debtor

Case No. _____
Chapter _____

REAFFIRMATION AGREEMENT COVER SHEET

This form must be completed in its entirety and filed, with the reaffirmation agreement attached, within the time set under Rule 4008. It may be filed by any party to the reaffirmation agreement.

1. Creditor's Name: _____
2. Amount of the debt subject to this reaffirmation agreement:
\$ _____ on the date of bankruptcy \$ _____ to be paid under reaffirmation agreement
3. Annual percentage rate of interest: _____% prior to bankruptcy
_____ % under reaffirmation agreement (_____ Fixed Rate _____ Adjustable Rate)
4. Repayment terms (if fixed rate): \$ _____ per month for _____ months
5. Collateral, if any, securing the debt: Current market value: \$ _____
Description: _____
6. Does the creditor assert that the debt is nondischargeable? ___ Yes ___ No
(If yes, attach a declaration setting forth the nature of the debt and basis for the contention that the debt is nondischargeable.)

Debtor's Schedule I and J Entries

Debtor's Income and Expenses
as Stated on Reaffirmation Agreement

7A. Total monthly income from \$ _____
Schedule I, line 16

7B. Monthly income from all \$ _____
sources after payroll deductions

8A. Total monthly expenses \$ _____
from Schedule J, line 18

8B. Monthly expenses \$ _____

9A. Total monthly payments on \$ _____
reaffirmed debts not listed on
Schedule J

9B. Total monthly payments on \$ _____
reaffirmed debts not included in
monthly expenses

10B. Net monthly income \$ _____
(Subtract sum of lines 8B and 9B from
line 7B. If total is less than zero, put the
number in brackets.)

11. Explain with specificity any difference between the income amounts (7A and 7B):

12. Explain with specificity any difference between the expense amounts (8A and 8B):

If line 11 or 12 is completed, the undersigned debtor, and joint debtor if applicable, certifies that any explanation contained on those lines is true and correct.

Signature of Debtor (only required if
line 11 or 12 is completed)

Signature of Joint Debtor (if applicable, and only
required if line 11 or 12 is completed)

Other Information

Check this box if the total on line 10B is less than zero. If that number is less than zero, a presumption of undue hardship arises (unless the creditor is a credit union) and you must explain with specificity the sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt: _____

Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?

_____ Yes _____ No

If debtor was represented by counsel during the course of negotiating this reaffirmation agreement, has counsel executed a certification (affidavit or declaration) in support of the reaffirmation agreement?

_____ Yes _____ No

FILER'S CERTIFICATION

I hereby certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Reaffirmation Agreement Cover Sheet.

Signature

Print/Type Name & Signer's Relation to Case

COMMITTEE NOTE

This form is new. It gathers certain financial information, including information necessary for the court to determine whether a reaffirmation agreement creates a presumption of undue hardship under § 524(m) of the Code, and it allows the debtor to provide additional information that may rebut such a presumption.

To implement the requirements of Bankruptcy Rule 4008(b), the form also provides for a disclosure of any differences between the income and expenses reported on schedules I and J and the income and expenses reported in the debtor's statement in support of the reaffirmation agreement, together with an explanation of any such differences.

Finally, the form requires a certification that the information supplied is true and correct.

3. *Public Comment on Proposed Amendments to Official Form 8:*

Comment 07-BK-001 was submitted by David S Yen on behalf of the Legal Assistance Foundation of Metropolitan Chicago. Mr. Yen suggests that the form include a certificate of service or, if not a certificate of service, a warning that Rule 1007(b)(2) requires that the form be served on the trustee, creditors and lessors.

Judge Hunter (W.D. La.) submitted **Comment 07-BK-005** in response to the proposed amendment. His comment echos concerns expressed by the Bankruptcy Judges Advisory Group (BJAG) which had a brief opportunity to review the proposed form. Generally, the concern is that the form, as revised, is too complicated and attempts to accomplish too much. Judge Hunter suggests that the proposed form as amended is too complex. He notes that the proposed form allows a debtor to state that something “other” than surrender, reaffirmation or redemption will be done with the property. He suggests that no other option is available. Furthermore, he asserts that the form should not include any reference to whether the debtor intends to claim the property as exempt. This additional information, Judge Hunter argues, will confuse the issues. He notes that exemptions are covered by Schedule C, and he suggests that information regarding exemptions be limited to that form.

Comment 07-BK-023 was submitted by Ms. Margaret Grammar Gay, Chief Deputy Clerk of the Bankruptcy Court for the District of New Mexico. Ms. Grammar Gay notes her agreement with Judge Hunter’s comments which are summarized above. She also notes that she finds the explanation or instructions for the fourth column on the form to be confusing and not illustrative of the form. Furthermore, she states that the form should require the debtor’s signature to be verified as required by Rule 1008, and she believes the form could delete the declaration of a petition preparer who would already be required to file Official Form 19 (petition preparer’s declaration) with Official Form 8 when it is filed.

Changes Made After Publication:

The form was revised by setting the question of whether the debtor intends to exempt property apart from the question of whether the debtor intends to retain the property. In addition, the form is amended to add a space for the joint debtor’s signature and to specify that, as required by Rule 1008, the signature of the debtor or joint

debtor is a declaration made under penalty of perjury. Other stylistic changes were made to the form to simplify the form and make it easier to complete.

4. *Public Comment on proposed new Official Form 27:*

Comment 07-BK-013 Bankruptcy Judge Philip Brandt (W.D. Wash.) Judge Brandt's comment suggests that the form include a line that would capture reaffirmation agreements that are proposed as settlements of unsecured claims alleged to be nondischargeable. He proposes that if a reaffirmation is based on such a claim, the form include a sworn statement that sets out the factual basis of the debt and why it is nondischargeable. This issue could be addressed in the first information item on the form as more fully discussed in connection with Comment 07-BK-017.

Comment 07-BK-016 Mr. Philip Bartlett, CEO and President of the Financial Services Roundtable Mr. Bartlett does not offer any comment directly on proposed Official Form 27, other than to say that additional work should be done to prepare a required form of reaffirmation agreement itself. He notes that there is a wide range of forms being used across the country, and he suggests that there should be a single, uniform reaffirmation agreement.

Comment 07-BK-020 American Bankers Association, et al. (including the Financial Services Roundtable) These groups note that they do not "per se" object to the form, but they urge the Committee to take action to ensure that reaffirmation agreements comply with the requirements of the Bankruptcy Code. Among the suggestions is that there should be rules or forms that ensure that reaffirmation agreements include the language that is specifically required by the Code. The group states that the Committee should not be troubled by the current discrepancies among the courts with regard to the form and content of reaffirmation agreements because a form that would preserve adherence to the Code could not raise substantive disagreement among the courts. They express concern that although the Code provisions governing reaffirmations require increased uniformity, there is still a variety of forms that they must use in different courts across the country.

Comment 07-BK-017 Bankruptcy Clerk Thomas Hart (D. Vt.) Mr. Hart submitted a lengthy comment that generally supports

proposed Official Form 27, and that includes a number of suggestions for the improvement of the form. More significantly, the submission includes a form of reaffirmation cover sheet that they have used along with an extensive instruction sheet that provides much more detail than is included in the proposed Official Form. He notes that the District was in the process of creating a form of reaffirmation cover sheet, but they decided to use the proposed Official Form 27, with one modification, as their form. They also decided to make a few stylistic changes to the form along with a much more extensive instruction sheet that accompanies the form. The “substantive” modification that they made to the form was to delete the item on proposed Official Form 27 that asks for the amount of the debt as of the commencement of the case. They deleted the question because they found it to be ambiguous. That item calls for the “amount of debt as of commencement of case”, and they noted that it could be read to mean all of the debt owed as of the commencement of the case rather than just the debt owed to the creditor who is a party to the reaffirmation agreement.

Comment 07-BK-023 Chief Deputy Bankruptcy Court Clerk Margaret Grammar Gay (D.N.M.) Ms. Grammar Gay makes several suggestions regarding proposed Official Form 27. First, she notes that the form should be denominated OF27 rather than B27 at the top of the form. Second, she suggests that at the top of the form, an instruction be added directing the appropriate person to “Complete this form and file it within the time set under Rule 4008.” She further suggests that the form not require a listing of the debtor’s name and address, and that the third sentence on the form provide that the filer must “Attach the reaffirmation agreement to this cover sheet.” She suggests that the words “set out” be deleted in lines 8 and 11 on the form and that in the sentences at the first check box, the words “greater than” be underlined to provide greater emphasis to the concept. She also notes that the filer’s certification would not be necessary if the reaffirmation agreement is attached to the form.

Changes Made After Publication:

The form was changed to require the submission of additional information to assist the court in determining whether the reaffirmation agreement presents an undue hardship to the debtor and the debtor’s dependents. The form now requires the person completing the form to include the interest rates charged under the

original agreement and the reaffirmation agreement, the repayment terms of the reaffirmation agreement, and whether the creditor asserts that the underlying obligation is nondischargeable. The debtor's income and expenses at the time of the reaffirmation agreement and as set out on Schedules I and J (the debtor's income and expenses at the time of the commencement of the case) are now set out in parallel columns for ease of comparison. Other stylistic changes were made to the form, and the Committee Note is revised to reflect these changes.

5. *Exhibit D to Official Form 1:*

Exhibit D was published for comment in August 2006. The changes to the form were made necessary in part because the Advisory Committee decided to withdraw Proposed Rule 1017.1 which would have created a new process for the consideration of requests for the postponement of a debtor's obligation to obtain a prepetition credit counseling briefing. The revised form deletes the reference to a motion to be filed by the debtor, as no motion is required. Instead, the form itself operates as the debtor's request for consideration of the issue by the court. The Advisory Committee recommends that this amendment become effective on December 1, 2008.

D. Proposed Amendments to Bankruptcy Rules 2016, 7052, 9006(f), 9015, and 9023 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference Without Publication.

The Advisory Committee recommends that the following amendments be approved and submitted to the Judicial Conference without publication. The amendments to Rules 2016 and 9006(f) are technical amendments necessary to correct cross references in the rules to provisions of the Bankruptcy Code and to the Federal Rules of Civil Procedure that were amended and renumbered. The amendments to Rules 7052, 9015, and 9023 are necessary to implement the new 14-day deadline for the filing of a notice of appeal. The Advisory Committee recommends that these amendments become effective on December 1, 2009.

1. *Synopsis of Proposed Amendments to Rules 2016, 7052, 9006(f), 9015, and 9023.*
 - (a) **Rule 2016** is amended to correct a cross reference in the rule to a subsection of the Code that was changed by a 2005 amendment to the Code. The amendment also changes the deadline for filing a supplemental statement to conform to the time computation amendments that change all 10 day periods to 14 day periods.
 - (b) **Rule 7052** is amended by limiting the time for filing post judgment motions for

amended or additional findings. The deadline is set at 14 days in contrast to the 30 day deadline included in the Federal Rules of Civil Procedure. This is necessary because the deadline for filing a notice of appeal under Bankruptcy Rule 8002 is 14 days rather than the 30 days allowed under Rule 4(a)(1)(A) F. R. App. P.

- (c) **Rule 9006** is amended to correct a cross reference to subparagraphs of Rule 5(b)(2) F. R. Civ. P.. Those subparagraphs were renumbered as a part of the civil rules restyling project.
- (d) **Rule 9015** is amended by deleting the reference to Rule 50 F.R.Civ.P. from the list of civil rules that are applicable in cases and proceedings. Subdivision (c) is added to make Rule 50 applicable in cases and proceedings, but it limits the time for filing certain post judgment motions to 14 days rather than 30 days as set out in the civil rules.
- (e) **Rule 9023** is amended to limit the time for filing a post judgment motion for a new trial or for the court to order sua sponte a new trial to 14 days after entry of judgment. This is necessary because the deadline for filing a notice of appeal under Rule 8002 is 14 days.

2. *Text of Proposed Amendments to Rules 2016, 7052, 9006(f), 9015, and 9023.*

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

1

* * * * *

2

(c) DISCLOSURE OF COMPENSATION PAID

3

OR PROMISED TO BANKRUPTCY PETITION

4 PREPARER. Before a petition is filed, every Every
5 bankruptcy petition preparer for a debtor shall ~~file~~ deliver to
6 the debtor, a the declaration under penalty of perjury ~~and~~
7 ~~transmit the declaration to the United States trustee within~~
8 ~~10 days after the date of the filing of the petition, or at~~
9 ~~another time as the court may direct, as required by §~~
10 110(h)(1) (2). The declaration shall ~~must~~ disclose any fee,
11 and the source of any fee, received from or on behalf of the
12 debtor within 12 months of the filing of the case and all
13 unpaid fees charged to the debtor. The declaration shall also
14 ~~must~~ describe the services performed and documents
15 prepared or caused to be prepared by the bankruptcy
16 petition preparer. The declaration shall be filed with the
17 petition. The petition preparer shall file a ~~A~~ supplemental
18 statement ~~shall be filed~~ within ~~10~~ 14 days after any payment
19 or agreement not previously disclosed.

Subdivision (f) is amended to conform to the changes made to Rule 5(b)(2) of the Federal Rules of Civil Procedure as a part of the Civil Rules Restyling Project. As a part of that project, subparagraphs (b)(2)(C) and (D) of that rule were rewritten as subparagraphs (b)(2)(D), (E), and (F). The cross reference to those rules contained in subdivision (f) of this rule is corrected by this amendment.

Rule 9015. Jury Trials

1

2

(a) APPLICABILITY OF CERTAIN FEDERAL

3

RULES OF CIVIL PROCEDURE. Rules 38, 39, and ~~47-~~

4

~~51~~ 47-49, and 51, F.R.Civ.P., and Rule 81(c) F.R.Civ.P.

5

insofar as it applies to jury trials, apply in cases and

6

proceedings, except that a demand made ~~pursuant to~~ under

7

Rule 38(b) F.R.Civ.P. shall be filed in accordance with

8

Rule 5005.

9

* * * * *

10

(c) APPLICABILITY OF RULE 50 F.R.CIV.P.

11

Rule 50 F.R.Civ.P. applies in cases and proceedings, except

5 or amend a judgment shall be filed, and a court may on its
6 own order a new trial, no later than 14 days after entry of
7 judgment.

COMMITTEE NOTE

The rule is amended to limit to 14 days the time for a party to file a post judgment motion for a new trial and for the court to order sua sponte a new trial. In 2009, Rule 59 F.R.Civ.P. was amended to extend the deadline for these actions to 30 days after the entry of judgment. That deadline corresponds to the deadline for filing a notice of appeal in a civil case under Rule 4(a)(1)(A) F.R.App.P. In a bankruptcy case, however, the deadline for filing a notice of appeal is 14 days. Therefore, the 30 day deadline for filing a motion for a new trial or a motion to alter or amend a judgment would effectively override the notice of appeal deadline under Rule 8002(a) but for this amendment.

- E. Proposed Amendments to Official Forms 9F, 10,
 and 23 Submitted for Final Approval by the
 Standing Committee and Submission to the Judicial
 Conference Without Publication.

The Advisory Committee recommends that the amendments to Official Forms 9F, 10, and 23 be approved and submitted to the Judicial Conference without publication. These changes are largely technical in nature and are made to conform to the language of the Bankruptcy Code.

Official Form 9F is amended to delete inclusion of the debtor's phone number. Official Form 10 is amended to include a reference to instruction

seven in the parenthetical at the end of numbered paragraph seven on page one, to include information about health care-related claims in instructions two and seven, and to revise the definitions of “creditor” and “claim” to conform to those definitions in the Bankruptcy Code. Official Form 23 is amended to include a reference to § 1141(d)(5)(B) in the filing deadlines note at the bottom of the page. The Advisory Committee recommends that these amendments become effective on December 1, 2008.

Text of Proposed Amendments to Official Forms 9F, 10, and 23.

EXPLANATIONS

B9F (Official Form 9F) (12/08)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. <i>The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.</i> Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is <i>not</i> listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all or if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. Filing Deadline for a Creditor with a Foreign Address: The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. <i>See</i> Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor: _____		Case Number: _____
NOTE: <i>This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: _____ <i>(If known)</i> Filed on: _____
Name and address where notices should be sent: Telephone number: _____		
Name and address where payment should be sent (if different from above): Telephone number: _____		
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____ <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
2. Basis for Claim: _____ (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____ Annual Interest Rate ___ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. 7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:		
Date: _____	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if the trustee or another party in interest files an objection to your claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. Secured Claim:

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). If the claim is based on the delivery of health care goods or services, see instruction 2. Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

INFORMATION

Debtor

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. §101 (10)

Claim

A claim is the creditor's right to receive payment on a debt owed by the debtor that arose on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended at box seven on page one, and instructions two and seven on page two, to instruct the claimant that the information contained in or attached to a claim based on the delivery of health care goods or services should be limited so as to avoid embarrassment or the unnecessary disclosure of confidential information. The claimant is informed that additional disclosure may be required if the trustee or another party in interest objects to the claim.

Page two of the form is also amended to revise slightly the definitions of "creditor" and "claim" to conform more closely to the definitions of those terms in the Code.

United States Bankruptcy Court
District Of

In re Debtor Case No. Chapter

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7, chapter 11 in which § 1141(d)(3) applies, or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

I, the debtor in the above-styled case, hereby certify that on (Date), I completed an instructional course in personal financial management provided by (Name of Provider), an approved personal financial management provider.

Certificate No. (if any):

I, the debtor in the above-styled case, hereby certify that no personal financial management course is required because of [Check the appropriate box.]: Incapacity or disability, as defined in 11 U.S.C. § 109(h); Active military duty in a military combat zone; or Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor:

Date:

Instructions: Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

F. Proposed Amendments to Bankruptcy Rules 1014, 1015, 1018, 5009, and 9001, and Proposed New Bankruptcy Rules 1004.2 and 5012.

The Advisory Committee recommends that the Standing Committee approve the following preliminary draft of proposed amendments to the Bankruptcy Rules and Official Forms for publication for comment.

1. *Synopsis of Proposed Amendments to Bankruptcy Rules 1014, 1015, 1018, 5009, and 9001, and Proposed New Bankruptcy Rules 1004.2 and 5012.*
 - (a) **Rule 1004.2** is new. It requires that the entity filing a chapter 15 petition state on the petition the country of the debtor's main interests. It also requires that the filer list each country in which a case involving the debtor is pending. The rule sets a deadline for challenging the statement asserting the country of the debtor's main interests.
 - (b) **Rule 1014** is amended to include chapter 15 cases among those subject to the rule that authorizes the court to determine where cases should go forward when multiple petitions involving the same debtor are pending.
 - (c) **Rule 1015** is amended to include chapter 15 cases among those subject to the rule that authorizes the court to order the consolidation or joint administration of cases.
 - (d) **Rule 1018** is amended to reflect the enactment of chapter 15 of the Code in 2005. The rule also is amended to clarify that it applies to contests over involuntary petitions but does not apply to matters that are merely related to a contested involuntary petition.
 - (e) **Rule 5009** is amended to redesignate the former rule as new subdivision (a), and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to individual debtors in chapter 7 and 13 cases that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial management course. Subdivision (c) requires a foreign representative in a chapter 15 case to file and give notice of the filing of a final report in the case.
 - (f) **Rule 5012** is new. It establishes the procedure in chapter 15 cases for obtaining the approval of an agreement regarding communications and the coordination of the proceedings with cases involving the debtor pending in other countries.

11 determination that the debtor's center of main interests is
12 other than as stated in the petition for recognition
13 commencing the chapter 15 case. The motion shall be filed
14 no later than 60 days after notice of the petition has been
15 given to the movant under Rule 2002(q)(1). The motion
16 shall be transmitted to the United States trustee and served
17 on the debtor, all persons or bodies authorized to administer
18 foreign proceedings of the debtor, all entities against whom
19 provisional relief is being sought under § 1519 of the Code,
20 all parties to litigation pending in the United States in
21 which the debtor was a party at the time of the filing of the
22 petition, and such other entities as the court may direct.

COMMITTEE NOTE

This rule is new. Subdivision (a) directs any entity that files a petition for recognition of a foreign proceeding under chapter 15 of the Code to state in the petition the center of the debtor's main interests. The petition must also list each country in which a foreign proceeding involving the debtor is pending. This information will assist the court and parties in interest in determining whether the foreign proceeding is a foreign main or nonmain proceeding.

Subdivision (b) sets a 60-day deadline for filing a motion to challenge the statement in the petition as to the country in which the debtor's center of main interests is located.

Rule 1014. Dismissal and Change of Venue

* * * * *

1
2 (b) PROCEDURE WHEN PETITIONS
3 INVOLVING THE SAME DEBTOR OR RELATED
4 DEBTORS ARE FILED IN DIFFERENT COURTS. If
5 petitions commencing cases under the Code or seeking
6 recognition under chapter 15 are filed in different districts
7 by, regarding, or against (1) the same debtor, or (2) a
8 partnership and one or more of its general partners, or (3)
9 two or more general partners, or (4) a debtor and an
10 affiliate, on motion filed in the district in which the petition
11 filed first is pending and after hearing on notice to the
12 petitioners, the United States trustee, and other entities as
13 directed by the court, the court may determine, in the
14 interest of justice or for the convenience of the parties, the

15 district or districts in which the case or cases should
16 proceed. Except as otherwise ordered by the court in the
17 district in which the petition filed first is pending, the
18 proceedings on the other petitions shall be stayed by the
19 courts in which they have been filed until the determination
20 is made.

COMMITTEE NOTE

Subdivision (b) of the rule is amended to provide that petitions for recognition of a foreign proceeding are included among those that are governed by the procedure for determining where cases should go forward when multiple petitions involving the same debtor are filed. The amendment adds a specific reference to chapter 15 petitions and also provides that the rule governs proceedings regarding a debtor as well as those that are filed by or against a debtor.

Other changes are stylistic.

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

1 *****
2 (a) CASES INVOLVING SAME DEBTOR. If two

3 or more petitions by, regarding, or against the same debtor
4 are pending in the same court ~~by or against the same debtor,~~
5 the court may order consolidation of the cases.

6 * * * * *

COMMITTEE NOTE

By amending subdivision (a) to include cases regarding the same debtor, the rule explicitly recognizes that the court's authority to consolidate cases when more than one petition is filed includes the authority to consolidate cases when one or more of the petitions is filed under chapter 15. This amendment is made in conjunction with the amendment to Rule 1014(b), which also governs petitions filed under chapter 15 regarding the same debtor as well as those filed by or against the debtor.

Rule 1018. Contested Involuntary Petitions; Contested Petitions Commencing Ancillary Chapter 15 Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings

1 Unless the court otherwise directs and except as
2 otherwise prescribed in Part I of these rules, the ~~The~~
3 following rules in Part VII apply to all proceedings ~~relating~~
4 ~~to a contested~~ contesting an involuntary petition, ~~to~~

5 ~~proceedings relating to a contested~~ petition or a chapter 15
6 petition for recognition ~~commencing a case ancillary to a~~
7 ~~foreign proceeding, and to all proceedings to vacate an~~
8 ~~order for relief: Rules 7005, 7008-7010, 7015, 7016, 7024-~~
9 ~~7026, 7028-7037, 7052, 7054, 7056, and 7062 ,~~ ~~except as~~
10 ~~otherwise provided in Part I of these rules and unless the~~
11 ~~court otherwise directs.~~ The court may direct that other
12 rules in Part VII shall also apply. For the purposes of this
13 rule a reference in the Part VII rules to adversary
14 proceedings shall be read as a reference to proceedings
15 ~~relating to a contested~~ contesting an involuntary petition, or
16 ~~contested ancillary petition or a chapter 15 petition for~~
17 recognition, or proceedings to vacate an order for relief.
18 Reference in the Federal Rules of Civil Procedure to the
19 complaint shall be read as a reference to the petition.

COMMITTEE NOTE

The rule is amended to reflect the enactment of chapter 15 of

the Code in 2005. As to chapter 15 cases, the rule applies to contests over the petition for recognition and not to all matters that arise in the case. Thus, proceedings governed by § 1519(e) and § 1521(e) of the Code must comply with Rules 7001(7) and 7065, which provide that actions for injunctive relief are adversary proceedings governed by Part VII of the rules. The rule is also amended to clarify that it applies to contests over an involuntary petition, and not to matters merely “relating to” a contested involuntary petition. Matters that may arise in a chapter 15 case or an involuntary case, other than contests over the petition itself, are governed by the otherwise applicable rules.

Other changes are stylistic.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

1 (a) CASES UNDER CHAPTERS 7, 12, AND
2 13. If in a chapter 7, chapter 12, or chapter 13 case the
3 trustee has filed a final report and final account and has
4 certified that the estate has been fully administered, and if
5 within 30 days no objection has been filed by the United
6 States trustee or a party in interest, there shall be a
7 presumption that the estate has been fully administered.

8 (b) NOTICE OF FAILURE TO FILE RULE
9 1007(b)(7) STATEMENT. If an individual debtor in a
10 chapter 7 or 13 case has not filed the statement required by
11 Rule 1007(b)(7) within 45 days after the first date set for
12 the meeting of creditors under § 341(a) of the Code, the
13 clerk shall promptly notify the debtor that the case will be
14 closed without entry of a discharge unless the statement is
15 filed within the applicable time limit under Rule 1007(c).

16
17 (c) CASES UNDER CHAPTER 15. A foreign
18 representative in a proceeding recognized under § 1517 of
19 the Code shall file a final report when the purpose of the
20 representative's appearance in the court is completed. The
21 report shall describe the nature and results of the
22 representative's activities in the court. The foreign
23 representative shall transmit the report to the United States
24 trustee, and give notice of its filing to the debtor, all

25 persons or bodies authorized to administer foreign
26 proceedings of the debtor, all parties to litigation pending in
27 the United States in which the debtor was a party at the
28 time of the filing of the petition, and such other entities as
29 the court may direct. The foreign representative shall file a
30 certificate with the court that notice has been given. If no
31 objection has been filed by the United States trustee or a
32 party in interest within 30 days after the certificate is filed,
33 there shall be a presumption that the case has been fully
34 administered.

COMMITTEE NOTE

The rule is amended to redesignate the former rule as subdivision (a) and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to an individual debtor in a chapter 7 or 13 case that the case may be closed without the entry of a discharge due to the failure of the debtor to file a timely statement of completion of a personal financial management course. The purpose of the notice is to provide the debtor with an opportunity to complete the course and file the appropriate document prior to the filing deadline. Timely filing of the document avoids the need for a motion to extend the time retroactively. It also avoids the potential for closing the case without discharge, and the possible need to pay

an additional fee in connection with reopening. Timely filing also benefits the clerk's office by reducing the number of instances in which cases must be reopened.

Subdivision (c) requires a foreign representative in a chapter 15 case to file a final report setting out the foreign representative's actions and results obtained in the United States court. It also requires the foreign representative to give notice of the filing of the report, and provides interested parties with 30 days to object to the report after the foreign representative has certified that notice has been given. In the absence of a timely objection, a presumption arises that the case is fully administered, and the case may be closed.

Rule 5012. Agreements Concerning Coordination of Proceedings in Chapter 15 Cases

1 Approval of an agreement under § 1527(4) of the Code
2 shall be sought by motion. The movant shall attach to the
3 motion a copy of the proposed agreement or protocol and,
4 unless the court directs otherwise, give at least 30 days'
5 notice of any hearing on the motion by transmitting the
6 motion to the United States trustee, and serving it on the
7 debtor, all persons or bodies authorized to administer
8 foreign proceedings of the debtor, all entities against whom

9 provisional relief is being sought under § 1519, all parties
10 to litigation pending in the United States in which the
11 debtor was a party at the time of the filing of the petition,
12 and such other entities as the court may direct.

COMMITTEE NOTE

This rule is new. In chapter 15 cases, any party in interest may seek approval of an agreement, frequently referred to as a “protocol,” that will assist with the conduct of the case. Because the needs of the courts and the parties may vary greatly from case to case, the rule does not attempt to limit the form or scope of a protocol. Rather, the rule simply requires that approval of a particular protocol be sought by motion, and designates the persons entitled to notice of the hearing on the motion. These agreements, or protocols, drafted entirely by parties in interest in the case, are intended to provide valuable assistance to the court in the management of the case. Interested parties may find guidelines published by organizations, such as the American Law Institute and the International Insolvency Institute, helpful in crafting agreements or protocols to apply in a particular case.

Rule 9001. General Definitions

1 The definitions of words and phrases in §§ 101, § 902,
2 ~~and § 1101, and 1502 of the Code,~~ and the rules of
3 construction in § 102, ~~of the Code~~ govern their use in these

4 rules. In addition, the following words and phrases used in
5 these rules have the meanings indicated:

6 * * * * *

COMMITTEE NOTE

The rule is amended to add § 1502 of the Code to the list of definitional provisions that are applicable to the Rules. That section was added to the Code by the 2005 amendments.

III. Information Items

(1) Statutory Time Periods Affected by the Time Computation Rule Changes

Bankruptcy Rule 9006 governs the computation of statutory periods as well as deadlines set out in the rules and court orders. Amending that rule to provide that intervening weekends and holidays are no longer to be excluded when the time period is less than 8 days would effectively shorten those time periods. The Advisory Committee reviewed the Bankruptcy Code and identified sixteen deadlines of less than 8 days in the Code. Ten of these deadlines are 5 day periods, four are 7 day periods, one is a 3 day period, and one is a 1 day period. The Advisory Committee recommends that, with the exception of one 5 day period that is expressed in terms of “business days,” Congress expand the 5 day periods to 7 days, thereby essentially retaining the amount of time typically applicable under current law. The Advisory Committee recommends that the four 7 day periods set out in the Code remain 7 days. Retention of the 7 day deadlines arguably shortens those time periods, but adding two or three days to those deadlines would run counter to the policy of adopting periods in multiples of 7 days. Finally, the Advisory Committee recommends retaining the 3 and 1 day periods under the Code because the provision that includes the three day period is set out as “3 calendar days”, so Congress has already provided a computation method for that deadline. Finally, the one day deadline cannot reasonably be extended without contradicting the apparent purpose of the current statute. Thus, the Advisory Committee recommends that the 5 day periods in the following provisions of the Bankruptcy Code be extended to 7 days: 11 U.S.C. §§ 109(h)(3)(A)(ii), 322(a), 332(a), 342(e)(2), 521(e)(3)(B), 521(i)(2), 704(b)(1)(B), 764(b), and 749(b).

(2) Backward Counting Deadlines

The Advisory Committee discussed at length the computation of backward counting deadlines under the proposed time-computation amendments. In particular, significant concern was expressed about the Time-Computation Committee’s recommendation that state holidays be included in the computation method. Under subdivision (a)(5), a backward counting deadline that ends on a Saturday, Sunday, or holiday would continue to the “next day” that is not a Saturday, Sunday, or holiday. Since it is a “backward” counting deadline, if the last day of a backward counting period is a Saturday, the “next day” would be Friday, and the action or filing would have to be completed on or before that Friday. If the last day is a holiday, the same rule applies. That is, the next day that is before the holiday (and that is not also a Saturday, Sunday, or holiday) is the day on which the action or filing must occur.

The Advisory Committee is concerned that parties will be unaware of many state holidays and will suffer the loss of rights for failure to act timely under the backward counting system as it applies to lesser known state holidays. Many of these holidays are not well known, and they pass without any other recognition by the federal courts. Nonetheless, a backward counting deadline that ends on Victory Day in Rhode Island (the second Monday in August), would not end on that day, but would end on the Friday before that day. This would shorten the time for a party to act,

even though the federal court is open and operating on the day of the state holiday.

To the extent that the decision not to exclude state holidays from the backward counting method was based on the assumption that there are relatively few of these deadlines, that assumption may not be appropriate for the Bankruptcy Code. The Code includes 80 backward counting deadlines. Attached is a spreadsheet that sets out these deadlines. Also attached is a spreadsheet that sets out the 18 backward counting deadlines included in the Bankruptcy Rules. The Advisory Committee recognizes the interest in and need for uniformity in the adoption of a time computation rule, but it also believes that an exclusion from the backward counting method for state holidays might be appropriate.

(3) Draft Minutes

Draft minutes of the March 2008 meeting of the Advisory Committee are attached.

ATTACHMENTS:

Spreadsheet of Comments on the Extension of the Deadline for Filing a Notice of Appeal
Spreadsheets on Backward Counting Deadlines in the Bankruptcy Code and Rules
Draft Minutes of March 2008 Advisory Committee Meeting

BANKRUPTCY RULE 8002
COMMENTS

Comment #	Name	Status	10	14	30	
1	McKee	Pract.	X			
2	Wizmur	BJ		X		
3	McGarity	BJ		X		
4	Heller	Staff Atty 10th Cir			X	
5	Efremsky	BJ		X		
6	Myers, T.	BJ		X		
7	Tucker	Pract.			X	
8	Boswell	BJ		X		
9	Boroff	BJ		X		
10	Sontchi	BJ		X		
11	Lyons	BJ			X	
12	Fitzgerald	BJ	X			
13	Kressel	BJ			X	
14	Dodd	BJ	X			
15	Easterbrook	7TH CIR		X		
16	Brown	BJ		X		
17	Adams	BJ		X		
18	McCollough	BJ	X			
19	Goldgar	BJ		X		
20	Grammar Gay	Court Clerk			X	
21	Starzinski	BJ			X	
22	Mahoney, T	BJ			X	
23	Bussart	Pract.		X		
24	Rogan	Pract.	X			
25	Lennox	Pract.	X			
26	Resnick	Prof.	X			
27	Schermer	BJ	X			This comment was submitted by the four Bankruptcy Judges and the Clerk for the ED Mo.
28	ABI	Assoc.		X		This is an aggregation of responses, and I would suggest that the position might also be correctly characterized as a preference for a 10 day deadline.
29	Brandt	BJ	X			
30	Mich. Bar	Assoc.	X			
31	Teel	BJ		X		The Clerk of the court also joined in this comment, and they suggest that 30 days is also acceptable.
32	Cal. Bar	Assoc.	X			
33	NYC Bar	Assoc.	X			
34	CLLA	Assoc.	X			
35	Wallace	Court Clerk		X		
36	7th Cir	Assoc.	X			This comment actually suggests that the deadline be made 7 days to conform to the multiple of 7 principle.
37	ABA	Assoc.	X			
BK-2	Klee	Pract.	X			
BK-3	Mannes	BJ		X		
BK-7(same as 23)		Pract.		X		
BK-9(same as 26)		Prof.	X			
BK-13(same as 29)		BJ	X			
BK-15(same as 33)		Assoc.	X			
BK-22	NBC	Assoc.	X			
			17	16	7	

A	B	C	D					E	F	G	H	I	J	K					
			Title 11 of the Bankruptcy Code - Time Computation Rules																
1	2	3	Section	Subsection	Nature of Deadline					Unit of Time	Hours	Days	Weeks	Months	Year(s)	Issues	Comments		
4	11	101	(10A)(A)(i)	The term "current monthly income" means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived from the 6-month period ending on (1) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii);														I believe time computation rules apply here- if the last day of the calendar month is on a weekend or legal holiday, what is the proper unit of time? (6 months?)	
5	11	101	(14)(B)	The term "disinterested person" means a person that (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor;															
6	11	101	(22A)(A)	The term "financial participant" means (A) an entity that, at the time it enters into a securities contract, swap agreement, repurchase agreement, or forward contract, or at the time of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total in notional or actual principal amount outstanding on any day during the previous 18-month period; or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than the affiliate) on any day during the previous 15-month period;															
7	11	101	(47)(A)	(47) The term "repurchase agreement" (which definition also applies to a reverse purchase agreement) (A) means (i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;															
8	108	(a)(2)		(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order of relief.															
9	108	(b)(2)		Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 60 days after the order of relief.															
10	11	108	(c)(2)	Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case, or (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.															
11	11	109	(g)	Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title															

1	A	B	C	D	E					J	K
					Title 11 of the Bankruptcy Code- Time Computation Rules						
2	Title	Section	Subsection	Nature of Deadline	Hours	Days	Weeks	Months	Year(s)	Issues	Comments
3				Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.							
12	11	109	(h)(1)	The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.		180					
13	11	109	(h)(2)(B)	Subject to paragraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that (i) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request,				1			
14	11	109	(h)(3)(A)(ii)	With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.		5					
15	11	109	(h)(3)(B)	With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.		30					
16	11	109	(h)(3)(B)	A declaration under penalty of perjury by the bankruptcy petition preparer shall be filed together with the petition, disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor.		15					
17	11	110	(h)(2)	The court shall disallow and order the immediate turnover to the bankruptcy trustee any fee referred to in paragraph (2) found to be in excess of the value of any services (i) rendered by the bankruptcy petition preparer during the 12-month period immediately preceding the date of the filing of the petition.						12	
18	11	110	(h)(3)(A)(i)	A bankruptcy petition preparer shall be fined no more than \$500 for each failure to comply with at court order made to turn over funds within 30 days of the service of such order.		30					
19	11	110	(h)(5)	If a nonprofit budget and credit counseling agency or instructional course did not appear on the approved list for the district under subsection (a) immediately before approval under this subsection of such agency or such instructional course shall be for a probationary period not to exceed 6 months.							
20	11	111	(b)(3)	Not later than 30 days after any final decision under paragraph (4), an interested person may seek judicial review or such decision in the appropriate district court of the United States.		30				6	?
21	11	111	(b)(5)	If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount, or (2) within 120 days before the date of filing the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.		30					
22	11	303	(h)(2)	Except as provided in subsection (b)(1), a person selected under the section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.		120					
23	11	322	(a)	A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.		5					
24	11	322	(d)						2		

A	B	C	D	E	F	G	H	I	J	K	
1	2	3	Title 11 of the Bankruptcy Code- Time Computation Rules	Hours	Days	Weeks	Months	Year(s)	Issues	Comments	
Title	Section	Subsection	Nature of Deadline	Unit of Time	Hours	Days	Weeks	Months	Year(s)	Issues	Comments
25	11	329	(a)	Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.					1		
26	11	331		A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.	120						
27	11	332	(a)	If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.	6						
28	11	333	(a)(1)	If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.	30						
29	11	333	(b)(2)	An ombudsman appointed under subsection (a) shall (1) monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians; (2) not later than 60 days after the date of appointment, and not less frequently than at 60-day intervals thereafter, report to the court after notice to the parties in interest, at a hearing or in writing, regarding the quality of patient care provided to patients of the debtor;	60						
30	11	342	(c)(2)(A)	If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.	90						"such 90-day period" refers that the 90-day period discussed in Section 342 (c)(2)(A) above.
31	11	342	(c)(2)(B)	If a creditor would be in violation of applicable nonbankruptcy law by sending any such communication within such 90-day period and if such creditor supplies the debtor in the last 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.	90						
32	11	342	(d)	In a case under chapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under section 707(b), the clerk shall give written notice to all creditors not later than 70 days after the date of the filing of the petition that the presumption of abuse has arisen.	10						
33	11	342	(e)(2)	Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.	5						
34	11	342	(f)(2)	In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).	30						
35	11	347	(a)	Ninety days after the final distribution under sections 726, 1226, or 1326 of this title in a case under chapter 7, 12 or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of title 28.	90						
36	11	351	(1)(A)	If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law, the following requirements may apply: (1) The trustee shall (A) promptly publish notice in 1 or more appropriate newspapers, that if records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and	365						

1	A	B	C	D				E	F	G	H	I	J	K
				Title	Section	Subsection	Nature of Deadline							
37	11	351	(1)(B)	(B) during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records. If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified mail, at the end of such 365-day period a written request to each appropriate Federal agency to request permission from that agency to deposit the patient records with that agency, except that no Federal agency is required to accept patient records under this paragraph.	180									
38	11	351	(2)	The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay (12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law.	365									
39	11	362	(b)(12)	The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay (13) under subsection (e) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936.	90									
40	11	362	(b)(13)	The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay (20) under subsection (e), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (f)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing.	90									
41	11	362	(b)(20)	The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property of the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty or perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property. Except as provided in subsections (d), (e), (f), and (h) of this section (3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)-	30								2	
42	11	362	(b)(23)	the stay under subsection (e) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.	30									
43	11	362	(c)(3)	on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any oral creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed	30									
44	11	362	(c)(3)(A)											
45	11	362	(c)(3)(B)											

Title 11 of the Bankruptcy Code- Time Computation Rules												
A	B	C	D			E	F	G	H	I	J	K
Title	Section	Subsection	Nature of Deadline			Unit of Time	Days	Weeks	Months	Year(s)	Issues	Comments
			Hours	Days	Year(s)							
56	11	362	(m)(1)	15			15					
57	11	362	(m)(2)(B)	10			10					
58	11	362	(m)(3)(A) & (B)	15			15					
59	11	363	(b)(2)(B)(i)-(iii)	15			15					
60	11	365	(d)(1)	60			60					
61	11	365	(d)(3)	60			60					
62	11	365	(d)(4)(A)(i)	120			120					
63	11	365	(d)(4)(B)(i)	90			90					The "120-day period" mentioned refers to that discussed in 11 USC 365(d)(4)(A)(i)
64	11	365	(d)(5)	60			60					
65	11	365	(e)(2)(B)	30			30					
66	11	366	(b)	20			20					
67	11	366	(c)(2)	30			30					

1	A	B	C	D	E				I	J	K		
					Title 11 of the Bankruptcy Code- Time Computation Rules								
2	Title	Section	Subsection	Nature of Deadline	Unit of Time	Hours	Days	Weeks	Months	Year(s)	Issues	Comments	
3				Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition and shall allow such claim in such amount, except to the extent that (9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed on or before the date that is 60 days after the date on which such return was filed as required.									
68	11	502	(b)(9)	The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if (B) the offer of the debtor under subparagraph (A)(i) was made at least 60 days before the date of the filing of the petition; and			180/60					The "60 day period" discussed in 11 USC 502(k)(2)(B) refers to the 60 day period discussed in 502(k)(1).	
69	11	502	(k)(1)	After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title including (7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6).			60						
70	11	503	(b)(7)	After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title including (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.							2		
71	11	503	(b)(9)	The court may not so determine (B) any right of the estate to a tax refund, before the earlier of (i) 120 days after the trustee property requests such refund from the governmental unit from which such refund is claimed;			20						
72	11	505	(a)(2)(B)(i)	A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax at the address and in the manner designated in paragraph (1). Unless such return is fraudulent, or contains a material misrepresentation, the estate, the trustee, or the debtor, and any successor to the debtor are discharged from any liability for such tax (A) upon payment of the tax shown on such return, if (i) such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or (ii) such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days after such request or within such additional time as the court, for cause, permits.			120						
73	11	505	(b)(2)(A)(i) & (ii)	The following expenses and claims have priority in the following order: (4) Fourth, allowed unsecured claims, but only to the extent of \$10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first.			60/180						
74	11	507	(a)(4)	Fifth, allowed unsecured claims for contributions to an employee benefit plan (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first;			180						
75	11	507	(a)(5)(A)	Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition (i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;			180						
76	11	507	(a)(8)(A)(i)	Ninth, allowed unsecured claims of governmental units, only to the extent that such claims are for (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition (ii) assessed within 240 days before the date of the filing of the petition, exclusive of (i) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days									
77	11	507	(a)(8)(A)(ii)	(ii) assessed within 240 days before the date of the filing of the petition, exclusive of (i) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days			240						
78	11	507	(a)(9)(A)(i)(I)	assessed within 240 days before the date of the filing of the petition, exclusive of (ii) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days			30						
79	11	507	(a)(9)(A)(i)(II)	Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for (B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition.			90						
80	11	507	(a)(8)(B)							1			

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Title		Section		Subsection		Nature of Deadline		Unit of Time		Hours		Days		Weeks		Months		Year(s)		Issues		Comments				
1																										
2																										
3																										
81	11	507		(a)(8)(D)			Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for (D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;																			
82	11	507		(a)(8)(E)(i)			Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for (E) an excise tax on (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;																			
83	11	507		(a)(8)(E)(ii)			Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for (F) a customs duty arising out of the importation of merchandise (i) entered for consumption within one year before the date of the filing of the petition;																			
84	11	507		(a)(8)(F)(i)			covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisal or classification of such merchandise was not available to the appropriate customs officer before such date; or																			
85	11	507		(a)(8)(F)(ii)			An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection taken or proposed against the debtor, plus 90 days , plus any time during which the stay of proceedings was in effect a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days .																			
86	11	507		(a)(8)(F)(iii)			copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor, from any employer of the debtor;																			
87	11	507		(a)(8)(G)			a statement disclosing any reasonable anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition																			
88	11	521		(a)(1)(B)(iv)			within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk's a statement of his intention with respect to the retention or surrender of such property, and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;																			
89	11	521		(a)(1)(B)(v)			within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and																			
90	11	521		(a)(2)(A)			in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(e), either (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or (B) redeems such property from the security interest pursuant to section 722.																			
91	11	521		(a)(2)(B)			The debtor shall provide (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed.																			
92	11	521		(a)(6)			If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan (A) at a reasonable cost; and (B) not later than 5 days after such request is filed.																			
93	11	521		(e)(2)(A)(i)			in a case under chapter 13 (A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and																			
94	11	521		(e)(3)(B)			annually after the plan is confirmed and until the case is closed, not later than he date that is 45 days before the anniversary of the confirmation of the plan;																			
95	11	521		(f)(4)(A)			Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.																			
96	11	521		(f)(4)(B)																						
97	11	521		(i)(1)																						

1	A	B	C	D										E	F	G	H	I	J	K		
				Title 11 of the Bankruptcy Code- Time Computation Rules																		
2	Title	Section	Subsection	Nature of Deadline										Unit of Time	Days	Weeks	Months	Year(s)	Issues	Comments		
3														Hours								
98	11	521	(i)(2)	Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.										5								
99	11	521	(i)(3)	Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (e)(1) if the court finds justification for extending the period for the filing.										45/45								
100	11	521	(i)(2)	If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after the request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.										90								
101	11	522	(e)(3)(A)	Property listed in this paragraph is (A) subject to subsections (O) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile has not been located at a single State for such 730-day period or for a longer portion of such 180-day period than in any other place.										730/180								
102	11	522	(b)(4)(D)(ii)(II)	Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code or 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution. (ii) A distribution described in this clause is an amount that (I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and (II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.										60								
103	11	522	(p)(1)	Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$125,000 in value in (A) real or personal property that the debtor or a dependent of the debtor uses as a residence; (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence; (C) a burial plot for the debtor or a dependent of the debtor; or (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.										1215								For this time computation rule, the computation must be made for the first day of the period?
104	11	522	(p)(2)(B)	For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.										1215								
105	11	522	(g)(1)(B)(iv)	The debtor owes a debt arising from (iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.																		5
106	11	523	(e)(1)(B)(ii)	A discharge under section 727, 1141, 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt (1) for tax or a customs duty (B) with respect to which a return, or equivalent report or notice, if required (i) was not filed or given; or (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing for the petition.																		2
107	11	523	(a)(2)(C)(i)(I)	For the purposes of subparagraph (A) (i) consumer debts owed to a single creditor and aggregating more than \$500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and										90								
108	11	523	(a)(2)(C)(i)(II)	cash advances aggregating more than \$750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable.										70								
109	11	523	(e)(7)(B)	to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.																		3
110	11	524	(k)(3)(j)(I)	"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later.										60								
111	11	524	(m)(1)	Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's complete and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt.										60								

		Title 11 of the Bankruptcy Code- Time Computation Rules																			
		Nature of Deadline																			
A	B	C	D		E		F		G		H		I		J		K				
Title	Section	Subsection	Unit of Time		Hours		Days		Weeks		Months		Year(s)		Issues		Comments				
1																					
2																					
3																					
112	11	527	(a)(2)	A debt relief agency providing bankruptcy assistance to an assisted person shall provide (2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advise assisted persons that-												Section 101 does not provide a definition of "business days." However, this might be commonly understood?					
113	11	528	(a)(1)	A debt relief agency shall (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously (A) the services such agency will provide to such assisted persons; and (B) the fees or charges for such services, and the terms of payment;				3													
114	11	541	(a)(5)	Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date (A) by bequest, devise, or inheritance; (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or (C) as a beneficiary of a life insurance policy, or of a death benefit plan.				5								see note above					
115	11	541	(b)(5)	Property of the state does not include (5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title but-				180													
116	11	541	(b)(5)(C)	(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;				365													
117	11	541	(b)(6)	Property of the state does not include (6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but-				720/365													
118	11	541	(b)(6)(C)	(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;				365													
119	11	541	(b)(9)(A)	any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made (A) on or after the date that is 14 days prior to the date on which the petition is filed;				720/365													
120	11	543	(c)(3)	The court, after notice and a hearing, shall (3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for an improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.				14													
121	11	543	(d)(2)	After notice and hearing, the bankruptcy court (2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.				120													
122	11	546	(a)(1)(A)	An action or proceeding under section 544, 545, 547, 548, 553 of this title may not be commenced after the earlier of (1) the later of (A) 2 years after the entry of the order for relief, or				120													
123	11	546	(a)(1)(B)	title if such appointment or such election occurs before the expiration of the period of specified in subparagraph (A).				2													
124	11	546	(c)(1)	Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods-				45													
125	11	546	(c)(1)(A)	not later than 45 days after the date of receipt of such goods by the debtor, or				45													
126	11	546	(c)(1)(B)	commencement of the case.				20													
127	11	546	(d)(1)	such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor.				10													

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Title		Section		Subsection		Nature of Deadline		Unit of Time		Hours		Days		Weeks		Months		Year(s)		Issues		Comments	
1																							
2																							
3																							
128	11	546		(h)		Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.					120												
129	11	547		(b)(4)(A)		Except as provided in subsections (c) and (j) of this section, the trustee may avoid any transfer of an interest of the debtor in property (4) made (A) on or within 90 days before the date of the filing of the petition, or					90												
130	11	547		(b)(4)(B)		between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider, and					90												
131	11	547		(c)(3)(B)		The trustee may not avoid under this section transfer (3) that creates a security interest in property acquired by the debtor (B) that is perfected on or before 30 days after the debtor receives possession of such property.					30												
132	11	547		(c)(5)(A)(i)		The trustee may not avoid under this section transfer (5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferees caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of (A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or					90												
133	11	547		(c)(5)(A)(ii)		with respect to a transfer which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition																	
134	11	547		(e)(2)(A)		For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or																	
135	11	547		(e)(2)(B)		within 30 days after, such time, except as provided in subsection (c)(3)(B);					30												
136	11	547		(e)(2)(C)(i)		at the time such transfer is perfected, if such transfer is perfected after such 30 days ; or					30												
137	11	547		(f)		immediately before the date of the filing of the petition, if such transfer is not perfected at the later of (i) the commencement of the case; or (ii) 30 days after such transfer takes effect between the transferor and the transferee.					30												
138	11	547		(i)		For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition					90												
139	11	548		(a)(1)		If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.					90												
140	11	548		(b)		The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition.																	
141	11	548		(e)(1)		The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.																	
142	11	549		(d)(1)		In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 70 years before the date of the filing of the petition.																	
143	11	550		(c)		An action or proceeding under this section may not be commenced after the earlier of (1) two years after the date of the transfer sought to be avoided;																	
144	11	553		(a)(2)(B)(i)		If a transfer made between 90 days and the year before the filing of the petition (1) is avoided under section 547(b) of this title, and (2) was made for the benefit of a creditor that at the time of such transfer was an insider, the trustee may not recover under subsection (g) from a transferee that is not an insider.					90												
145	11	553		(a)(3)(A)		Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that (2) such claim was transferred, by an entity other than the debtor, to such creditor (B)(i) after 90 days before the date of the filing of the petition;																	
						the debt owed to the debtor by such creditor was incurred by such creditor (A) after 90 days before the date of the filing of the petition.					90												

1	A	B	C	D					E	F	G	H	I	J	K
				Title	Section	Subsection	Title 11 of the Bankruptcy Code- Time Computation Rules								
2				Unit of Time	Hours	Days	Weeks	Months	Years(s)	Issues			Comments		
3				Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(n), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of											
146	11	553	(b)(1)	90 days before the date of the filing of the petition; and		90									
147	11	553	(b)(1)(A)	the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.		90									
148	11	553	(b)(1)(B)	For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition		90									
149	11	553	(c)	Notwithstanding sections 362, 363, 365, and 554 of this title, on the court's own motion the court may, and on the request of the trustee or an entity that claims an interest in grain or the procedures for the grain the court shall, expedite the procedures for the determination of interests in and the disposition of grain and the proceeds of grain, by shortening to the greatest extent feasible such time periods as are otherwise applicable for such procedures and by establishing, by order, a timetable having a duration of not to exceed 120 days for the completion of the applicable procedure specified in subsection (d) of this section.		120									
150	11	557	(c)(1)	The court may extend the period for final disposition of grain or the proceeds of grain under this section beyond 120 days if the court finds that (1) the interests of justice so require in light of the complexity of the case; and (2) the interests of those claimants entitled to distribution of grain or the proceeds of grain will not be materially injured by such additional delay.		120									
151	11	557	(f)	With respect to a debtor who is an individual in a case under this chapter (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and		10									
152	11	704	(b)(1)(A)	not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.		5									
153	11	704	(b)(1)(B)	The United States trustee (or the bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or (B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.		30									
154	11	704	(b)(2)	The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.		15									
155	11	707	(a)(3)	Except as provided in section 510 of this title, property of the estate shall be distributed (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of (A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or (B) the date on which the trustee commences final distribution under this section;		10									
156	11	726	(a)(1)(A)	The court shall grant the debtor a discharge unless (7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;							1				
157	11	727	(a)(7)	The court shall grant the debtor a discharge unless (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14371 or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;											
158	11	727	(a)(8)	The court shall grant the debtor a discharge unless (9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least (A) 100 percent of the allowed unseasoned claims in such case; or (B) (i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort.										8	
159	11	727	(a)(9)											6	

A	B	C	D				E	F	G	H	I	J	K
			Title	Section	Subsection	Nature of Deadline							
1													
2													
3													
160	11	727	(a)(11)	The court shall grant the debtor a discharge unless (1) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter); or									
				The court shall grant the debtor a discharge unless (12) the court after notice and a hearing held not more than 70 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that (A) section 522(q)(1) may be applicable to the debtor; and (B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).									
161	11	727	(a)(12)				10						
162	11	727	(e)	The trustee, a creditor, or the United States trustee may request a revocation of a discharge (1) under subsection (d)(1) of this section within one year after such discharge is granted;									
				"net equity" means, with respect to all accounts of a customer that such customer has in the same capacity (B) any payment by such customer to the trustee, within 60 days after notice under section 342 of this title, of any business related claim of the debtor against such customer in such capacity;									
163	11	741	(6)(B)	Notwithstanding section 365(d)(1) of this title, the trustee shall assume or reject, under section 365 of this title, any executory contract of the debtor for the purchase or sale of a security in the ordinary course of the debtor's business, within a reasonable time after the date of the order for relief, but not to exceed 30 days.			60						
164	11	744		Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is (1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash securities, or other property margining or securing such commodity contract; or (2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.			30						
165	11	764	(b)	Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as a trustee in the case.			5						
166	11	1104	(b)(1)	The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to section 362 if (A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract;			30						
167	11	1110	(a)(2)(A)	Except as provided in (c) and (f), the court, on request of the United States trustee, may convert a case under this conditional sale contract (j) that occurs before the date of the order is cured before the expiration of such 60-day period; (i) that occurs after the date of the order and before the expiration of such 60-day period is cured before the later of (i) the date that is 30 days after the date of the default; or (ii) the expiration of such 60-day period; and (iii) that occurs on or after the expiration of such 60-day period is cured in compliance with the terms of such security agreement, lease, or conditional sale contract, if a cure is permitted under that agreement, lease, or contract.			60						The "60-day period" refers to section (a)(2)(A) immediately above
168	11	1110	(a)(2)(B)(i)	The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 75 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.			30						
169	11	1112	(a)(3)	Except as provided in (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.			30/15						
170	11	1112	(e)	Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application.			15						
171	11	1113	(d)(1)	All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing.			14						
172	11	1113	(d)(1)				10						

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							Title 11 of the Bankruptcy Code- Time Computation Rules							
			Title	Section	Subsection	Nature of Deadline	Unit of Time	Days	Weeks	Months	Year(s)	Issues	Comments	
173	11	1113	(d)(1)	The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.	7									
174	11	1113	(d)(2)	The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing.	30									
175	11	1114	(k)(1)	Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application.	14									
176	11	1114	(k)(1)	All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing.	10									
177	11	1114	(k)(1)	The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.	7									
178	11	1114	(k)(2)	The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing.	90									
179	11	1114	(l)	If the debtor, during the 180-day period ending on the date of the filing of the petition (1) modified the retiree benefits; and (2) was insolvent on the date such benefits were modified; the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.	180							?		
180	11	1116	(1)	In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;	7									
181	11	1116	(3)	In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall (3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances.	30									
182	11	1121	(b)	Except as otherwise provided in this section, only the debtor may file a plan until 120 days after the date of the order for relief under this chapter.	120									
183	11	1121	(c)(3)	Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or an indenture trustee, may file a plan if and only if (3) the debtor has not filed a plan that has been accepted, before 160 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.	160									
184	11	1121	(d)(2)(A)	The 120-day period specified in paragraph (1) may not be extended beyond the date that is 18 months after the date of the order for relief under this chapter.	18									
185	11	1121	(d)(2)(B)	The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.	20									
186	11	1121	(e)(1)	In a small business case (1) only the debtor may file a plan until 180 days after the date of the order for relief unless that period is (A) extended as provided by this subsection, after notice and a hearing, or (B) the court, for cause, orders otherwise;	180									
187	11	1121	(e)(2)	In a small business case (2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief.	300									
188	11	1125	(f)(3)(B)	Notwithstanding subsection (b), in a small business case (3)(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan.	25									
189	11	1129	(a)(9)(C)(ii)	Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303;	5									
190	11	1129	(e)	In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).	45									
191	11	1141	(d)(5)(C)	In a case in which the debtor is an individual (C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that (i) section 522(q)(1) may be applicable to the debtor; and (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).	10									

A		B		C		D Title 11 of the Bankruptcy Code- Time Computation Rules										E		F		G		H		I		J		K	
Title	Section	Subsection	Nature of Deadline	Unit of Time	Hours	Days	Weeks	Months	Year(s)	Issues	Comments	Hours	Days	Weeks	Months	Year(s)	Issues	Comments											
192	11	1143	(a)(3)(C)(i)	If a plan requires presentation or surrender of a security or the performance of any other act as a condition to participation in distribution under the plan, such action shall be taken not later than five years after the date of the entry of the order of confirmation.																									
193	11	1145	(a)(3)(C)(i)	Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply to (3) the offer or sale, other than under a plan, of a security of an issuer other than the debtor or an affiliate, if (C) such offer or sale is of securities that do not exceed (i) during the two-year period immediately following the date of the filing of the petition, four percent of the securities of such class outstanding on such date; and																									
194	11	1145	(a)(3)(C)(ii)	during any 180-day period following such two-year period, one percent of the securities outstanding at the beginning of such 180-day period;																									
195	11	1145	(a)(4)	a transaction by a stockbroker in a security that is executed after a transaction of a kind specified in paragraph (1) or (2) of this subsection in such security and before the expiration of 40 days after the first date on which such security was bona fide offered to the public by the issuer or by or through an underwriter, if such stockbroker provides, at the time of or before such transaction by such stockbroker, a disclosure statement approved under section 1125 of this title, and, if the court orders, information supplementing such disclosure statement.																									
196	11	1145	(d)	The Trust Indenture Act of 1939 does not apply to a note issued under the plan that matures not later than one year after the effective date of the plan.																									
197	11	1146	(b)(2)	The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of (1) the date on which such governmental unit responds to the request under this subsection, or (2) 270 days after such request.																									
198	11	1168	(a)(1)(A)	The right of a secured party with a security interest in or of a lessor or conditional vendor of equipment described in paragraph (2) to take possession of such equipment in compliance with an equipment security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court, except that right to take possession and enforce those other rights and remedies shall be subject to section 362, if (A) before the date that is 60 days after the date of the commencement of a case under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract.																									
199	11	1168	(a)(1)(B)(i)(I)	any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract (ii) that occurs or becomes an event of default after the date of commencement of the case and before the expiration of such 60-day period is cured before the later of (i) the date that is 30 days after the date of the default or event of the default;																									
200	11	1172	(b)	If, except for the pendency of the case under this chapter, transfer of, or operation of or over, any of the debtor's rail lines by an entity other than the debtor or a successor to the debtor under the plan would require approval by the Board under a law of the United States, then a plan may not propose such a transfer or such operation with the Board and, within such time as the court may fix, not exceeding 180 days , the Board, with or without a hearing, as the Board may determine, and with or without modification or condition, approves such application or does not act on such application.																									
201	11	1174		On request of a party in interest and after notice and a hearing, the court may, or, if a plan has not been confirmed under section 1173 of this title before five years after the date of the order for relief, the court shall order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of this title.																									
202	11	1201	(d)	Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (e) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.																									
203	11	1221		The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if then need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.																									
204	11	1222	(a)(4)	The plan shall (4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.																									
205	11	1222	(c)	Except as provided in subsections (b)(5) and (b)(9), the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years .																									

1	2	3	A	B	C	D	Title 11 of the Bankruptcy Code- Time Computation Rules				J	K	
							E	F	G	H			I
			Section	Subsection	Nature of Deadline	Unit of Time	Hours	Days	Weeks	Months	Years(s)	Issues	Comments
206	11	1224				After expedited notice, the court shall hold a hearing on confirmation of the plan. A party in interest, the trustee, or the United States trustee may object to the confirmation of the plan. Except for cause, the hearing shall be concluded not later than 45 days after the filing of the plan.		45					
207	11	1225		(b)(1)(B)		If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(C), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or					3		
208	11	1225		(b)(1)(C)		the value of the property to be distributed under the plan in the 3-year period, or such longer period as the court may approve under section 1222(C), beginning on the date that the first distribution is due under the plan is not less than the debtor's projected disposable income for such period.					3		
209	11	1228		(d)		On request of a party in interest before one year after a discharge under this section is granted, an after notice and a hearing, the court may revoke such discharge only if (1) such discharge was obtained by the debtor through fraud; and (2) the requesting party did not know of such fraud until after such discharge was granted.					1		
210	11	1228		(f)		The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting that discharge finds that there is no reasonable cause to believe that (1) section 522(q)(1) may be applicable to the debtor, and (2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).		10					
211	11	1229		(c)		A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.					3/5		
212	11	1230		(a)		On request of a party in interest at any time within 780 days after the date of the entry of an order of confirmation under section 1225 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.		180					
213	11	1231		(b)(2)		The court may authorize the proponent of a plan to request a determination, limited to questions of law, by any governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of (1) the date on which such governmental unit responds to the request under this subsection, or (2) 270 days after such request.		270					identical to section 1201(d) above
214	11	1301		(d)		Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.		20					
215	11	1307		(c)(9)		Except as provided in subsection (3) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521.		15					
216	11	1308		(b)(1)(A)		Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond (A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or		120					
217	11	1308		(b)(1)(B)(i)		for any return that is not past due as of the date of the filing of the petition, the later of (i) the date that is 120 days after the date of that meeting; or (ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable bankruptcy law.		120					
218	11	1308		(b)(2)(A)		After notice and a hearing, and order entered before the filing of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period by the trustee under this subsection for (A) a period of not more than 30 days for returns described in paragraph (1);							
219	11	1322		(a)(4)		The plan shall (4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(e)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan					5		identical to section 1222(a)(4)
220	11	1322		(d)(1)(C)		If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12 is not less than (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4, the plan may not provide for payments of a period that is longer than 5 years.					5	?	

		Title 11 of the Bankruptcy Code- Time Computation Rules											
		Nature of Deadline											
		Unit of Time											
		Hours	Days	Weeks	Months	Year(s)	Issues						
A	B	C	D	E	F	G	H	I	J	K			
1	2	3	4	5	6	7	8	9	10	11	12	13	
Title	Section	Subsection		Hours	Days	Weeks	Months	Year(s)	Issues			Comments	
221	11	1322	(d)(2)(C)					3/6	?				
222	11	1324	(b)		20/45								
223	11	1325	(a)(9)		9/10			1					
224	11	1325	(b)(4)(A)(i)					3					
225	11	1325	(b)(4)(A)(ii)					5					
226	11	1326	(a)(1)		30								
227	11	1326	(a)(4)		60								
228	11	1328	(f)(1)					4					
229	11	1328	(f)(2)					2					
230	11	1328	(g)(3)					1				Identical to section 1228(f) above	
231	11	1328	(h)		10								
232	11	1329	(c)					6					
233	11	1330	(a)		180								
234	11	749	(b)		6								
235	11	1308	(a)		1								

	A	B	C	D	E	F	G	H	I	J	K
	Title 18 of the Bankruptcy Code- Time Computation Rules										
1	Title	Section	Subsection	Nature of Deadline	Unit of Time	Days	Weeks	Months	Year(s)	Issues	Comments
2	18	1961	(5)	"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity	Hours				10		
3											
4											
5											
6											
7											
8											
9											
10											
11											
12											
13											
14											
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31											
32											
33											
34											
35											
36											

A	B	C	D	E	F	G	H	I	J	K
Title	Section	Subsection	Title 28 of the Bankruptcy Code- Time Computation Rules Nature of Deadline	Unit of Time Hours	Days	Weeks	Months	Year(s)	Issues	Comments
1										
2										
3										
4	28	152	(a)(1)		180					
5	28	152	(B)(2)(C)(i)(II)		180					
6	28	158	(b)(1)		90					
7	28	158	(c)(1)(B)		30					
8	28	158	(d)(2)(E)		60					
9	28	586	(d)(2)		90					
10	28	589a	(d)		120					

A	B	C	D	E		F	G	H	I	J	K
Title	Section	Subsection	Title 28 of the Bankruptcy Code- Time Computation Rules Nature of Deadline	Unit of Time	Days	Weeks	Months	Years	Issues	Comments	
				Hours							
11	28	604	(a)(3)	The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall, (3) Submit to the annual meeting of the Judicial Conference of the United States, at least two weeks prior thereto, a report of the activities of the Administrative Office and the state of the business of the courts, together with the statistical data submitted to the chief judges of the circuits under paragraph (a)(2) of this section, and the Director's recommendations, which report, data and recommendations shall be public documents.		2					
12	28	657	(c)(1)	Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.	30						
13	28	1408	(1)	Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district.		180					
14	28	1930	(a)(6)	The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.						??- What if the last day of the calendar month is on Sunday or a holiday?	

BANKRUPTCY RULES - BACKWARD COUNTING TIME PERIODS

- 2002(a) "shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:"
- 2002(b) "shall give the debtor, the trustee, all creditors and indenture trustees at least 25 days' notice by mail of"
- 2002(q)(1) "shall forthwith give the debtor at least 20 days' notice by mail"
- 2006(c) "a meeting of which all creditors . . . had at least five days notice in writing"
- 2007(b)(1) "a meeting of which all creditors . . . had at least five days notice in writing"
- 2015.1(a) "a patient care ombudsman, at least 10 days before making a report . . . , shall give notice that the report will be made to the court."
- 2015.2 "unless the trustee gives at least 10 days' notice of the transfer to the patient care ombudsman"
- 2015.3(b) "The first report required by this rule shall be filed no later than five days before the first date set for the meeting of creditors"
- 2015.3(e) "No later than 20 days before filing the first report . . . , the trustee . . . shall send notice"
- 3015(g) "The clerk . . . shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections"
- 3017(a) "the court shall hold a hearing on at least 25 days' notice to the debtor, creditors, equity security holders and other parties in interest"
- 3017(f)(1) "the court shall consider procedures for providing the entity with: (1) at least 25 days' notice of the time fixed for filing objections"
- 3019(b) "The clerk . . . shall give the debtor, the trustee, and all creditors not less than 20 days' notice by mail of the time fixed to file objections"
- 4002(b)(4) "If a creditor, at least 15 days before the first date set for the meeting of creditors under § 341, requests a copy of the debtor's tax return . . . , the debtor, at least 7 days before the
- 4004(a) "At least 25 days notice of the time so fixed shall be given to the United States trustee and all creditors"
- 6004(b) "an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action"
- 6004(g)(2) "no later than 5 days before the hearing on the motion under § 363(b)(1)(B), the United States trustee shall file a notice of the appointment"
- 9006(d) "A written motion . . . and notice of any hearing shall be served not later than five days before the time specified for such hearing" – "opposing affidavits may be served not later than one day before the hearing"

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 27-28, 2008
St. Michaels, MD

Draft Minutes

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Kenneth J. Meyers
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, reporter
Professor S. Elizabeth Gibson, assistant reporter
District Judge Thomas S. Zilly, former member
Bankruptcy Judge Eric Frank, former member
Bankruptcy Judge Christopher M. Klein, former member
Bankruptcy Judge Paul Mannes, former member
Bankruptcy Judge Mark B. McFeeley, former member
Professor Alan Resnick, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
James Ishida, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office

Stephen “Scott” Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following members were unable to attend:

District Judge David H. Coar
District Judge Irene M. Keeley

The following summary of matters discussed at the meeting is written in the order of meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, *other than materials distributed at the meeting after the agenda was published*, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

INTRODUCTORY MATTERS

The Chair welcomed the members, advisers, staff, and guests, including several former members and former chairs, to the meeting. She introduced Professor Elizabeth Gibson as the Committee’s new Assistant Reporter, and the members and guests each introduced themselves.

1. *Approval of Minutes of Jackson Hole meeting of September 6-7, 2007.*

The Chair asked for a motion to approve the minutes of the Jackson Hole meeting held September 6-7, 2007. **A motion to approve the minutes passed without opposition.**

2. *Oral reports on meetings of other Rules Committees.*

(A) January 2008 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

The Chair said the Standing Committee accepted this Committee’s recommendations from the Jackson Hole meeting.

(B) November 2007 meeting of the Advisory Committee on Appellate Rules Committee.

The Chair said that the Appellate Rules Committee continues to consider adopting a rule to deal with indicative rulings. She said that proposed Federal Rule of Appellate Procedure 12.1 would provide a mechanism for discretionary remand by the appellate court upon receiving notice that the district court would be inclined to grant a motion to vacate, but for the filing of the appeal.

(C) January 2008 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Conti said that the Bankruptcy Committee reviewed the current fee structure in consideration of possible increases to enhance revenue. She said that although no increase was currently contemplated, a possible source for additional fees in the future was a fee to process claims transfers in bankruptcies of publicly traded companies or companies with assets over \$50,000,000.

Judge Conti said one of the major endeavors of the Bankruptcy Committee over the next five years will be long range planning. She said the Bankruptcy Committee continued to recommend the FEGLI fix as one of its highest priorities, and that the case weight study and biennial judgeship survey are coming this year.

With respect to the EOUST's request for mandatory data-enabling of the existing Official Forms, Judge Conti said that the Bankruptcy Committee had recommended going forward as soon as possible with enhancements to the DXTR system as a method of providing many of the data elements requested by the Executive Office for United States Trustees.

The Chair elaborated on how the DXTR system works, and said this Committee maintains great interest in the Bankruptcy Committee's data-enabled forms decision because it implicates this Committee's Forms Modernization project. She noted that in considering the data-enabled forms request, the Bankruptcy Committee expressed support for the Forms Modernization Project as a forum for looking at future technology.

(D) November 2007 meeting of Advisory Committee on Civil Rules.

Judge Wedoff reviewed two major issues considered by the Civil Rules Committee: the report of the Discovery Subcommittee on expert witnesses, and further consideration of Rule 56.

He said that with respect to expert witnesses, four separate issues were discussed. The first issue was what should be done with experts, such as treating physicians, who are not required to provide reports. The Subcommittee recommended that the only disclosure required be by the attorney for the party tendering the expert. The second and third issues were whether disclosure of draft reports, and attorney communications about such reports, should be required. On these issues, the Subcommittee recommended disclosure only upon a showing that would require disclosure of attorney work product. Finally, Judge Wedoff said that the Subcommittee identified a problem with work papers. The Subcommittee did not have a good way to distinguish between draft reports that don't need to be disclosed, and work papers that might need to be disclosed. Judge Wedoff said there was considerable discussion by the full Civil Rules Committee and that the expert witness issues were given back to the Discovery Subcommittee for further consideration.

Judge Wedoff recapped that at its April 2007, meeting, the Civil Rules Committee recommended publishing substantial changes to Rule 56, but because of the volume of interest in

the matter, the Standing Committee deferred consideration of the proposal for a year. This gave the Civil Rules Committee the opportunity to reconsider its proposed changes at its November meeting at which time it recommended a number of small changes to its original proposal. Judge Wedoff said the proposal would be discussed again at the Civil Rules Committee's upcoming meeting and he expected a recommendation would be made that rule be published for comment in the fall.

Judge Swain elaborated that the Rule 56 proposal sets a presumptive briefing structure for summary judgment motions, which Judge Wedoff had previously noted could be unworkable in bankruptcy cases. However, changes in the proposal since the last meeting would allow the court to alter the presumptive structure by order.

(E) November 2007 meeting of Advisory Committee on Evidence.

Judge Meyers reported that the Evidence Committee is considering restyling the rules.

(F) Bankruptcy CM/ECF Working Group.

Judge Perris said that the item of greatest interest to this Committee was that the CM/ECF Working Group was looking at how the record for an appeal gets assembled. She said that an approach under consideration would be to simply extract the record directly from the originating court's docket. She said that depending on how the proposal developed, changes in rules (for example, the number of copies of papers required) may be needed.

(G) Sealing Subcommittee.

The Assistant Reporter said that the Sealing Committee was formed to consider when it is appropriate to seal all or part of the court record. She said that at its January meeting, the Sealing Committee addressed the scope of its work, and considered whether (1) it should just look at issues related to sealing an entire case file; or (2), in addition, look at sealing particular filings in the case; or (3), also look at sealing things that are not filed (such as discovery). Ultimately, the Sealing Committee decided to limit its review to the entire case issue. The Assistant Reporter said that the Federal Judicial Center will do an empirical study and report back at the next meeting about how often the issue occurs.

(H) Time Computation Project.

Judge Wedoff said that the Standing Committee's Time Computation Subcommittee considered the comments to all the time computation amendments and that it continued to recommend the amendments as proposed. He said that the Time Computation Subcommittee would also recommend statutory amendments to Congress to conform statutory time periods to the proposed rules amendments. He said that two proposals had generated significant discussion: (1), a proposal to amend the committee notes to specifically address conflicts with local rules; and (2), a proposal to exempt state holidays from the usual counting rule that applies to holidays and weekends in backward-looking time periods. Judge Wedoff said the Subcommittee considered but ultimately rejected both proposals.

3. *Request that Subcommittees Classify Recommendations.*

The Chair asked that each subcommittee classify any recommended changes in the rules and forms as either for immediate action or to hold until a package of amendments is ready.

Subcommittee Reports and Other Action Items

4. *Report by the Subcommittee on Consumer Issues*

- (A) Comments on published rules and forms amendments, including Rules 4008 and 1017.1 and Exhibit D to Official Form 1, and recommended actions.

Judge Wedoff reminded the Committee of the substance of proposed Rule 1017.1, and explained the proposed amendment to Exhibit D of Form 1. Rule 1017.1, he said, would “deem satisfactory” the debtor’s certification of exigent circumstances warranting a postponement of the obligation to obtain a credit counseling briefing so long as no action was taken by the court or a party in interest within 14 days after commencement. The debtor’s certification would be made in Exhibit D of Form 1.

Judge Wedoff said that after considering the comments, the Consumer Subcommittee recommended that proposed Bankruptcy Rule 1017.1 be withdrawn. He said that there were a number of comments that illustrated problems with the rule as published, but that the primary reason for withdrawal is that the subcommittee members no longer thought the rule was necessary. According to the comments, and the experience of the bankruptcy judges on the Subcommittee, the harm the statute was designed to prevent rarely, if ever, comes up. Judge Wedoff explained that to take advantage of the exigent circumstances exception under 11 U.S.C. § 109(h)(3), the debtor must truthfully certify that he or she sought credit counseling during the 5 days before filing, but was unable to obtain it. Because of the existence of Internet and phone providers nationally, however, the Consumer Subcommittee concluded that this situation was mostly theoretical and almost never occurs.

Mr. Rao suggested that the issue might come up if the debtor wanted an “in person” counseling session, and he pointed out it was possible for Internet and phone service to be unavailable for extended periods of time, such as in a natural disaster. He nevertheless supported withdrawing the rule because he thought the situation was sufficiently rare that a rule was unnecessary. Several members thought that incarcerated debtors, especially in joint cases, might present facts for exigent circumstances, but other members said such cases more often present statutory access problems that no deadline extension can solve. After additional discussion, Judge Wedoff moved to withdraw Rule 1017.1, **and the motion carried without opposition.**

Judge Wedoff said that in light of its recommendation to withdraw Rule 1017.1, the Subcommittee also recommended removing the reference to the rule in option 3 of Exhibit D. He then moved that Exhibit D as set forth in the agenda materials be approved with a re-ordering

of the clauses in the last sentence as follows: “Your case may also be dismissed if the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing.” Another member suggested adding the word “to” after “warns” in the penultimate sentence of the committee note. **The motion to recommend Exhibit D and its committee note with the suggested changes for final adoption, with an anticipated December 1, 2008, effective date, carried without opposition.**

Judge Wedoff said that no negative comments were received concerning the proposed amendment to Rule 4008(a) that would require the use of an official form reaffirmation agreement coversheet. He moved that the amendment be recommended for final approval, with a December 1, 2009 effective date. **The motion carried without opposition.**

- (B) Rule 2016 issues relating to the delivery and filing of petition preparer declarations pursuant to 11 U.S.C. §110(h)(2).

Judge Wedoff referred to the Reporter’s memo at pages 29-32 of the agenda materials and the proposed changes to Rule 2016 at page 31. He said that last September, the Subcommittee recommended a simple change correcting a reference in the rule from 11 U.S.C. §110(h)(1) to § 110(h)(2). The change was needed because § 110(h)(1) was re-designated as §110(h)(2) by the 2005 amendments to the Bankruptcy Code. Upon further review, however, it became apparent that the fix would be more complicated because the 2005 amendments also required that the petition preparer’s declaration be filed with the petition (rather than within 10 days of filing, as had been the case before the 2005 amendments). The Subcommittee’s solution was to require the petition preparer to deliver the declaration to the debtor before the petition was filed, so that the debtor could file the declaration along with the petition. After a short discussion, **a motion to recommend approval of the proposed change to 2016 as final without publication as a technical change carried without objection.** A December 1, 2009 effective date is anticipated.

- (C) Proposed new Rule 5009(b).

Judge Wedoff said that at its last meeting, the Advisory Committee approved an amendment to Rule 5009, adding a new subdivision (b) that requires the clerk to give notice to the debtor that the case will be closed without entry of a discharge unless the debtor timely files the statement required by Rule 1007(b)(7). He said the Subcommittee was simply seeking confirmation of that decision and that it recommended forwarding the amendment to the Standing Committee at this time. The Chair added that the recommendation was held back from the Standing Committee pending the resolution of issues concerning the package of cross border changes to several rules, including Rule 5009. **Judge Wedoff’s motion to forward proposed new subdivision (b) of Rule 5009 to the Standing Committee for publication was seconded and approved without opposition. Further, a motion to remove the last the words of the committee note -- “under § 350” -- carried without opposition.** A December 1, 2010, effective date is anticipated.

- (D) Status of consideration of possible amendment of the rules to establish a procedure to govern “automatic dismissals” under § 521(i) of the Code.

Judge Wedoff referred the Advisory Committee to the Reporter's memo at page 36-39, and he said that since there had been little case law development in this area that the Subcommittee recommended no rule amendment at this time. He said the Subcommittee would continue to monitor developments, and would report back at the next committee meeting.

5. *Report by the Subcommittee on Technology and Cross Border Insolvency.*

- (A) (1) Amendment of Rule 1018 to clarify the scope of provisions and applicability of Rule 7065 to actions for injunctive relief under §§ 1519(e) and 1521(e).

The Reporter referred the Committee to his memo at pages 58-63 of the agenda materials. He said as an initial matter, the Subcommittee considered but rejected a suggestion that Rule 1018 be amended and limited to involuntary cases and that a new Rule 1018.1 be proposed that would apply only in chapter 15 cases. The Subcommittee next considered the need to amend Rule 1018 to clarify that the rule applies to matters relating directly to contests over involuntary petitions and petitions filed under chapter 15 and not to other matters relating to the contested petitions. He said the rule had been interpreted to reach other matters, and the Subcommittee concluded that the rule should be more limited in its scope, and that it recommended publishing the rule as set out pages 59-60 of the agenda materials. **After discussing the matter, the Committee agreed with the Subcommittee and recommended publishing the proposed changes to Rule 1018. A December 1, 2010, effective date is anticipated.**

- (2) Possible amendments of Rules 1014 and 1015 to resolve a potential problem that can arise when two or more cases are pending simultaneously.

The Reporter explained that the proposed amendments to Rules 1014 and 1015 would include petitions for recognition of a foreign proceeding in the procedures for consolidation and joint administration, or for determining which case should go forward, when multiple petitions concerning the same debtor are filed. **A motion to approve a recommendation to publish the proposed amendments as set out at pages 61-63 of the agenda materials carried without opposition. A December 1, 2010, effective date is anticipated.**

- (B) Approval of transmission of the chapter 15-related amendments package (amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012) to the Standing Committee with a request that they be published for comment.

The Reporter said that the Committee previously approved several chapter 15-related rule changes and that the Subcommittee on Technology and Cross Border Insolvency recommends publishing the changes (amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012) for comment in August 2008. He briefly described the changes, which were set out in the agenda materials at pages 64-69. He said Rule 1004.2 is a new rule that requires an identification of the debtor's center of main interests on the petition and establishes a procedure for challenging that identification. Rule 5009(c) requires the foreign representative to file a final

report in a chapter 15 case and sets out the scope of that report. New Rule 5012 governs agreements for the coordination of the chapter 15 case and the foreign proceeding. Finally, Rule 9001 is amended to reflect the addition to the Bankruptcy Code of § 1502.

Members suggested a several stylistic changes that the Reporter incorporated into a handout distributed on Friday. With respect to the change to Rule 5009(c), members discussed who should receive the final report, and who should merely receive notice of the report, and how the clerk would know when all requirements had been met so that the case could be closed. Members agreed that the closing report should be transmitted to the U.S. trustee, that notice of the report should be transmitted to parties in interest, and that the filing of a certificate of service that notice had been sent would trigger case closing. Because there were several wording issues with Rule 5009(c), however, a member suggested that drafting changes be left to the Style Subcommittee and that the rule be redistributed to the Committee for final approval. **A motion to recommend publishing Rules 1004.2, 5009(c), 5012, and 9001 carried without opposition, with the understanding that changes to Rule 5009(c) would be made by the Style Subcommittee and sent back to the Committee for final approval. The Committee approved the final version of 5009(c) by email vote, after the meeting.** A December 1, 2010, effective date is anticipated.

6. *Report of Subcommittee on Privacy, Public Access, and Appeals.*

- (A) (1) Comments on the published separate document amendments to Rules 7052, 7058, and 9021 and recommended actions.

The Reporter said that only one comment was received concerning the separate document amendments to Rules 7052, 7058, and 9021: Judge Brandt's suggestion that "shall be read as a reference to" could be replaced by "means." The Reporter said that the Subcommittee recommended the lengthier published version because it was established historically from Rule 9021. One member suggested adding a discussion in the committee notes explaining that the separate document requirement still applied in adversary proceedings, but no change was made. After additional discussion, **a motion approving all three rules as published for transmission to the Standing Committee with a recommendation for final approval carried without objection.** A December 1, 2009, effective date is anticipated.

- (2) Comments on the published time computation amendments to Rules 8002, et al., and recommended actions.

The Reporter said that there had been considerable comment from the bench and bar concerning the proposed change of the appeal time period in Rule 8002 from 10 to 14, or possibly 30 days. Comments were received not only from individual bankruptcy judges, clerks and attorneys, but several prominent organizations, including the National Bankruptcy Conference, the American Bar Association, the American Bankruptcy Institute, the Commercial Law League of America, and many state bar associations and sections of state bar associations. A summary of the comments received on the proposed change to Rule 8002 can be found in the agenda materials at pages 72-89.

The Reporter said although there was some support for going to 30 days, most of the comments advocated for either 10 or 14 days. In general, those favoring 10 days were attorneys, and those favoring 14 days (or more) were clerks and judges, although there was substantial overlap.

The Reporter said the primary argument for keeping the appeal period at 10 days was the policy that appeals in bankruptcy should move quickly to facilitate the debtor's reorganization. Another argument for 10 days was that bankruptcy practitioners are used to the existing deadline, and don't see the need for a change.

The Reporter said the primary argument in favor of 14 days was to make the time period consistent the time amendment changes to all other rules (i.e. periods less than 30 days should be multiples of seven days). After considering the arguments for each side, the Subcommittee continued to recommend changing the period to 14 days on the ground that the time increase was not very long, because it would help to mitigate the difficulty government agencies and other complex institutions often face in ensuring attention at the appropriate levels to the appealable ruling within the time limit, and because having an exception to the "multiples of seven" rule would be a trap to the occasional bankruptcy practitioner.

Professor Resnick and several members reiterated the arguments in favor of keeping the appeal period at 10 days, emphasizing the number of attorney organizations that came out against a longer period and noting in particular that increasing the appeal deadline extends uncertainty in situations where no appeal will be taken. Other members, including attorney members, argued that the existing 10-day deadline actually increases uncertainty, because it is so short that it encourages unnecessary protective notices of appeal. **After extended discussion the Committee approved a motion to forward Rule 8002 to the Standing Committee for final approval as published, with an appeal period of 14 days, by a vote of 10-3.** A December 1, 2009, effective date is anticipated.

- (3) Comments on the published time computation amendments to Rule 9006 and recommended actions. *[The Committee's post-meeting approval by email of the published time amendment changes to bankruptcy rules other than Rules 8002 and 9006(a), is reported at the end of this subsection.]*

The Reporter said that there were a substantial number of comments regarding the amendments to Rule 9006(a), most of which have been considered by the Standing Committee's Time Computation Subcommittee. He said that many of the comments overlapped with the related proposed amendment to Rule 8002(a) (discussed above). A summary of the comments directly generally at Rule 9006(a) was included in the March 3, 2008 memorandum at pages 90-123 of the agenda materials.

The Reporter said that said that one non-controversial amendment to Rule 9006(a) was to fix an incorrect cross-reference in subdivision (a)(3) from a reference to Rule 6(a)(1) to 9006(a)(1), and that he recommended that such a change be made.

As to other changes, the Reporter said that Time Computation Subcommittee considered adding changes to the Committee Note to further address potential conflicts with local rules because of the adoption of a “days are days” computation method. He noted that the national rules supersede local rules, but that several comments expressed concern that some local rules may not be changed, and the result would be the significant shortening of periods under those rules by the inclusion of intermediate weekends and holidays under the new computation system. He said that Time Computation Subcommittee considered the matter and concluded that no special protections should be provided for local rules provisions. If certain time limits in the local rules become too short, those rules will need to be amended in a manner consistent with the national rule. He said that the Time Computation Subcommittee did consider adding a more explicit statement regarding the impact of the new system on local rules to the Committee Note, but that it ultimately made no change.

The Reporter said a number of comments, including one from former reporter Professor Alan Resnick, recommended exempting short time periods from the “days are days” computation method. He said that the concern was that -- both with the local rule issue, but especially with respect to short statutory time periods, (i.e., seven days or less) -- changing to a system that counts weekends and holidays would effectively make such periods shorter than they were when originally implemented.

The Reporter said that rather than exempting statutory time periods from the “days are days” approach, the Standing Committee and the Time Computation Subcommittee were working with congressional staff to change short time periods to seven-day multiples. He said that the Committee would later consider, at Agenda Item 6(B), a proposed recommendation that Congress change several existing bankruptcy related five-day statutory deadlines to seven days so that adoption of proposed 9006(a) does not result in a *de facto* shortening of those deadlines.

The Chair asked Judge Rosenthal, chair of the Standing Committee, to report on the current status of the Time Computation Subcommittee’s request to amend short deadlines. Judge Rosenthal said that congressional staff has been very cooperative so far, and that they were working to ensure that recommended statutory time period changes and the rule changes occur seamlessly. She said that they were no guarantees, but her sense was that this request was not controversial and that Congress would enact the requested conforming statutory time amendments effective December 1, 2009, the date Rule 9006(a) is scheduled to go into effect.

Professor Resnick spoke in favor of exempting deadlines of less than seven days from the “days are days” computation method. He said that even if the Standing Committee successfully coordinated with Congress to get the statutory deadlines listed in Agenda Item 6(B) changed, he worried that there would be conflict between the effective dates of the statutory changes and 9006(a), that some periods may have been missed in the recommendation at Agenda Item 6(B), that there might be possible UCC time periods that have been overlooked, and that there would be lots of short time periods proposed by future congresses.

Several members supported Professor Resnick’s suggestion to exempt periods of seven days or less from the “days are days” calculation method. Other members opposed such a two-tiered approach because they thought it would undermine the intent of the rule, which was to

eliminate the confusion inherent in having exceptions to the general counting rule and to encourage future drafters to use more uniform time periods.

Finally the Reporter elaborated on an issue mentioned earlier by Judge Wedoff. The Reporter said the Time Computation Subcommittee considered, but ultimately rejected, amending the general counting system for backward looking periods when the last day backwards fell on a state holiday. He explained that as published, when calculating backward looking time periods, (e.g., a filing is due at least 5 days prior to a scheduled hearing), the rule requires counting in the same direction to determine the applicable deadline. So, if the fifth day prior to a scheduled hearing is a Saturday, then Friday becomes the deadline for the filing of the document.

The Reporter said that when little known state holidays come into play, the backward looking time calculation could be a trap. For example, Illinois recognizes Casimir Pulaski Day as a state holiday. If the fifth day prior to a scheduled hearing fell on a Thursday that also happened to be Casimir Pulaski Day, then in a federal court in Illinois, the document would be due on Wednesday, irrespective of the fact that the court would most likely be open on the holiday. The Reporter added that little known state holidays do not create problems when the time computation is forward looking, because in those circumstances, the person subject to the deadline would wind up with an extra day.

The Reporter said that although some were in favor of a change to the rule that would address the “Casimir Pulaski Day” problem, that ultimately, the Time Computation Subcommittee did not think the problem was significant enough to create an exception to the general backward counting rule.

Judge Wedoff said that he was in favor of creating an exception, and suggested that if the Committee voted in favor of making the change to the bankruptcy version of the rule, that at least the Standing Committee would then have the benefit of knowing that one advisory committee thought the change was needed. Judge Rosenthal counseled against such a recommendation, however, unless it was based on the premise that bankruptcy was somehow different from other federal practice in this context.

After additional discussion, **a motion to approve the version of 9006(a), as set forth in the agenda materials beginning at page 94, correcting the typo at line 53 on page 96 (i.e., substituting Rule 9006(a) for 6(a)), for forwarding to the Standing Committee for approval as final, carried on a 7 to 5 vote. The Committee will, however, provide, and Judge Rosenthal indicated that the Standing Committee will consider in connection with its final determination on the backward-counted holidays issue, a list of the backward-counted deadlines in the Bankruptcy Code and Rules and other relevant statutes. A December 1, 2009 effective date is anticipated.**

Time Amendments to Rules other than Rules 8002 and 9006(a).

After the meeting, by email vote, the Committee approved the published time amendment changes to Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008,

2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8003, 8006, 8009, 8015, 8017, 9027, and 9033. A December 1, 2009 effective date is anticipated.

- (4) Possible amendments to Rules 7052, 9015, and 9023 to “decouple” the time provisions set by the three Bankruptcy Rules from Civil Rules 50, 52, and 59 in connection with proposed amendments to the Civil Rules extending 10-day periods after entry of judgment to 30 days.

The Reporter said that as part of the Time Computation Project, the Civil Rules Committee proposed changing the 10-day deadlines in Civil Rules 50, 52, and 59 to 30 days, rather than 14 days. Each of the rules applies to post judgment motions. The Reporter said that the proposed changes present a problem for this Committee, because those civil rules are incorporated into the Bankruptcy Rules 9015, 7052, and 9023. Given this Committee’s decision to limit the appeal deadline to 14 days (see Agenda Item 6(A)(2)), the Reporter said there was a need to “decouple” Bankruptcy Rules 9015, 7052, and 9023 from Civil Rules 50, 52, and 59.

The Reporter said the memo at pages 124-131 contained two stylistic versions to decouple the civil rules: a “Full Text” incorporation, which uses the language from the relevant civil rule but uses 14 days instead of 30 days; and a “Streamlined Option,” which generally takes the approach that the relevant civil rule applies in bankruptcy cases, but includes language that requires filing the relevant motion within 14 days rather than 30 days. After considering the two approaches, **the Committee recommended approval, as a technical amendment without need for publishing, the streamlined versions of Rules 7052, 9015, and 9023 set out at pages 129-131 of the agenda materials, with the following changes: all instances of “must” were changed to “shall” and the title of Rule 9023 was changed to conform to restyled Civil Rule 59, “New Trial; Altering or Amending a Judgment.”** A December 1, 2009 effective date is anticipated.

- (B) Recommendation in response to request from the Standing Committee’s Time Computation Subcommittee for the Advisory Committee’s view on which, if any, bankruptcy-related short statutory deadlines should be amended to offset the change in time computation under Rule 9006(a), i.e., the inclusion of weekends and holidays in the computation of periods of less than 8 days.

The Reporter said that an ad hoc group of committee members convened to review statutory deadlines that could be affected by adoption of proposed Rule 9006(a). He said that although there were a lot of statutory deadlines, (he noted 235 deadlines in Title 11 alone), that only deadlines less than eight days would be affected by the proposed change to Rule 9006(a), as existing Rule 9006 only excludes weekends and holidays from computation of periods of less than 8 days. The Ad Hoc Group ultimately identified 16 deadlines that could be effectively shortened by the adoption of the new counting rule.

After reviewing the deadlines, the Ad Hoc Group decided not to recommend changing any of the four seven-day periods it identified, because increasing those periods would require going to the next multiple of seven, to 14 days. Although staying at seven days would

effectively shorten the deadline under the “days are days” approach by two days (instead of counting intervening weekends for a total of nine days, seven days would *really* be seven days) the Ad Hoc Group did not think it was appropriate to increase those deadlines to 14 days.

The Reporter said that Ad Hoc Group did recommend changing the five-day periods to seven days, because under proposed Rule 9006(a), the change would bring the statutes into conformity with the seven-day approach, and would also effectively keep the time period the same as it is now. The Reporter said that all proposed changes were all set out at pages 135-136 of the agenda materials. **Motion to approve the Ad Hoc Committee’s recommendation that Congress change, effective December 1, 2009, the five-day deadlines in the following statutes to seven days carried without opposition: 11 U.S.C. §§ 109(h)(3)(A)(ii); 322(a); 332(a); 342(e)(2); 521(e)(3)(B); 521(i)(2); 704(b)(1)(B); 764(b), and 749(b).**

- (C) Recommendation in response to suggestion by the bankruptcy clerk of court in the Southern District of New York that Rule 9006(a)(1) be amended to exclude weekends and holidays in computing the five-day period set by section 704(b)(1)(B) of the Code for the clerk’s duty to provide creditors with a copy of the United States trustee’s statement concerning presumption of abuse.

The Reporter said 11 U.S.C. § 704(b)(1)(B) is one of the five-day deadlines included in the list of such deadlines at Agenda Item 6(B) that the Committee recommends Congress change to seven days. He said that changing the statutory period to seven days addresses the concern raised by the bankruptcy clerk for the Southern District of New York that proposed Rule 9006(a) would make it impractical to timely provide creditors a copy of the United States trustee’s statement concerning abuse under § 704(b)(1)(B). The Committee took no action.

- (D) Recommended response to John Shaffer’s suggestion to amend Rule 8006 to address the consequence of premature filing of an appellant’s designation of items to be included in the record and its statement of issues.

The Assistant Reporter said that the Subcommittee considered a comment from former member John Shaffer regarding a possible ambiguity in Rule 8006. In the case of an interlocutory appeal, Rule 8006 requires the appellant to file its designation of items to be included in the record and its statement of issues within 10 days from the entry of an order by the district court or the BAP granting leave to appeal. The rule then permits the appellee “10 days after the service of the appellant’s statement” to file and serve a designation of additional items to be included in the record.

Mr. Shaffer was concerned that if an appellant prematurely serves its designation and statement before leave to appeal has been granted, the literal wording of the rule starts the clock for the appellee’s designation, and could cause the appellee to expend time and money before learning whether an appeal will be allowed. Mr. Shaffer also thought that the appellant’s premature designation and statement might cause the bankruptcy clerk’s office to transmit the record to the appellate court, leading to the docketing of the appeal and the commencement of the briefing period – work which would be unnecessary if leave to appeal is not granted.

In discussing the matter, Subcommittee members questioned whether the issue should be first be considered by the Advisory Committee on Appellate Rules because of similar wording in Appellate Rule 10(b)(3)(B). The Assistant Reporter said that she talked with the reporter for the Advisory Committee on Appellate Rules who indicated that the issue does not seem to come up often in appellate practice, and that the Appellate Rules Committee was not likely to take any action.

The Assistant Reporter said that in an effort to determine whether the issue happens often bankruptcy practice, Jim Waldron polled his fellow bankruptcy clerks. There were 55 responses to the poll. Most bankruptcy clerks had never encountered the problem. Those who had encountered the problem said it was infrequent, and that they generally dealt with it by waiting for a ruling on the motion for leave to appeal before forwarding any papers to the appellate court. Several clerks said they also inform the appellee that the time for filing its designation would not begin to run until leave was granted.

The Assistant Reporter said that the Subcommittee fully discussed the issue by teleconference and, because the problem seems to occur infrequently and seems to be handled well when it does occur, unanimously decided not to recommend an amendment of Rule 8006 at this time. A member of the Subcommittee suggested, however, that the issue could be revisited in any future comprehensive review of the Part VIII rules that the Committee might authorize.

A motion to approve the Subcommittee’s recommendation that no change to Rule 8006 be made at this time carried without opposition, with the understanding that the issue could be addressed in the context of any comprehensive review of the appellate rules authorized by the Committee.

- (E) Recommendations in response to (1) erroneous cross-reference in proposed amendment to Rule 9006(a) and (2) suggestion by the bankruptcy clerk of court in the Middle District of North Carolina that the cross-reference to Civil Rule 5(b)(2)(C) and (D) in Rule 9006(f) be updated in light of the restyling and renumbering of the Civil Rule, in order to preserve 3-day grace period for both service by mail and by electronic means.

The Reporter directed the Committee’s attention to his memo at pages 162-163 of the agenda materials and said the memo described two technical changes needed for Rule 9006. The Chair noted that the Committee already approved the first technical change (correcting an erroneous cross-reference in the proposed amendment to Rule 9006(a)) at Agenda Item 6(A)(3). The Reporter said the second change, expanding the two cross-references in Rule 9006(f) to the subparagraphs of Civil Rule 5(b)(2) was needed because the civil rule had been restyled. **A motion approving the proposed change to 9006(f) without publishing as a technical change with a recommended effective date of December 1, 2009 carried without opposition.**

7. *Report of Subcommittee on Forms.*

- (A) Comments on published forms amendments, including Official Forms 8 and 27, and recommended action.

The Reporter said that the Forms Subcommittee considered several comments received after publishing Official Forms 8 and 27 in August 2007. Form 8 is the debtor's statement of intention in which debtors must set out their intentions as to personal property that is either subject to a lien or security interest, or that the debtor holds under a lease. Proposed new Official Form 27 is the cover sheet for reaffirmation agreements.

The Reporter said that the Subcommittee made a number of formatting and language changes to the published version of Form 8 in response to the comments, to streamline the form and make it easier to understand. Among other things, the Reporter said, the Subcommittee considered but rejected a suggestion that the form include a certificate of service, deleted the petition-preparer declaration on page 2 as unnecessarily duplicative of Form 19, (which must be filed with any paper prepared by a petition-preparer), and added a continuation page. **After discussing the changes, the Committee voted to recommend Form 8 for final approval as set out in the agenda materials at pages 173-175, with a recommended effective date of December 1, 2008. After the meeting, the Committee approved the committee note describing the changes to Form 8 by email vote.**

The Reporter and Judge Perris described a number of formatting and wording changes made to Form 27 as a result of the comments. Members made several additional suggestions, which were incorporated into a handout distributed on Friday, the second day of the meeting. **After additional discussion on Friday, the Committee voted to recommend Form 27 for final approval as set forth in the Friday handout, with minor additional changes. After the meeting, the Committee approved additional formatting changes and a committee note to Form 27 by email vote.**

- (B) Recommendation in response to suggestion by Bankruptcy Judge Joyce Bihary of the Northern District of Georgia for the issuance of forms for § 522(q) and/or Domestic Support Obligation certification before chapter 13 discharge.

The Assistant Reporter said that as a result of Judge Joyce Bihary's inquiry of whether the Committee was considering a national form to implement the domestic support obligation (DSO) certificate required by 11 U.S.C. § 1328(a), she surveyed the various local forms and rules that have been developed to address some aspect of the requirements for a chapter 13 debtor's eligibility for discharge. She said that approximately 40 districts have adopted such local forms, and, although wording varied, they fell into three basic categories: (1), a DSO-only type of form; (2), a comprehensive form that requires the debtor to certify all of the eligibility requirements of § 1328 have been satisfied; and (3), something in between, generally a DSO certification as well as a certification or statement regarding the inapplicability of § 522(q)(1).

After considering the various local forms that have been developed, the Subcommittee recommended that the Administrative Office adopt proposed Director's Form 283 as set out at pages 185-186 of the agenda materials. The Assistant Reporter said this was a "middle ground" version in that it addressed the DSO certification and the statement regarding the applicability of 522(q), but that it also required the debtor to supply current address information for the debtor and the debtor's employer.

Members discussed several aspects of the proposal, including: (i), whether to include the bracketed language a “Part II”; (ii) whether the statutory definition of a domestic support obligation should be incorporated into language on the first page of the form, or if including the statutory definition and reference in the “Information” section of the form was sufficient; and (iii), whether the form should be an official form rather than a director’s form. **After discussing the various suggestions, a majority of the Committee (eight members) voted in favor of recommending that the Administrative Office promulgate Form 283 as a Director’s form, as set forth in the agenda materials, including Part II (but without the brackets).** The four dissenting members favored adopting the form as a director’s form, but would have included the statutory definition for a DSO on page one, instead of, or in addition to the DSO definition and statutory reference on page two. No member supported making form an official form.

The Chair also asked the Administrative Office staff to review all the forms for consistent certifications.

- (C) Recommendation regarding possible amendment to Official Form 10 or Rule 3001 to restrict disclosure of sensitive information contained in the debtor’s medical records by advising creditors holding health care claims to submit only the minimally necessary information. The proposal was part of Comment 06-BK-016 submitted by Bankruptcy Judge Colleen Brown of the District of Vermont.

The Reporter reviewed Comment 06-BK-016, submitted by Bankruptcy Judge Colleen Brown (D. Vt.) which included a suggestion that the Committee consider amendments to the rules and forms to prevent the disclosure of personal information on proofs of claim and attached documentation provided to support claims. Judge Brown noted in particular that claims filed by health care providers frequently include information about services and medical tests that essentially disclose the nature of the illness or condition of the patient.

The Reporter said that Judge Brown’s suggestion was initially given to the Subcommittee on Privacy, Public Access and Appeals to consider possible rule changes. That Subcommittee, however, suggested instead that the Forms Subcommittee consider whether Official Form 10 or the instructions to that form could be amended to advise creditors to submit only minimally necessary information. The Advisory Committee concurred, and the matter was given to the Forms Subcommittee.

The Forms Subcommittee met by teleconference to consider the matter, and after considerable deliberation, recommended amending instructions 2 and 7 on the back of Form 10, and box 7 on the front of the form, as set forth in the materials at pages 188-189. **A motion made to recommend adopting the health care-related changes to Form 10, as proposed by the Forms Subcommittee, passed without opposition, except that the word “unnecessary” in the new material added to instruction 2 was deleted. The Committee also recommended that the change take effect as a technical change on December 1, 2008, without publication.**

- (D) Recommended changes to definitions on back of Official Form 10: proposed new definition of “creditor” (approved at September 2007 Jackson Hole meeting);

proposed revision of definition of “claim” to conform to the change in the definition of “creditor.”

Mr. Myers referred the Committee to the memo at pages 194-195 of the materials and explained that, at the Jackson Hole meeting, the Committee approved revising the definition of “creditor” on the back of Form 10 to more closely follow the statutory definition as follows:

Creditor

A creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. § 101(10).

Mr. Myers said that, although Committee approved the proposed revision at the Jackson Hole meeting, it decided not to forward the recommendation to the Standing Committee until other changes to the form were needed. The Committee had also asked the Forms Subcommittee to propose a similar change for the related definition of “Claim” on the back of Form 10. Mr. Myers said that the Subcommittee discussed the matter and that it recommends that the definition of “Claim” set forth below. He said the Subcommittee also proposes that both the “creditor” and “claim” definitions go forward to the Standing Committee along with the health care-related changes discussed at Agenda Item 7(C):

Claim

A claim is a creditor's right to receive payment on a debt owed by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. §101(5). A claim may be secured or unsecured.

The Committee approved a motion to recommend revising the definitions of “creditor” and “claim” on the back of Form 10, and to recommend that the revisions be made effective December 1, 2008 as a technical change without publication along with the health care-related changes to the form discussed at Agenda Item 7(C).

- (E) Recommended response to suggestion by the chief deputy clerk of the bankruptcy court for the District of New Mexico that the debtor’s phone number be deleted from Official Form 9F, the meeting of creditors notice for chapter 11 corporate/partnership debtors.

The Reporter said that among several amendments to most versions of Official Form 9 that became effective on December 1, 2007, was the deletion of the language that required debtors to state their telephone numbers. He said that the deletion was consistent with the Judicial Conference privacy policy, and was approved by the Advisory Committee. In the case of Official Form 9F (“Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines in cases filed under chapter 11 by a corporation or a partnership”), however, the deletion was inadvertently overlooked. The Reporter said that the Subcommittee recommends that Official Form 9F be revised to delete the request for the debtor’s telephone number. **The Committee approved a motion to recommend deletion of the request for the**

debtor’s telephone number on Official Form 9F as a technical change not requiring publication, with a recommended December 1, 2008, effective date.

- (F) Recommendation regarding possible revision of the statement on filing deadlines at the bottom of Official Form 23 in light of comment from the bankruptcy court for the Southern District of New York on the application of the debtor education requirement to certain individual debtors in chapter 11 cases.

Mr. Myers said that Mark Diamond, an attorney and the operations manager of the bankruptcy court in the Southern District of New York, reported an inconsistency with the “Filing Deadlines” note at the bottom of Official Form 23. The form, entitled Debtor’s Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management, was amended on December 1, 2007.

Mr. Myers explained that the pending amendment to Rule 1007(c) that will go into effect on December 1, 2008, includes a deadline for filing the certificate in a chapter 11 case in which the debtor requests a hardship discharge under § 1141(d)(5)(B) of the Code. The note at the bottom of Form 23, however, does not include the same deadline.

Although an individual receiving a hardship discharge in chapter 11 would be rare, to avoid confusion, the Forms Subcommittee recommended changing the footnote to track the language in the pending rule. The suggested fix conforms to the language of pending Rule 1007(c) by adding a reference to § 1141(d)(5)(B) and removing the words “entry of.” As revised, the note would read:

Filing Deadlines: In a chapter 7 case, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for ~~entry of~~ a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

After discussion, the Committee approved the change to Form 23 as set forth above, and recommended that it go into effect without publication on December 1, 2008 as a conforming change, the same time as the proposed amendment to Rule 1007(c).

- (G) Judicial Conference approval of amendments to Official Forms 1, 22A, 22B, and 22C. (Information item.)

Mr. Myers referred to the Committee to the agenda materials at pages 203 and 204 for a description of changes to Form 1 and Forms 22A and 22C, which went into effect on January 1, 2008, after approval by the Committee, the Standing Committee and the Judicial Conference by email vote. Form 22B went into effect at the same time.

- (H) Amendments to Director’s Procedural Forms 200, 254, 255, and 256. (Information item.)

Mr. Wannamaker recapped changes (described at pages 205 and 206 of the agenda materials) to the Director's Procedural Forms 200, 254, 255, and 256 that became effective since the Committee's September 2007 meeting.

Discussion Items

8. *Status of the Bankruptcy Forms Modernization Project and its organizational meeting on January 31, 2007.*

Judge Perris reported that at its organizational meeting, the group divided its work among two subgroups. She said that one subgroup, the "Analytical" Subgroup, has begun to inventory the informational elements requested on the petition and schedules. The Analytical Subgroup has had several conference calls, and has already done its initial analysis of the petition and schedules. She said the next step will be to put the information into spreadsheets, categorizing it, filtering it and thinking about how to restate it. She said a primary focus of the Analytical Subgroup at this point is to identify overlapping information requests and eliminate redundancies.

Judge Perris reported that the other subgroup, the Technology Subgroup, has also had several conference calls since the January meeting, and that it is currently surveying available technologies for imputing, outputting and manipulating information currently collected on the forms. She said the Forms Modernization Project Group is also planning to make presentations at several upcoming FJC events and at the clerk operations forum as part of the effort to solicit input from the bankruptcy community.

9. *Planning for the future of the CM/ECF system.*

As an informational item, Judge Perris told the Committee that the Administrative Office is in the initial stages of forming a group to assess plans for the future of CM/ECF. She said that she would be acting as liaison from the Committee, and that she would report on the group's activity at the next Committee meeting.

10. *Suggestion by Bankruptcy Judge Laurel M. Isicoff of the Southern District of Florida to create a new Official Form to be used as a petition in chapter 15 cases.*

The Reporter said that the Hon. Laurel Myerson Isicoff (Bankr. S.D. Fla.) has suggested that a new form be developed, in place of Official Form 1, to commence a case under chapter 15 of the Bankruptcy Code. Judge Isicoff reported that recently, a trustee in an individual debtor bankruptcy case pending in the United Kingdom initiated a chapter 15 case in her court. The debtor in UK case had relocated to the United States, and the trustee intended to liquidate some of the debtor's jewelry he asserted was an asset of the estate in the UK case.

Judge Isicoff believes that the UK trustee's use of Official Form 1 to commence the chapter 15 case creates several problems. First, it creates the appearance of a "case." Judge Isicoff argues that this is inconsistent with § 1511 of the Code, which authorizes the foreign representative to initiate a bankruptcy case "upon recognition" of the foreign proceeding.

Judge Isicoff reported that the UK trustee initially filed a pleading called a “Petition for Recognition,” as required § 1515, but that the filing was rejected in the absence of a Form 1 Voluntary Petition to accompany the pleading. She suggests that since Official Form 1 merely contains a check box for chapter 15, it creates confusion about whether a “Petition for Recognition” pleading is needed.

Judge Isicoff believes that using Official Form 1 to file a chapter 15 case against an individual also creates new difficulties for the individual. In the case before Judge Isicoff, the debtor was unable to use a credit card because the credit reporting agencies reported the filing of a petition under the debtor’s name. This might not be justified if, for example, the credit card was issued after the UK filing. Judge Isicoff maintains that future problems could be avoided if a form other than Official Form 1 was used to initiate a chapter 15 case.

After a brief discussion, **the Chair referred the matter to the Subcommittee on Technology and Cross Border Insolvency to consider whether a new form should be created to commence chapter 15 proceeding, or whether existing Official Form 1 is (or could be if amended) sufficient, to address the matter.**

11. *Suggestion by Mr. Brunstad that Part VIII of the bankruptcy rules be rewritten to more closely follow the Federal Rules of Appellate Procedure.*

Mr. Brunstad said that, although Part VIII of the bankruptcy rules is based on the Federal Rules of Appellate Procedure (“FRAP”), it has become somewhat dated because it does not reflect the many amendments that have been made to FRAP over time. He suggested that many of the FRAP amendments would be beneficial in bankruptcy appeals and he proposed that a subcommittee review and rewrite the bankruptcy appellate rules. **The Chair referred the matter to the Subcommittee on Privacy, Public Access, and Appeals.**

12. *Memorandum by the Director of the Administrative Office pursuant to Rule 5003(c) authorizing clerks to keep their files and indices of judgments and orders in electronic form, using any automated means that the court determines will meet the needs of the users of those records and that the clerk’s office can support.*

As an information item, Mr. Wannamaker reviewed Director Duff’s January 16, 2008 memorandum authorizing clerks to keep their indices of civil judgments and orders in electronic form.

13. *Regulations proposed by the Executive Office for United States Trustees for final reports in chapter 7, chapter 12, and chapter 13 cases and approval of credit counseling agencies.*

The Assistant Reporter referred the Committee to the agenda materials at pages 213-233 for a description of the EOUST’s proposed regulations for final reports in chapter 7, 12, and 13 cases, and for approval of credit counseling agencies.

With respect to closing reports, the Assistant Reporter said that case trustees currently use hundreds of different closing forms throughout the United States, and EOUST's proposed closing reports (mandated by BAPCPA) would make the process uniform and facilitate closing. She also advised members that the comment period on the proposed forms ends April 4, 2008.

The Assistant Reporter also described the proposed regulations concerning approval of credit counseling agencies, which she said were also out for public comment until April 1, 2008.

On behalf of the EOUST, Mark Redmiles reiterated that the deadline for comments concerning the closing reports was April 4. He noted that the reports would be filed as "data-enabled" forms to facilitate the EOUST's ability to pull the information from the forms.

14. *Suggestion by the Loan Syndication and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019.*

The Assistant Reporter said that the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association (collectively the "LSTA") have proposed that Rule 2019 be repealed. She said that Rule 2019, titled "Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases," comes into play in chapter 9 and 11 cases with respect to entities and committees (other than committees appointed under § 1102 or § 1114) that represent more than one creditor or equity holder. She said the LSTA generally objects to detailed reporting requirements concerning the members of an ad hoc committee including details about how and when holder claims or equities were acquired and at what price, as well as information about the organizational structure of the ad hoc committee itself.

The Assistant Reporter said that in contrast to the LSTA, it was her understanding that other organizations, including the National Bankruptcy Conference, were considering whether to recommend that Rule 2019 be expanded to cover official committees or whether the rule should be otherwise amended. Several members indicated that other organizations that they are involved in might want to take a position on Rule 2019 elimination or expansion as well.

After additional discussion, LSTA's suggestion was tabled until the next meeting in anticipation of suggestions from other interested organizations. Members were encouraged to discuss the matter with other organizations they participate in. **The Chair asked the Assistant Reporter to provide a review of the case law on Rule 2019 for the next meeting.**

Information Items

15. *Comment circulated to Congress in February 2008 regarding the deadline set out in H.R. 3609 – mortgage foreclosure legislation – for filing a notice of fees charged pursuant to a chapter 13 debtor's home mortgage.*

The Chair gave a report about the status of legislation before Congress that would amend § 1322(c)(3) of the Bankruptcy Code to disallow certain fees on the debtor's home mortgage while case is pending unless certain notice is given. She said there was a problem in the way the

proposed legislation calculated the notice period, and that Administrative Office’s legislative affairs office has forwarded a proposed fix to congressional staff.

16. *Rules Docket.*

Mr. Wannamaker asked the members to review the Rules Docket and let him know if any changes were needed.

17. *New posting of list of suggested rules amendments on the Internet*

Mr. Ishida said that the Rules Support Office recently begun posting suggestions for changes to the bankruptcy rules and forms on the court’s public website at:

http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm.

He asked members to review the webpage and provide any suggestions. He said that he anticipated that the status of suggestions and official responses would be posted on the chart so that the public could easily learn what action had been taken. He said that he also anticipated that keeping historical suggestions and responses posted publicly would help refine future suggestions, as interested parties would have the benefit of easily learning Committee reaction to prior similar suggestions.

18. *Bull Pen:*

All of the proposed rules amendments in the *Bull Pen* were addressed in prior agenda items.

19. *Future Meetings.*

The Chair reminded the Committee that the next meeting was scheduled for October 2-3, 2008, at the Hotel Teatro in Denver, Colorado. **The Chair asked members to make suggestions for the spring 2009 meeting by email.**

20. *New business:*

- (A) Use of the term “family size” rather than “household size” in determining the National Standard deduction for food, clothing and other items on Line 19A of Official Form 22A.

Judge Wedoff reviewed his March 6 memo from the materials. He explained that in the last revisions to the means test forms, the Committee approved using “household” rather than “family” size in determining applicable median income to conform with the term used in 11 U.S.C. § 707(b)(7). He noted, however, unlike the Internal Revenue Manual, the means-test forms do not have an IRS dependency limitation built into the calculation of household size. Because there was no dependency limitation, he thought the forms could produce anomalous results in some instances (for example, a college age debtor living at home with his two parents

and asserting a household of “three”), and he suggested the Consumer Subcommittee review the matter. **The Chair agreed with the suggestion and referred the matter to the Consumer Subcommittee.**

(B) Suggested changes to Rule 6003.

The Reporter reviewed his memo, which sets out two issues that have been raised concerning Rule 6003: (1) Judge Robert Kressel’s query as to whether the time period should start from the “order for relief” instead of the “filing of the petition;” and (2) informal comments from BJAG members that Rule 6003 as written might prevent the debtor-in-possession from hiring counsel prior to the first 20 days of the case. As to Judge Kressel’s comment, because the purpose of the rule was simply to relieve some of the time pressures at the beginning of the case, no member thought it was necessary to tie the beginning of the period to the order for relief in involuntary cases.

With respect to the second issue, the Reporter said that when Rule 6003 was initially recommended, the expectation was that an application to employ counsel in chapter 11 would be filed on the first day of a chapter 11 case, that counsel would serve until employment was approved, and that approval would be effective from the date of the application or from commencement of the case, as the court determined.

The Committee discussed the matter and the general consensus was that the rule allows for employment of debtor-in-possession counsel from the beginning of a chapter 11 case. Members agreed with the Reporter that the rule only limits when the order approving employment can be entered, not when it is effective. Some members also pointed out that the rule has an exception “to avoid immediate an irreparable harm,” which seems to allow for immediate entry of the order if the court agrees with the argument that a debtor cannot file at all unless counsel first has an order approving employment in hand.

There was some agreement with the Reporter’s observation that a more explicit statement in the committee note that the rule is not intended to prevent counsel from acting on behalf of the debtor-in-possession before an employment order is entered might have been helpful. However, it is not possible to amend or add to a committee note without amending the rule. In the absence of a formal request or suggestion for a rule change or clarification from BJAG or another party in this respect, the Committee did not undertake to develop a statement on the issue.

The Committee voted to table the issue pending the BJAG’s determination as to whether it will request any Committee action. The Committee noted in this connection that, if the BJAG requested action or comment, the Committee’s response could be posted on the new area of the judiciary’s rulemaking website that provides links to written suggestions and responses to those suggestions.

21. *Adjourn*

The Chair again (see addendum below) thanked Judges Zilly, Klein, and McFeeley for their service to Committee over their terms, and she thanked the current members and the guests for their participation in a great meeting, and adjourned the meeting.

Addendum: Commemoration to Judges Zilly, Klein, and McFeeley at the “Zillybration”

The Chair asked that the minutes reflect some of the comments made at the committee dinner honoring the Committee’s three outgoing members, former chair of the Committee, Judge Thomas S. Zilly, former chair of the Subcommittee on Forms, Judge Christopher M. Klein, and former chair of the Subcommittee on Technology and Cross Border Insolvency, Mark B. McFeeley. In addition to the committee membership, assigned staff and committee liaisons, two former chairs (Judge Thomas Small, and Judge Paul Mannes), former reporter and committee member Professor Alan Resnick, and former member Judge Eric L. Frank attended the celebration.

Speakers at the Zillybration included Standing Committee Chair Judge Lee Rosenthal, Judge Thomas Small, reporter Professor Jeffrey Morris, former reporter and committee member Professor Alan Resnick, Judge Eugene Wedoff, Peter McCabe, James Wannamaker, Scott Myers, Patricia Ketchum and Committee Chair Judge Laura Taylor Swain.

The speakers shared many anecdotes about the three retiring members, and all praised the extraordinary accomplishments undertaken by the Committee over the past several years. Of particular note, Judge Zilly led, and Judges Klein and McFeeley played vital roles in, an intensive team effort by the Committee to draft and approve an extensive set of Interim Rules and Forms in the 180 days between the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) and the act's effective date on 10/17/05. Because the usual rules process takes at least three years, the Interim Rules were adopted by the courts as local rules.

Despite the expedited process and the ambiguity of many BAPCPA provisions, the Interim Rules have served the bankruptcy community well and required only limited fine tuning for adoption as permanent rules. The permanent rules were approved by the Supreme Court Congress a few days before the Committee meeting, and will take effect on 12/1/08 unless Congress acts to the contrary.

The following rules amendments (and new rules) were proposed during Judge Zilly’s term as chair:

Thirty-nine Interim Rules (for BAPCPA) proposed in 2005 were approved by the Committee on Rules of Practice and Procedure (the Standing Committee) in August 2005 and adopted by the courts as local rules, effective 10/17/05.

One Interim Rule was amended in 2006 in response to practice under BAPCPA.

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Nine rules amendments were proposed in 2005 and were published for comment in August 2005. Eight of the nine amendments will become effective on 12/1/07 unless Congress acts to the contrary.

Forty amendments proposed in 2006 were published for comment in August 2006. All 40 will be effective on 12/1/08 if approved by the Supreme Court and unless Congress acts to the contrary.

Thirty-nine amendments proposed in 2007 were published for comment in August 2007. Comments for these amendments were considered by the Advisory Committee in March 2008.

Four technical amendments were proposed in 2007 and approved by the Judicial Conference in September 2007. The technical amendments will be effective on 12/1/08 if approved by the Supreme Court and unless Congress acts to the contrary.

In addition, Judge Zilly shepherded 12 other rules amendments (proposed during Judge Small's tenure as chair) through the remainder of the rules process. Eight of the nine amendments published in August 2003 became effective on 12/1/05, and four amendments published in August 2004 (including two separate amendments to Rule 5005) became effective on 12/1/06.

The following form amendments were proposed during Judge Zilly's term as chair:

Nineteen amendments to the Official Forms (and new forms) were proposed on an expedited basis in 2005 in response to the enactment of BAPCPA. The amended forms were approved by the Judicial Conference and took effect on 10/17/05.

Three of the new Official Forms were amended by the Judicial Conference in October 2005.

Eight amendments to the Official Forms were proposed on an expedited basis in 2006 in response to practice under BAPCPA and comments on the 2005 amendments. The amended forms were approved by the Judicial Conference in September 2006 and took effect on 10/1/06.

Twenty-five forms amendments (including new forms) were published for comment in August 2006 (including the BAPCPA forms amendments). Fifteen of the forms became effective on 12/1/07 (including 2 forms which were combined), three became effective on 1/1/08, and six are scheduled to take effect on 12/1/08.

In addition, two technical forms amendments proposed during Judge Small's tenure became effective on 12/1/04.

Throughout the years of drafting and revising the forms and rules to implement the 2005 bankruptcy legislation, Judges Zilly, Klein and McFeeley remained cheerful (and sane) despite the long hours of meetings and conference calls, the often tedious process of proofreading hundreds of pages of documents, and countless discussions of how the committee should

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proceed. They were considerate of both the other committee members and the staff, and they steadfastly kept the “train” running on schedule. Their efforts are greatly appreciated and will be much missed.

The Committee presented each departing member with a certificate of appreciation. Judge Zilly was also presented with a unique leather bound volume of the Rules, Rule amendments, and Forms developed under his leadership.

Respectfully submitted,

Stephen “Scott” Myers



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
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Office of Judges Programs

April 29, 2008

**MEMORANDUM TO JUDGE ROSENTHAL, CHAIR, COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE**

SUBJECT: Survey of Chief District Judges and Chief Bankruptcy Judges on Standing Orders

In early 2007, the Standing Committee asked Professor Capra to prepare a preliminary report on standing or general orders in the district and bankruptcy courts. Professor Capra focused on the relationship between such orders to local rules and on the difficulties in locating such orders on particular topics. He presented a paper on the subject at the June 2007 committee meeting. The paper raised several questions that required information from the courts on their actual uses of standing and general orders. Professor Capra and staff developed a survey asking district judges and bankruptcy judges for information. The survey also sought the judges' advice on how best to identify matters that are best addressed in local rules and those that are appropriately addressed in standing orders.

The survey was sent to chief judges in all district and bankruptcy courts on February 11, 2008. Responses were submitted by 49 district courts and 37 bankruptcy courts. A copy of the survey is attached. The courts were asked to indicate whether they addressed each of 14 specific subject-matter areas by standing order, by local rule, or neither. The courts were also asked three general questions: (1) whether any national standard governing the contents of a standing or general order and a local rule should be in the form of a guideline or a mandatory rule; (2) whether local rules and orders should be posted in the same locations on each court's home page; and (3) whether standing orders should be listed, indexed, and searchable.

Responses to Questions on Whether Specific Subject Matters Were Addressed in Local Rules or Standing Orders

The courts were asked to indicate whether they addressed 14 specific subject matters in their local rules, standing orders, or neither. The subject matters ranged from

voir dire questioning to preparation of exhibits. Though there was a considerable degree of variation among the responses, two themes emerged. First, an overwhelming majority of judges reported that their court does not use standing orders to address the 14 listed subject matter areas. Second, a significant number of courts addressed about half of the specific subject matters in local rules. A description of the survey results and charts illustrating the results are attached.

Responses to the Three General Questions

The survey results showed that the courts agreed that: (1) a standard to distinguish what should be addressed in local rules as opposed to what should be addressed in standing or general orders should be in the form of a guideline that courts are encouraged to follow, not a rule that courts are required to follow (81%, 70 out of 86 respondents); (2) local rules and orders should be posted on the same locations on each court's Internet home page (87%, 74 out of 85 respondents); and (3) standing orders should be listed, indexed, and searchable to make orders on particular topics easier to locate (94%, 79 out of 84 respondents).

Next Steps

The survey results show that it would be helpful for courts to have guidelines on what subjects should be addressed in standing orders and what subjects should be addressed in local rules. In his earlier report, Professor Capra had outlined several standards that could be used to distinguish the contents of standing orders and local rules. The survey results are, to a large extent, consistent with Professor Capra's suggested standards.

Professor Capra has been asked to develop local-rules and standing-orders guidelines based on his earlier report and the survey results for the Committee's consideration at its January 2009 meeting. It is expected that once approved, the guidelines will be sent to the courts to inform them of the Committee's recommendations in an effort to provide greater uniformity in the courts' practices.

Attachments

ATTACHMENT

The following chart sets forth the percentage of respondents who indicated that their court does not use standing orders to address the specified subject matter. The chart states this percentage separately for district court respondents and for bankruptcy court respondents. The numbers in parentheses are the numbers from which each percentage was derived. The numbers in parentheses state in the numerator the number of courts responding that they do not use standing orders to address the particular topic, and in the denominator the total number of courts that responded to the survey as to that topic.

<u>Subject Matter</u>	<u>% of District Courts Not Using Standing Orders</u>	<u>% of Bankruptcy Courts Not Using Standing Orders</u>
Voir dire questioning	90% (45/50)	97% (29/30)
Transcription of audio recordings	86% (43/50)	91% (31/34)
Courtroom conduct	84% (43/51)	86% (31/36)
Use of juror notebooks	92% (45/49)	89% (25/28)
Time limits on opening/closing statement	92% (45/49)	100% (35/35)
Preparation of exhibits	88% (46/52)	100% (36/36)
Special pleading requirements	94% (46/49)	100% (34/34)
Sealing requirements	92% (46/50)	89% (32/36)
Filing pretrial motions	96% (47/49)	100% (36/36)
Pretrial conferences	94% (47/50)	100% (36/36)
Memoranda of law	96% (48/50)	100% (36/36)
Procedures for summary judgment	92% (46/50)	100% (35/35)
Electronic discovery protocols	86% (43/50)	97% (34/35)
Rules for non-court proceedings	96% (48/50)	84% (32/38)

The overwhelming majority of respondents rejected the use of standing orders to address any of the listed subject matter areas. Even for the subject matter area (“courtroom conduct”) where use of standing orders was reported to be most widespread, 84% of district courts and 86% of bankruptcy courts reported that they did not use standing orders. For the subject matter areas where use of standing orders was reported to

be least common – “filing pretrial motions” and “memoranda of law” – 96% of district courts and 100% of bankruptcy courts reported that they did not use standing orders.

The bankruptcy judge respondents, in general, were even less inclined to use standing orders than the district judge respondents. The 37 bankruptcy judge respondents reported that use of a standing order for one subject matter or another would be appropriate only a total of 23 times. The 49 district judge respondents said a total of 61 times that use of a standing order would be appropriate for one subject matter or another.

Possible confusion among respondents whether “standing order” included individual judge orders.

One of the survey responses noted that the questions failed to distinguish between “individual” judge standing orders and standing orders of the court as a whole. The potential confusion does not undermine the survey results. Indeed, the ambiguity could actually overstate, not understate, the already-small extent to which the respondents use standing orders of the court to address the 14 subject matter areas. This could be overstated because some or all of the few respondents who said they do use standing orders may not have meant standing orders of the court, but rather orders of individual judges.

Possible confusion among respondents whether “neither” included individual judge orders.

If there was any confusion whether “standing order” includes individual judge orders, then by the same token there may have been confusion about what is meant by “neither.” If a matter is addressed by individual judge orders, should the court respond that it addresses the matter by “standing order,” or by “neither?” It may be that respondents chose “neither” to report that their court uses individual judge orders to address a particular topic.

It is important to note, however, that any confusion about “neither” would not affect the survey results showing that most courts do not use standing orders of the court to address these topics. The confusion leaves it unclear how many respondents use individual judge orders, but it remains clear that no respondent uses standing orders of the court other than those respondents who checked “standing order” on the survey.

There were 4 subject matter areas which a substantial majority of respondents said should be addressed by “neither”: “voir dire questioning,” “transcription of audio recordings,” “use of juror notebooks,” and “time limits on opening or closing statement.” These do seem like the kinds of topics courts might consider best left to the idiosyncratic

preferences of individual judges in running their courtrooms, and thus best addressed by individual judge orders.

Use of Local Rules

The following chart sets forth the percentage of all respondents (both district court respondents and bankruptcy court respondents) who indicated that their court uses either “local rule” or “neither” to address the particular subject matter. The numbers in parentheses are the numbers from which each percentage was derived. The numbers in parentheses state in the numerator the number of courts responding that they use “local rule” or “neither” – as the case may be – to address the particular topic, and in the denominator the total number of courts that responded to the survey as to that topic.

<u>Subject Matter</u>	<u>% Using “Local Rule”</u>	<u>% Using “Neither”</u>
Procedures for summary judgment	78% (66/85)	18% (15/85)
Filing pretrial motions	78% (66/85)	20% (17/85)
Rules for non-court proceedings	77% (68/88)	14% (12/88)
Sealing requirements	76% (65/86)	15% (13/86)
Memoranda of law	76% (65/86)	22% (19/86)
Pretrial conferences	62% (53/86)	35% (30/86)
Preparation of exhibits	59% (52/88)	34% (30/88)
Special pleading requirements	49% (41/83)	47% (39/83)
Electronic discovery protocols	47% (40/85)	44% (37/85)
Courtroom conduct	41% (36/87)	44% (38/87)
Transcription of audio recordings	29% (24/84)	59% (50/84)
Voir dire questioning	25% (20/80)	67% (54/80)
Time limits on opening/closing statement	18% (15/84)	77% (65/84)
Use of juror notebooks	12% (9/77)	79% (61/77)

For 7 subject matter areas a significant majority of courts reported that they use local rules: “preparation of exhibits,” “sealing requirements,” “filing pretrial motions,” “pretrial conferences,” “memoranda of law,” “procedures for summary judgment,” and “rules for non-court proceedings.” For the remaining 4 subject matter areas a majority of courts reported that they use “neither:” “voir dire questioning,” “transcription of audio recordings,” “use of juror notebooks,” and “time limits on opening/closing statement.”

**Summary Survey Report
Standing and General Court Orders**

Responses:	
Bankruptcy	37
District	49
Other	3
Total	89

Subject Matter	Bankruptcy Courts Placed in...			District Courts Placed in...			Combined Total Placed in...		
	Standing Order	Local Rule	Neither	Standing Order	Local Rule	Neither	Standing Order	Local Rule	Neither
Voir dire questioning	1	4	25	5	16	29	6	20	54
Transcription of audio recordings	3	14	17	7	10	33	10	24	50
Courtroom conduct	5	13	18	8	23	20	13	36	38
Use of juror notebooks	3	4	21	4	5	40	7	9	61
Time limits on opening or closing statement	0	6	29	4	9	36	4	15	65
Preparation of exhibits	0	25	11	6	27	19	6	52	30
Special pleading requirements, e.g., for RICO cases	0	21	13	3	20	26	3	41	39
Sealing Requirements	4	25	7	4	40	6	8	65	13
Filing pretrial motions	0	27	9	2	39	8	2	66	17
Pretrial conferences	0	20	16	3	33	14	3	53	30
Memoranda of law	0	25	11	2	40	8	2	65	19
Procedures for summary judgment	0	29	6	4	37	9	4	66	15
Electronic discovery protocols	1	17	17	7	23	20	8	40	37
Rules for noncourt proceedings, e.g., arbitration, ADR attorney discipline	6	27	5	2	41	7	8	68	12

If a standard is issued to distinguish between what should be addressed in local rules as opposed to standing or general orders, should it be a guideline that courts are encouraged to follow or should it be a rule that courts are required to follow?

Rules	7	9	16
Guidelines	30	40	70

Should local rules and court orders, including all district- or division-wide standing orders and individual-judge orders, be posted in the same locations on each court's Internet home page?

Yes	32	42	74
No	4	7	11

Should standing orders be listed, indexed, and searchable to make orders on particular topics easier to locate?

Yes	36	43	79
No	0	5	5

*Magistrate Judge James Gates' response is included for the District of North Carolina Eastern. There was not a response from a District Judge from the District of North Carolina Eastern.

**Summary Survey Report
Standing and General Court Orders**

Responses from other courts

Subject Matter	Ct of Int'l Trade Placed in...			Ct of Appeals-4th Cir Placed in...			Ct of Appeals-Fed. Cir. Placed in...		
	Standing Order	Local Rule	Neither	Standing Order	Local Rule	Neither	Standing Order	Local Rule	Neither
	Voir dire questioning	-	-	-	0	1	0	-	-
Transcription of audio recordings	-	-	-	1	0	0	-	-	-
Courtroom conduct	-	-	-	0	1	0	-	-	-
Use of juror notebooks	-	-	-	1	0	0	-	-	-
Time limits on opening or closing statement	-	-	-	0	1	0	-	-	-
Preparation of exhibits	-	-	-	0	1	0	-	-	-
Special pleading requirements, e.g., for RICO cases	-	-	-	0	1	0	-	-	-
Sealing Requirements	-	-	-	0	1	0	-	-	-
Filing pretrial motions	-	-	-	0	1	0	-	-	-
Pretrial conferences	-	-	-	0	1	0	-	-	-
Memoranda of law	-	-	-	0	1	0	-	-	-
Procedures for summary judgment	-	-	-	0	1	0	-	-	-
Electronic discovery protocols	-	-	-	0	1	0	-	-	-
Rules for noncourt proceedings, e.g., arbitration, ADR attorney discipline	-	-	-	0	1	0	-	-	-

If a standard is issued to distinguish between what should be addressed in local rules as opposed to standing or

Rules	0	0	0
Guidelines	1	1	1

Should local rules and court orders, including all district- or division-wide standing orders and individual-judge

Yes	0	1	1
No	1	0	0

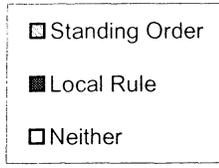
Should standing orders be listed, indexed, and searchable to make orders on particular topics easier to locate?

Yes	1	1	1
No	0	0	0

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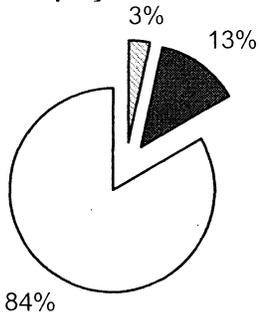
Jane A. Restani, Chief Judge, U.S. Court of International Trade
 Karen J. Williams, Chief Judge, Fourth Circuit Court of Appeals
 Paul R. Michel, Chief Judge, Federal Circuit Court of Appeals

Survey Results - Charts Standing and General Court Orders

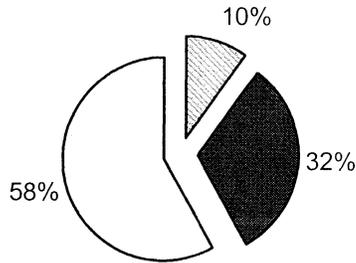


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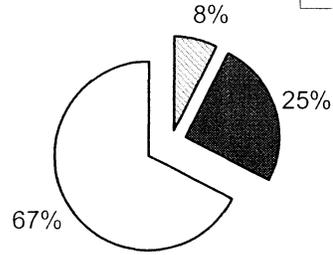
Bankruptcy



District

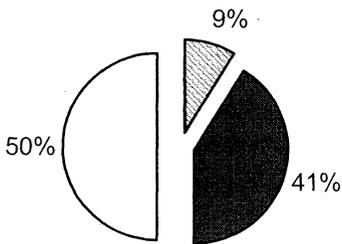


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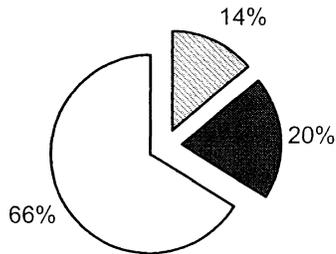


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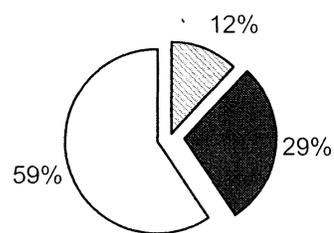
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District

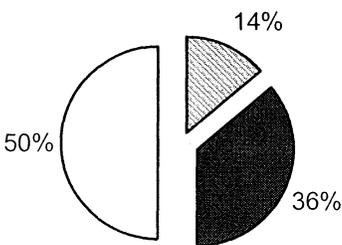


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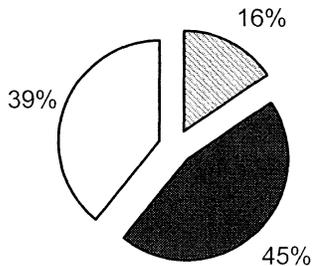


Courtroom conduct

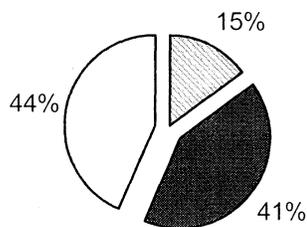
Bankruptcy



District

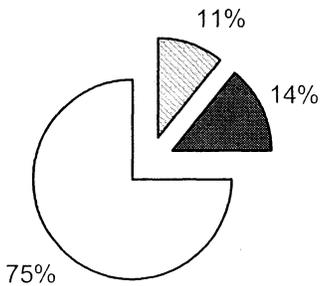


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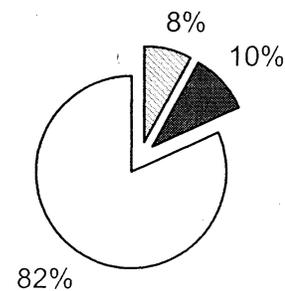


Use of juror notebooks

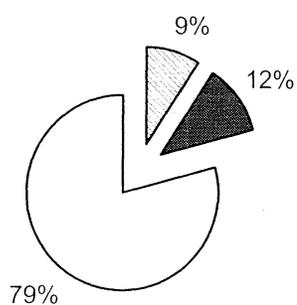
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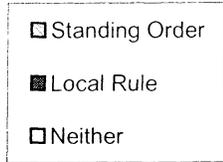
District



Total



Survey Results - Charts Standing and General Court Orders

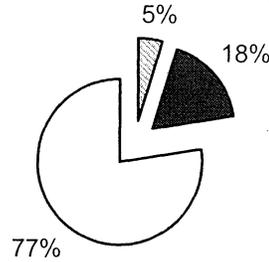
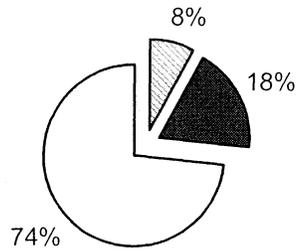
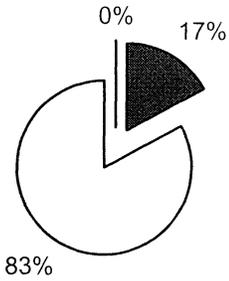


Time limits on opening or closing statement

Bankruptcy

District

Total

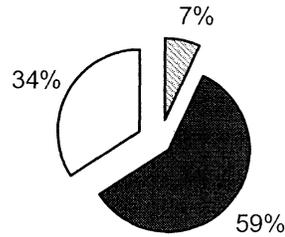
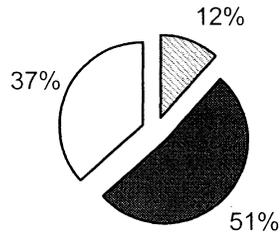
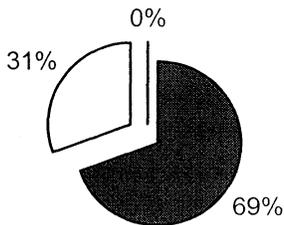


Preparation of exhibits

Bankruptcy

District

Total

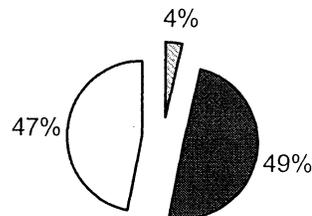
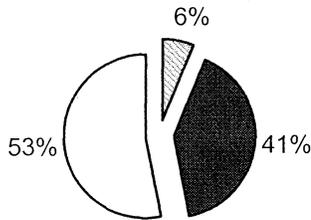
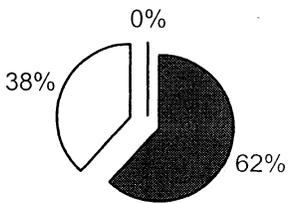


Special pleading requirements, e.g., for RICO cases

Bankruptcy

District

Total

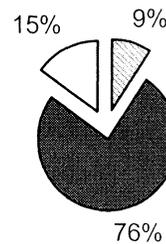
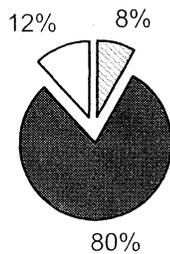
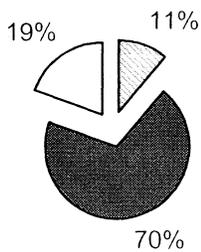


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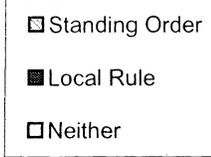
Bankruptcy

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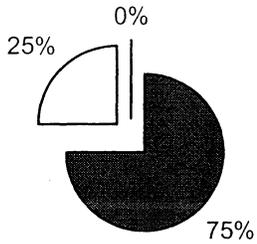


Survey Results - Charts Standing and General Court Orders

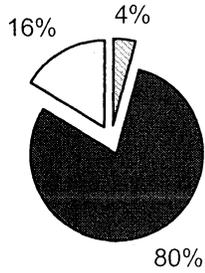


Filing pretrial motions

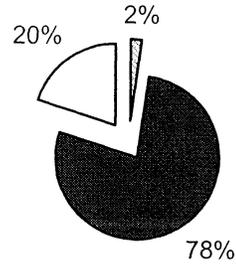
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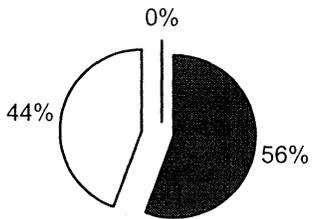


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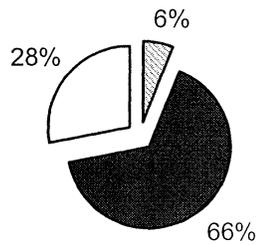


Pretrial conferences

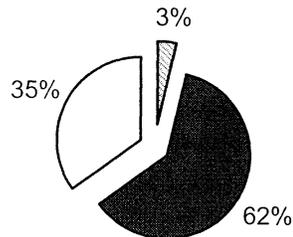
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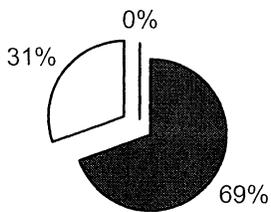


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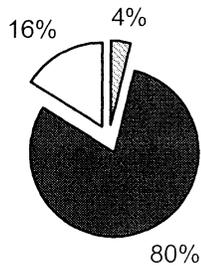


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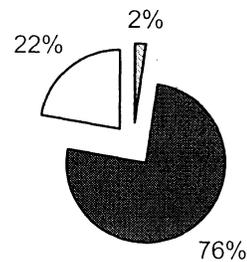
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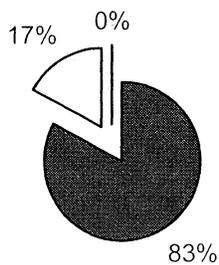


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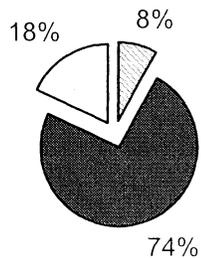


Procedures for summary judgment

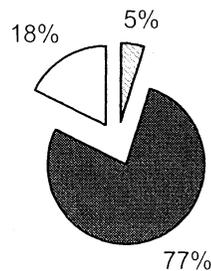
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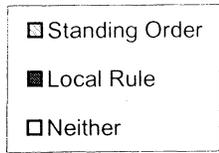
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Survey Results - Charts Standing and General Court Orders

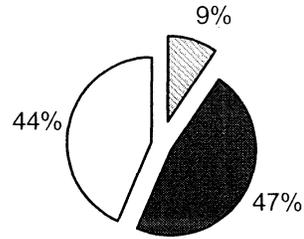
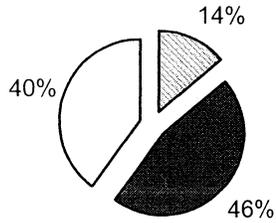
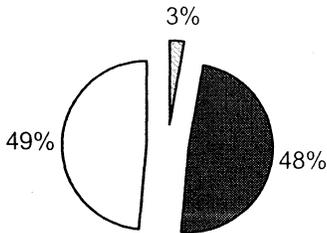


Electronic discovery protocols

Bankruptcy

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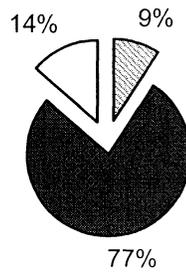
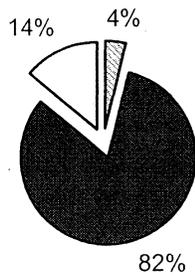
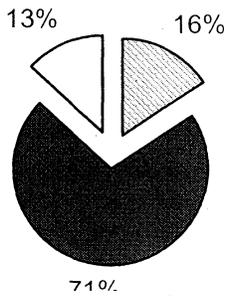


Rules for noncourt proceedings, e.g., arbitration, ADR, attorney discipline

Bankruptcy

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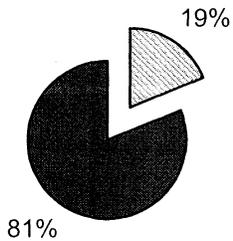


Survey Results - Charts Standing and General Court Orders

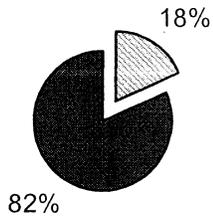
If a standard is issued to distinguish between what should be addressed in local rules as opposed to standing or general orders, should it be a guideline that courts are encouraged to follow or should it be a rule that courts are required to follow?



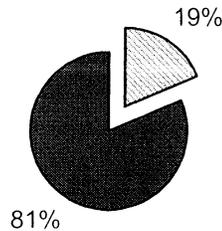
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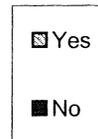
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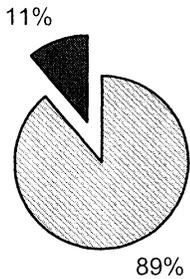
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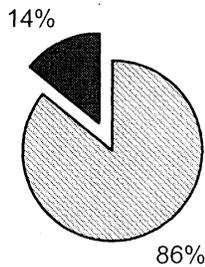
Should local rules and court orders, including all district- or division-wide standing orders and individual-judge orders, be posted in the same locations on each court's Internet home page?



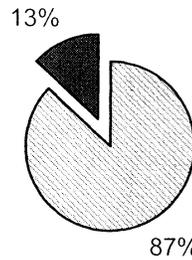
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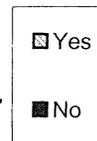
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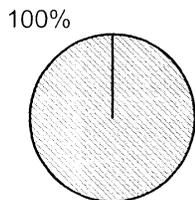
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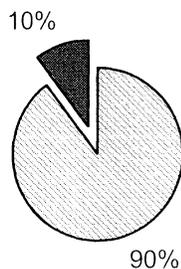
Should standing orders be listed, indexed, and searchable to make orders on particular topics easier to locate?



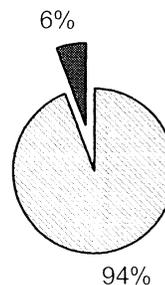
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District



Total



*Magistrate Judge James Gates' response is included for the District of North Carolina Eastern. There was not a response from a District Judge from the District of North Carolina Eastern.

Bradford L. Bolton	Local Rules serve as the foundation for local procedures. General Procedure Orders (GPOs) serve as a temporary means of test-driving procedures or implementing emergency procedures prior to and/or in anticipation of permanent inclusion in a subsequent update to the Local Rules. GPOs may also serve to provide direction to the Clerk in areas beyond the substantive interest of practitioners, i.e., internal reassignment of cases following the retirement of a sitting judge, internal administrative policies and procedures, use of leave, etc. Standing Orders are used by judges in procedural areas where consensus by the entire court is unobtainable, or to add further clarification or enforcement mechanisms to procedures that may be only generally covered in the Local Rules.
Henry J. Boroff	In this bankruptcy district, Standing Orders have been employed in only three circumstances: 1) where the issue leading to the Standing Order is temporary (e.g., adoption of the interim rules of bankruptcy procedure pending adoption of the final rules); 2) where the issue requires immediate action and can not wait the extensive vetting that we apply to changes in our local rules (e.g., recently, we realized that our local rules on sealing documents did not include sua sponte determinations; therefore the tool of a Standing Order was employed to cover the gap period); and 3) where an issue of courtroom conduct or decorum is of interest to one or more, but less than all, of the judges.
Jerry A. Brown	(1) We are not authorized to conduct jury trials, so of course, have no voir dire questioning or jury notebooks. (2) We have no suggestions, but we would like some guidance as to what should be included in Local Rules, General Orders, Standing Orders, and a new category that has recently come to our attention called "Administrative Orders".
Carl L. Bucki	I would recommend a standardized format for organization of local rules. For example, if someone wished to learn local practice about electronic discovery, that practitioner would ideally be able to refer to the same section number of every local rule throughout the United States. For those courts which may be considering a redrafting of their local rules, we might benefit from a guide providing suggestions for best practices, such as with regard to formation of advisory committees of the bar. I would appreciate it if you could share all responses to this survey, so that our court might give consideration to the concerns that will be expressed by other courts.
Harry C. Dees	Orders are appropriate to: a) deal with "emergency" type situations that need to be addressed more quickly than the rule making process will permit. b) experiment with procedures to see if they are workable and/or fine tune them before running them through the rule making process.
Douglas D. Dodd	THE GOAL (AS I UNDERSTAND IT) IS LAUDABLE, BUT I DON'T THINK THAT NATIONAL UNIFORMITY IS NECESSARY. ONE SIZE NEED NOT FIT ALL - AND WHY SHOULD "LESS ACTIVE" DISTRICTS ADOPT EXTENSIVE LOCAL RULES TO ADDRESS SITUATIONS THAT MAY NEVER ARISE IN THOSE DISTRICTS? ON THE OTHER HAND, TRANSPARENCY IS ESSENTIAL. A COMMENT ON QUESTION 3, ABOVE, REQUIRING POSTING OF LOCAL RULES ETC. ON THE SAME PLACE ON EVERY COURT'S WEB PAGE. THE WEB PAGES VARY WIDELY, AND UNLESS WE'RE GOING TO DEVELOP A STANDARD WEB PAGE LAYOUT (NOW *THERE'S* AN AMBITIOUS PROJECT), I RECOMMEND JUST REQUIRING A LINK, AND SEARCHABLE STANDING ORDERS. IN THE ALTERNATIVE, REQUIRE LOCAL RULES TO REFERENCE APPLICABLE STANDING ORDERS. IN FACT, THE LOCAL RULES POSTED ON OUR WEBSITE REFERENCE RELEVANT STANDING ORDERS.

Randy D. Doub	<p>Since this is the only space provided for comments, I would point out that this court has been under the opinion for many years that the public and bar should have only one place to search for how a court conducts its business. When time is crucial, this court has drafted general orders to have in place immediately and then have the general order codified into a local rule once the appropriate notice has been given. Local rules should not be cluttered with the various procedures and judges' preferences. This court has addressed procedures and judges' individual preferences in an administrative guide which becomes a part of and is linked to the local rules. The administrative guide can be changed from time to time without the notice process required for in the local rule making process. You are invited to view the court's local rules and the administrative guide at the following site: http://www.nceb.uscourts.gov/FlashHelp/Local_Rules.htm</p>
Carol A. Doyle	<p>We use Local rules for matters of procedure that are not addressed in a national rule on which all judges agree and believe should be subject to a rule that can easily be found. We reserve standing orders for matters relating to an individual judge's procedures regarding issues not addressed in national rules or local rules but which inform attorneys of the judge's procedural requirements. For example, the Fed. Rules of Bankruptcy Procedure do not address whether a party objecting to a proof of claim in a bankruptcy case can serve the claimant by using the address provided on the claim form. Some judges have standing orders requiring parties to serve claim objections in a particular manner.</p> <p>We use a section on our web page for each judge to answer "frequently asked questions" that gives information about the judge's practices on various matters (including trial procedures, exhibits, etc.) which we believe do not warrant an order (i.e. a standing order) but which members of the bar will find helpful in preparing to appear before the judge. We use General Orders signed by the chief judge to address temporary or emergency issues relevant to lawyers that apply to all judges in our court.</p>
William L. Edmonds	<p>I have answered the survey based solely on practice in the bankruptcy court, recognizing that other courts may have different needs. In consultation with my colleague in this court, we have decided to leave blank responses dealing with issues that we rarely deal with.</p>
Edward Ellington	<p>I believe the first step would be to require standing/general orders to be easily located on the web page of the court and to be searchable. I think the same thing should be required for local rules.</p>
Robert J. Faris	<p>I have not answered the questions relating to jury trials because the bankruptcy court in this district does not conduct them. I think that local rules should to the greatest extent possible be the sole source of guidance on local practice. The main exception should be for situations where a rule of some sort needs to be promulgated more quickly than the local rules process permits.</p>
Paul M. Glenn	<p>The United States (as well as the rest of the world) is getting smaller quickly. With electronic communication, court information is available readily to attorneys practicing in other Districts, and with convenient transportation, attorneys litigate in many Districts. To facilitate this, a standard identifying matters to be addressed in local rules would be helpful to attorneys. Of course, the substance of local rules may well differ. Procedures that are unique to particular judges should be in standing orders, or expressed by the judges in their management of cases. Because this is a bankruptcy court where jury trials are rarely held, I did not express an opinion about the jury issues.</p>
Ralph B. Kirscher	<p>Rules should deal with more permanent governance and procedure; standing orders should deal with short-term, interim procedural, administrative matters that later are incorporated into the rules unless the standing order deals solely with one case or procedural issue that is not applicable to all cases, matters or adversary procedures. In the bankruptcy court for the district of Montana, standing orders are used on a minimal basis.</p>

M. Bruce McCullough	The Bankruptcy Court in the Western District of Pennsylvania has its Local Rules and General Orders available on the Court's web-site. The Local Rules and General Orders both have indexes. Courts should be given discretion in the way Local Rules and General Orders are presented on their web-sites as long as the information is indexed, text searchable, and can be easily found. The last thing we need is more rules about rules.
Randall J. Newsome	Matters that affect procedures throughout a district should be put in published rules or guidelines, not general or standing orders. Except as to matters that affect how a judge runs a trial, such as where to sit, where to stand, how to mark exhibits, etc., general or standing orders should be prohibited. The only time our court has issued general orders is when changes in the law require an immediate change in the rules that cannot wait for the district court to approve by way of an amendment to a local rules.
Robert E. Nugent	Our local bankruptcy rule 9029.2 sets out what should be incorporated into a standing order. All our SO's are dated and regularly reviewed. Sometimes when we are adopting some new procedure, we "test" it by issuing a SO that incorporates the procedure. This enables us to tweak the procedural rule before presenting it to the District Court and Circuit for enshrinement in the local rules. A recent example of this was our procedural orders for the implementation of ECF. Currently, we are contemplating adopting a conduit payment plan in chapter 13 that will likely be initially implemented by SO. We almost always expose these orders to comment either by the bankruptcy court's bench and bar committee or the bar at large or both. They are always accessible on our website and in printed rulebooks.
Bill Parker	Our approach has been that any information pertaining to procedure should be placed within local rules as opposed to general orders. Differing procedures among different judges/divisions are placed in "Local Regulations" referenced by and attached to the Local Rules. In the bankruptcy area, it certainly appears as though there are courts who appear to protect their local processes/procedures from review by inserting them into general orders, although the difficulty in locating or learning of them appears to have been decreased because most do post them on an internet site. Our general approach has been that general orders should only be used for administrative matters unrelated to the pre-trial or trial process or for circumstances so unusual that it need not be addressed. Thank you for the opportunity to comment.
Ronald G. Pearson	Several of the subject matters are not applicable or are only infrequently applicable in bankruptcy proceedings. Several of the matters checked as "Place in Neither" are likely to be heavily dependent on the facts and circumstances of a particular case. For example, "Time limits on opening and closing statements" would depend on the issues and complexity of a case. These matters can be best dealt with by the court in routine scheduling orders or, if necessary, a specific order dealing with the matter.
Stephen Raslavich	<p>Initially, in this bankruptcy district, no individual judge issues any "standing orders." Standing orders are only issued as a collective action of the Board of Bankruptcy Judges. We consider the threshold question to be whether a particular practice or procedure even need be in a local rule or a standing order. Many procedures do not require uniformity in the district and each judge should be free to adopt the procedures he or she prefers. For such procedures, no local rule or standing order is appropriate and, if not already addressed in a pretrial order in a particular case, the practice or procedure can be described in a statement of each individual judge's practices and procedures made available on the court's website. While the "statement practices and procedures" published by each judge mirrors, to some extent, the practice of an individual judge issuing a standing order, the "statements" are not "orders" and lack the force of a standing order. As for distinguishing between local rules and standing orders, there should be a presumption in favor of local rules rather than standing orders.</p> <p>We endorse the standards identified by Prof. Capra in his Discussion Paper.</p>

Dana L. Rasure	<p>The Uniform Numbering System for Local Bankruptcy Court Rules as approved by the Judicial Conference in May 2003 set forth and enumerate local rule topics. Matters related to these topics and subjects should be included in Local Rules rather than in standing orders. We consider "standing orders" to be of a temporary nature until the order is incorporated into the Local Rules. Our Administrative Procedures (electronic filing and other related topics) are expressly incorporated into the Local Rules but can be amended from time to time without amending the Local Rules. It would be helpful if standing orders were placed in a searchable database and/or appropriately indexed. We use a standard numbering system for standing orders (e.g. 08-01, etc). We also distinguish 2 types of standing orders: General Orders and Miscellaneous Orders. Typically, General Orders apply to practitioners and the general public and are procedural or legal in nature; Miscellaneous Orders apply only to a specific event or person/company/firm, affect internal court operations, are limited in duration or are specific to a judge.</p>
Wesley Steen	<p>1. Bankruptcy rules for the SDTX incorporate district court rules. I have only addressed the bankruptcy rules. 2. I do not totally agree that there is NO standard concerning what goes into a local rule and what can go in standing orders. FRCP 83(b) provides a modicum of a standard. If a matter is so important that implied knowledge should be sufficient to punish non-compliance, then inclusion in a local rule is required. If no sanction will be imposed for non-compliance absent actual knowledge, then inclusion in a general order is an option, although inclusion in a local rule is also an option. 3. Professor Capra performed a real service by clearly identifying and articulating four main categories of matters that are often and appropriately addressed by standing orders: internal administration, emergencies, temporary problems, and constantly changing areas. I would emphasize that bankruptcy involves many issues in the last category. I can give you examples on request. Flexibility in these issues is very important to the bankruptcy courts.</p>
Arthur N. Votolato	<p>In our court we use general orders to authorize amendments to the local rules and to establish procedures pending the formal local rule process; or if temporary process -- i.e., interim bankruptcy rules after BAPCPA. They are categorized and posted on website.</p>
Mary F. Walrath	<p>Before 2001, most of the procedures in this Court were set forth in Standing Orders. Since 2001, we have established Local Rules which are modified each year. We therefore use Standing Orders for temporary or emergency procedures (such as adoption of procedures necessitated by the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005). This has reduced Standing Orders from over 30 to 5 or 6.</p>
Judith Wizmur	<p>I think that the most appropriate category of subject for standard orders is guidelines for a particular category of case. For instance, in the bankruptcy context, we have general orders adopting guidelines for complex Chapter 11 cases and guidelines for first day motions. I do not think that certain courtroom procedures are susceptible to either general orders or local rules because they are case specific and should be tailored to the matter at hand.</p>

Comments - District Courts

Standing and General Court Orders

Sandra S. Beckwith	I believe our guiding principles for the Local Rules Committee are well considered. They are, as I understand them: 1) Nothing in the local rules which repeats or contradicts a statute or national rule. (This is, of course, required by law and has been enforced in the past by the Sixth Circuit.) 2) Nothing in the local rules which is unnecessary. Experiments can be done by general order. Details of CM/ECF can appropriately be dealt with by a manual which the Clerk has authority to modify. 3) General orders for external matters not appropriate for a rule; administrative standing orders for internal matters (e.g., the related case matter).
Laurie Smith Camp	Matters governing attorneys' practice should be in local rules. General orders should be for court operation and governance, but it is unrealistic to expect attorneys to be aware of the content of general orders.
Todd Campbell	This is not a problem in our district.
Robin J. Cauthron	<p>First I think you should identify your terms. We have General Orders (which should all probably be in the local rules but are such esoteric subjects, e.g. CJA plan, jury plan, we try to streamline the rules by keeping them out. There are only 22 and they are clearly titled and posted on the website), Miscellaneous Orders (which cover all the temporary, emergency, and internal stuff that no one else is interested in. These are indexed in a General Order so if someone wants to see what we've got they know where to look but they are not on the website), a Policy and Procedure Manual for ECF (which is referred to in the local rules and posted on the website).</p> <p>We believe it is far too cumbersome to include it in the local rules, both because of its length and because it needs to be changed quickly, not just as technology changes but when we identify better practices), and Standing Orders (some of our judges have adopted these, covering only courtroom conduct, and they are all posted on the website). To lump all these in under the heading "standing orders" is problematic, to say the least. I feel strongly that the longer we make our local rules, the more difficult they are to use.</p>
Avern Cohn	Standing orders are easier for adoption and do not involve the practicing bar. Judges can best agree among themselves for procedural requirements.
Matthew J. Dykman	Some of the subject matters above marked "neither" are listed on the judges' individual web pages.
Claire V. Eagan	Voir dire questioning, use of juror notebooks, and time limits on opening or closing statement should be up to each judge (unless a standing order as to each judge). Courtroom conduct and preparation of exhibits should be placed in a local rule and additionally be up to each judge.
Rodney C. Early	In my opinion, the only way to obtain uniformity is to require the court's to adopt identical practices. After nearly 32 years of service to the judiciary, I am not certain this can ever be achieved. Standardization and uniformity, even within an specific court, are impossible to achieve. Such would make practice in the federal judiciary far easier but it seems to be an impossible dream given the long history of independent cultures which exist among the many districts and courts of appeal.
Jose Antonio Fuste	My experience is that standing orders work fine if they are published. Judges deal with many of these issues in different ways, and the local rule concept may not work in the majority of the cases. Local rules should not be used to micromanage these matters.
David Hamilton	Our court does not rely on "standing orders" on these matters, so we do not have much to offer by way of advice. The matters that I've indicated should be "placed in neither" are matters that our court leaves to case-specific orders or individual judges' preferences, most of which are handled informally or through some documents that are available on the court website and are referred to in orders in individual cases.

Robert C. Heinemann	Local Rules: Clarify application of the Federal Rules Guidelines: Local Division of Business guidelines relating to assignment of cases, and related case designations. Administrative Orders: Used sparingly. To provide Notice of amendments to Local Rules and Division of Business guidelines; and for general policy matters. All three categories should be available on a Court's public website, and posted in an organized and readily searchable manner.
Robert L. Hinkle	Standing orders should almost never be used to direct the conduct of attorneys or litigants in a case (as opposed to non-case-specific conduct within the courthouse such as carrying firearms or cell phones). Exceptions may be appropriate for emergencies, when necessary to address a temporary problem, or when necessary while a local rule is being adopted. If a judge wishes to require the attorneys to comply with judge-specific procedures (or otherwise to follow procedures not required by the federal rules or local rules), the judge should put the standards in an order in the specific case. This takes only a few key strokes. No judge should expect attorneys to comply with procedures that (1) aren't important enough, or aren't of sufficient general applicability, to be included in a federal rule or local rule, or (2) are too voluminous or silly to be included in an order in the case.
James F. Holderman and the Executive Committee	Individual district judge's procedures are electronically available on their individual pages on the District Court website which is, in our opinion, the proper place for them. Additionally, information about pretrial conferences conducted by individual judges is available there. As for electronic discovery, we have found each case should be dealt with in a manner consistent with the Federal Rules of Civil Procedures. In our district, individual judges' orders and standing orders are available and searchable on the website. We all feel strongly that any changes should be guidelines since district courts should be able to have some ability to adjust to accommodate their own unique court experience.
Leon Holmes	Local rules and standing orders should be minimal, which is not exactly the question asked but nevertheless my view.
Dan Hovland	Guidance on use of "Guidelines" for implementing ECF administrative policies (versus Rules or Standing Orders). See ECF Policies, USDC ND: http://www.ndd.uscourts.gov/pdf/cm_ecf_policy.pdf
Lynn N. Hughes	Judges should manage their cases by addressing the requirements in case-specific orders. Cases reflect the complexity of society, intricacy of law, and variety of human behavior. How on earth could you have a local rule that says all closing arguments are 45 minutes? Some need to be longer and most shorter. We have too many national rules. Courts that have many local rules as well as standing and general orders are both unfocused and setting traps for lawyers. The distinction should be made between "requirements" and "information." The Internet makes it very easy for the court to publish helpful hints, e-mail and street addresses, telephone numbers, interest rates, clerk's office structure, and other things. Education and plain data do not belong in rules. What is in a local rule should be something that is absolutely required.
Roger L. Hunt	Usually, general orders are used in cases of emergency where the rule needs to be implemented immediately and there is no time to go through the process of modifying the local rules. However, the process of modifying local rules is begun immediately so the matter will be in the local rules eventually. However, there are some matters that are so varied that codifying them in local rules is neither wise nor helpful. Some of the above matters you asked about are specific to individual judges and should be in neither an order nor the local rules. Also, different cases may need to be handled differently with respect to time limitations, exhibit presentations, etc. Some general orders are also superseded or the purpose of the general order is applicable only to a limited situation or time and is no longer relevant. The differences in sizes of the court and the number of judges make also affect what is needed in local rules. We try to keep our local rules simple and as uncomplicated as possible, and tied to FRCP or FRCrP rule numbers for easy reference. I suggest we avoid trying to make one size fit all. That would be cumbersome for attorneys as well as the court.

Yvette Kane	The discussion paper prepared by Professor Daniel Capra of Fordham Law School (see attached) sets forth what I believe to be appropriate uses of standing orders: 1. Rules of Internal Administration, (e. g., court security, uses for non appropriated funds, etc.); 2. Temporary problems, (e. g., how the court deals with the impact of Blakely decision or the Crack Cocaine Amendment); 3. Emergency situations; and 4. Constant changes. Subject matter that develops and changes too quickly to be handled by a local rule, (e. g., electronic filing). I believe guidelines should be adopted that would set forth standards for the use of Standing Orders and that there should be uniformity in the way Standing Orders, Local Rules and General Orders are placed on websites and otherwise made available to practitioners and the public. Generally speaking, adopting Local Rules through the device of standing orders contravenes the Rules Enabling Act. Subject matter that involves specific guidance on procedures and practice before the court should undergo the rules making process which provides for public comment.
Irene Keeley	Anything that an attorney or filer may need to know should go into a local rule. Anything that is strictly internal and is not material to an attorney or filer may go into a standing order- such as guidelines for assigning cases to judges and magistrate judges, specific venue assignments based on counties, or specific instructions to docketing clerks or financial officers of the court.
Hon. Samuel B. Kent	I don't use either. I draft fact/law specific orders in each case in consultation with counsel, or as development/problems occur. We have enough rules and general orders. Judges should be more involved in each case and be readily accessible to the bar.
Sim Lake	Many of the subjects listed in question 1 vary by judge and are not suitable for inclusion in either local rules or standing orders. Such subjects include Voir Dire Questioning, Courtroom Conduct, Use of Juror Notebooks, Time Limits on Opening or Closing Statement, and Pretrial Conferences. Many judges have their own procedures manuals, which are available on the court's website, that address these subjects.
Steven J. McAuliffe	Philosophically this district attempts to avoid judge specific rules and procedures and we try to create uniform procedures, set forth in our local rules, applicable to all of our judges. We adopted this approach because we do not want to unduly complicate the practice for attorneys in our district and we do not want different procedures and standards to apply depending upon the judicial officer assigned to the case. Thus, when addressing rules of procedure, we strongly believe that, in the vast majority of situations, such rules should be placed in the local rules and not in standing orders.
Norman A. Mordue	In the Northern District of New York if we have a General Order that covers a particular topic, the General Order is referenced under the appropriate Local Rule. Our General Orders and Local Rules are available in the same location on our external website so access to them is not an issue. Because of this survey, I will be asking our Local Rules Committee to review all of our General Orders to see if any of them should be rewritten as a Local Rule. Local Rules in the Northern District of New York are handled on the following timeline each year: The Court will solicit comment on new and amended Local Rules from the bar and public during the months of May, June and July. New and amended Local Rules of practice will be forwarded to the Circuit Council for review and approval during the month of October. All new and amended Local Rules will become effective on January 1st each year. This schedule allows us to review changes that are made to the Federal Rules each year that become effective on December 1st and make any appropriate changes to the Local Rules at approximately the same time.
David C. Norton	I don't think that trial procedures i.e. voir dire, exhibits, opening statements can be legislated to be uniform. Each trial judge has his or her own style once a trial is scheduled and what works for one judge may not work for another. It would seem to me that much of the confusion could be alleviated by making all general orders, local rules and individual judge's "rules" centralized and searchable. Good Luck!

Lawrence J. O'Neill	This issue would be an excellent one to include in the training of judges, especially in the new judge training courses. I sympathize with lawyers who have to decide what the "law of the courtroom" is in every case. Depending on the courtroom, the judge's rules can be more imposing than the Rules of Evidence and the Rules of Civil/Criminal Procedure COMBINED. While each judge has his or her personal preferences, it's indeed important to view the courtroom from a perspective other than solely from the Bench itself. The topic of enforcing existing universal rules is as important as is the topic of not imposing personal quirky rules just because we can.
James H. Payne	It is more realistic for the Committee to consider offering a guideline for the courts to follow and not a rule that courts are required to follow. Local Civil Rule I.I of the Eastern District of Oklahoma specifically speaks to the issues to be covered by general orders. Perhaps use of a similar rule should be part of the Committee's recommendation. It would be helpful for those utilizing the websites of the various courts if the local rules and general and standing orders were posted in the same location on each court's internet home page. Additionally, it would be helpful for the general orders and standing orders to be listed, indexed and searchable.
F. Dennis Saylor	I agree that there has been an unfortunate proliferation of standing orders, and that it can be difficult for counsel to keep track of the requirements, even in a court in which the lawyer practices regularly. Except for the four categories identified, as a general matter such requirements should be placed in local rules. I do believe that the foregoing should not apply to standard orders of individual judges that are sent to counsel in each case (i.e., counsel are specifically given a copy of the order, not just expected to know that it exists). For example, I send counsel in each civil case a standard order that advises them of various matters in advance of a scheduling conference. Some judges denominate these as "standing orders," although they are more accurately described as "standard orders." I also believe that standing orders of individual judges may have a limited role in assisting the court to experiment with procedures or to make broad-brush policy statements. For example, I have issued a standing order that expressly, and strongly, encourages the use of less-experienced counsel in court proceedings, with cert
Karen Schreier	Local rules should be broad based rules that apply to all cases and all judges. Our local rules tie into the federal rules of civil and criminal procedure and elaborate on those rules. Our district does not have many local rules, we rely primarily on the federal rules as our guide. We use standing orders very sparingly for matters such as courthouse security issues and cell phone usage in the courthouse, jury terms of service and how the jury panel is drawn, and our speedy trial plan. We have one judge who issued a standing order that describes attorney conduct for attorneys who will practice before him. His standing order is distributed by the clerk to everyone who files a case that is assigned to him. The other district court judges do not have similar rules. Our local rules are posted in our web page and we are currently working with our IT department to post all the current standing orders on the web page with an index. Our general principle is that fewer rules are better- and this applies to both local rules and standing orders.
Kathryn H. Vratil	<p>We make very sparing use of standing orders. They relate to such matters as committee appointments, transcript rates, authority for the Clerk's Office to refund erroneous filing fee payments, the amount of pro hac fees, appointment of magistrates and magistrate panels, etc. All standing orders back to 1994 (about 120 in all) are on our web site. Most of them have no current relevance and I would take them off before I would go to a lot of trouble to make them searchable. Almost all of the topics which you list above are addressed in standardized pretrial orders in individual cases.</p> <p>About 12 years ago, we embarked on a year-long effort to standardize all of our pretrial proceedings and -- to the extent possible -- move pretrial requirements from standing orders and case-specific orders into local rules. The process was successful beyond our wildest dreams. Even today, pretrial proceedings (both civil and criminal) are primarily handled by magistrates through these standardized forms which they occasionally tweak to reflect a particular judge's preferences for voir dire, courtroom conduct, etc. Our web site has a place for each judge to post expectations on courtroom conduct but most judges do not post anything.</p>

Vaughn Walker	<p>When I became chief judge, I attempted to persuade my colleagues to withdraw their individual standing orders and to replace them with one general order governing practice in all judges' courtrooms. My effort was singularly unsuccessful. If practice is to be made more uniform within districts and among districts, it will have to be done by limiting the scope of what an individual judge can require by standing order and what courts can do by way of local rule. This will not be easy. I am uncertain about the degree of difficulty posed by variation in practice among judges and among districts although I am inclined to think that the former is the greater problem as within-district lawyers greatly predominate in practice before district courts. Hence, making more uniform within-district practice would seem to offer the greater payoff. In any event, this subject is certainly worth opening up for discussion and consideration.</p>
Ronald C. Weston, Sr.	<p>Because various judges have different preferences regarding many of the subjects identified above, several of our judges have guidelines for practice (which are posted on our website) to identify their preferences - but these items are not addressed in either a standing order or a local rule. Because of the the great variation in practice across the country, we suggest that the Committee not attempt to impose a one-size-fits-all solution on all districts.</p>
Louise York	<p>Local Rules should contain material which is relevant to attorneys when working on individual cases. Local rules should be uniformly observed by all judges of the court and violations result in sanctions. General or Standing orders adopt guidelines or explanations of programs and court policies such as pro bono programs, attorney admission fund, pilot programs, the case assignment wheel. Plans like the CJA plan, CJRA plan and Jury plan serve as general orders. There is another new area which has arisen under the CM/ECF era. Administrative procedures need to be readily available to efilers but need to be amended by a different process than local rules. When a court loads a new version of CM/ECF, procedures need to be changed quickly and attorney comment less important because the issues are format to meet technology. My experience with attorneys and rulemaking is that they do not concern themselves differentiating between rules and administrative orders theoretically. They just want to be able to find the information they need.</p>

Comments - Court of International Trade

Standing and General Court Orders

Jane A. Restani	We cannot respond to No. 1 in the same manner as a district court would, so we are not responding. The United States Court of International Trade is unique among the judiciary in that all of its rules are local rules, as well as Fed.R.Civ.P. equivalents. The attorneys that practice before the CIT know that there are only a limited number of places they need to go to find any guidance available on a particular topic. Finally, in light of the differences between the CIT and the district courts, it does not seem prudent to require all court web sites to contain the same information in the same place, although posting in a prominent location would be appropriate.
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Comments - Fourth Circuit Court of Appeals

Karen J. Williams	These questions were addressed with reference to Fed. R. App. P. 47(a)(1), which provides that a "generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order."
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Comments - Federal Circuit Court of Appeals

Paul R. Michel	Please note: All items under #1 are left blank as I do not know enough to form a sound opinion.
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Discussion Paper on Standing Orders in Federal District Courts

Prepared for the Judicial Conference Committee on Rules of Practice and Procedure

I. Introduction

For years, judges have been concerned about the proliferation of “standing orders,” “administrative orders,” and “general orders” in the federal district courts. Such orders are not issued in particular cases but are intended to apply generally. Standing or general orders issued by district courts or divisions of district courts are similar to local rules but differ from them in ways that are troublesome. Standing orders on particular topics can be difficult to locate; confusing because they may cover the same topics as local rules; and problematic because they do not go through the notice and comment process required for local rules. These concerns have increased as the use of standing orders has increased. The absence of standards governing the content of local rules on the one hand and standing or general orders on the other, the variations in the ways courts use standing or general orders, and the variations in the ways courts make such orders available, raise particular concerns. On a practical level, the difficulties are most acute for lawyers who practice in different federal courts or primarily in state courts. The Judicial Conference Committee on Rules of Practice and Procedure (“the Rules Committee”) has received requests from judges on circuit councils for guidance on the proper delineation between standing orders and local rules. In response, the Committee asked the Administrative Office to research the use of standing orders in the district courts. This discussion paper summarizes the results of that and other research, providing an overview of the use of standing orders in the district courts; identifies problems

in using standing orders rather than local rules to regulate some matters; and provides some suggestions for determining which matters are usefully regulated by standing orders and which are more appropriately covered by local rule. The paper offers assistance in making it easier for members of the public to find standing orders on particular topics. Finally, the paper provides a starting point for developing standards to delineate between what should be in local rules as opposed to standing orders and seeks assistance in refining those standards.

II. Executive Summary

Concern about the proliferation of standing orders is similar to the concern over local rules that led to earlier studies by the Judicial Conference. Like local rules, the proliferation of standing orders can lead to a lack of uniformity in federal practice, undermining consistency in areas where the national rules were meant to provide it and creating traps for the unwary and even for the wary. But standing orders can raise even more serious problems than local rules, for at least three reasons. First, standing orders are promulgated without the benefit of public comment. Second, standing orders are often harder to find and retrieve than local rules. Third, because standing orders are entered by individual judges as well as by a division or district, there is significant variation even within the same district or division. Standing orders may raise these and other problems to such a degree as to risk invalidity.

The research into the use of standing orders in the district courts showed wide variance in number and topics addressed, and in how lawyers and the public receive notice. The case law presents some limits on the appropriate use of standing orders as opposed to local rules. But there are no national standards, and very few local standards, defining what

subjects are appropriately dealt with by local rule and what subjects are appropriately dealt with by standing or general orders.

The research suggested some general criteria for delineating between matters properly covered by standing orders and those properly addressed by local rules. Standing orders are most appropriate to address matters that require action too quickly to make the use of a local rule practical, or matters that are of no direct concern to practicing attorneys or litigants. Generally speaking, such matters concern internal administration or issues of a temporary or emergency nature. At the other end of the spectrum, standing orders are most problematic when they: 1) cover matters in which lawyers and litigants have a substantial interest but are issued without the notice and public comment that accompanies local rules; 2) modify or abrogate local rules; and, of course, 3) conflict with national or local rules. In between these two ends of the spectrum are a variety of matters that some courts address in local rules and some in standing orders. This paper discusses the difficulties of developing a standard for when such matters should be addressed in local rules and when they should or could be covered in standing orders.

Lack of access to standing orders is another problem. The fact that the same topics are addressed in local rules in some courts and in standing orders in other courts makes their location on websites inconsistent to begin with. Even when a topic is appropriately addressed in a standing order, it should be easy to locate and retrieve. In many districts, standing orders are easily retrievable on the district court's website. In other districts, however, it is not easy to find standing orders, and it is difficult to search for a particular standing order. Many standing orders are not indexed and most are not searchable by subject

or topic. This paper recommends steps for making it easier to find standing orders on the district court's website, and especially to make it easier to search for orders on particular subjects or topics. The paper also recommends a consistent approach to location and searchability across the websites of the districts. And in districts in which individual judges also issue standing orders, those orders should be posted on the district's website in a way that is easy to find and easy to search for particular topics or subjects. The paper offers assistance to districts that want to make their standing orders easier for lawyers and litigants to locate and retrieve.

III. Use of Standing Orders in the District Courts

The Rules Committee became aware of the increasing use of standing orders through several avenues. The Rules Committee's Local Rules Project, which ended in 2005, uncovered standing orders that covered the same topics as local rules. The Rules Committee's work on the Model Rules for electronic filing, approved by the Judicial Conference in 2004, showed that many districts were regulating electronic filing through standing orders, while other districts were using local rules. Work by the Civil Rules Committee to monitor developments in electronic discovery after the December 2006 Civil Rules amendments indicated that in some districts, standing orders are being used for detailed electronic discovery "protocols," while in other districts, local rules address electronic discovery.

The Administrative Office surveyed the use of standing orders in eleven district courts. The research involved collecting and reviewing the standing orders in these districts, as well as receiving information directly from clerks and judges. That research

(supplemented by some independent research conducted by the writer of this paper in some other districts) can be summarized as follows:

1. Varying number of standing orders

The districts vary widely in their use of standing orders. Some districts have very few standing orders issued by the district court as a whole. Others have standing orders in the hundreds.

2. Varying subject matters treated by standing orders

There is no standard approach to whether a particular subject matter is to be treated by standing order or local rule. For every district treating a matter by standing order, there are others treating the same matter by local rule. Examples include:

Use of electronic devices in courthouse: Addressed by standing order in five districts reviewed and by local rule in ten. (One district addresses the issue in *both* local rule and a standing order, *i.e.*, it revises the local rule from time to time by standing order, meaning that a lawyer must look in both places to determine how to comply.)

Referrals to Magistrate Judges: Addressed by standing order in five districts reviewed and by local rule in eight. (In one district there is a standing order on the subject that references a previous standing order, but the previous order is no longer on the court's website).

Procedure for filing documents under seal: Addressed by standing order in four districts reviewed and by local rule in six.

Applications for attorneys' fees: Addressed by standing order in four districts reviewed and by local rule in seven.

Redaction of personal identifiers to comply with E-Government Act : Addressed by standing order in three districts reviewed and by local rule in seven. In one district, the standing order “supersedes and vacates” the local rule on the subject, to the extent the local rule is inconsistent. It would seem uncontroversial to conclude that standing orders should not be used to vacate local rules.

Attorney admissions matters: Addressed by standing order in three districts reviewed and by local rule in ten.

Electronic filing: Addressed by standing order in seven districts reviewed and by local rule in five. Some districts using local rules have also posted on their websites a user manual to deal with technological developments and other particular electronic filing problems.

Court appearances by legal interns or law students : Addressed by standing order in two districts reviewed and by local rule in seven.

ADR, settlement, or mediation program: Addressed by standing order in two districts reviewed and by local rule in ten.

3. *Subject matters most likely to be treated by standing orders*: While there is no uniformity in the use of standing orders, certain matters are more likely to be handled by standing orders rather than by local rules. These include:

- Electronic filing
- Use of electronic devices in the courthouse

- Court security
- Internal personnel matters, *e.g.*, appointments, EEO, etc.
- Referrals to Magistrate Judges
- Case allocations between judges and/or divisions
- Juror pools and selection
- Use of nonappropriated funds
- Criminal Justice Act plans
- Schedules for forfeiture of collateral
- Conditions of probation and supervised release
- Speedy Trial Act implementation
- Waiver of PACER fees in individual circumstances
- Court reporters and transcripts
- Attorney admissions and discipline matters
- Naturalization ceremonies

4. *Attempts by some districts to delineate the proper use of standing orders*

Some districts have, by local rule, defined the type of matters to be covered by standing orders. For example, N.D. Okla. Local Civil Rule 1.1 states in pertinent part as follows:

General Orders, which are available on the Court’s website, are issued by the Court to establish procedures on administrative matters and less routine matters which do not affect the majority of practitioners before this Court.

As another example, D. Kan. LR 83.1.2(a) provides that the court may issue “standing orders dealing with administrative concerns or with matters of temporary or local

significance.” Like Oklahoma’s local rule, this rule identifies administrative matters as the most appropriate use of standing orders. But the Kansas local rule also allows standing orders on “matters of temporary or local significance” and does not include “less routine matters which do not affect the majority of practitioners before the court” in the topics that standing orders should address.

Eastern District of California, in Local Rule 1-102(a), carefully distinguishes between the content of local rules and standing orders:

Outside the scope of these Rules are matters relating to internal court administration that, in the discretion of the Court en banc, may be accomplished through the use of General Orders, provided, however, that no matter appropriate for inclusion in these Rules shall be treated by General Order. No litigant shall be bound by any General Order.

The Eastern District of California rule is the most limited of the three examples. Its approach restricts standing orders to matters such as funding, PACER fees, evacuation plans, case assignment, personnel appointments, and the like.

It might be argued that standing orders could permissibly cover the matters listed in the more expansive iterations of the Oklahoma and Kansas local rules. “Matters of local significance” may arise if one division has a problem that is not district-wide; a standing order in that division may be the most efficient and clearest way to address the problem. And matters of “temporary significance” might be appropriately dealt with in a standing order if implementing or abrogating a local rule is not feasible. For example, a standing order in one district was implemented to announce that the court was considering a moratorium on

sentencing proceedings until the impact of *Blakely* could be analyzed. The order directed the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act. It can be argued that this directive was properly placed in a standing order because it dealt with a temporary problem. By the time notice and comment for a local rule took place, the problem might be over.

5. Finding standing orders on the court's website

The AO reports that in the 11 districts reviewed, there was considerable variance in locating general or standing orders on the court's website. A review of a number of other district websites also found a widespread variance in the manner and web location for posting standing orders. Some districts have a link for "general orders" or "standing orders"; others do not. One district has a link entitled "local documents" that then has a sub-link to "administrative orders." Another district has a link entitled "rules." Another district locates standing orders under "general information"; the separate link to "rules" leads only to the local rules. And so on.

Once the link to standing orders is found, the question is how to find a particular order that might be relevant to a case or to find all orders that might be relevant to a topic. In most courts, it is not very difficult to review the standing orders for relevance. For example, in one district, there are five standing orders on the website, and they are listed by topic:

- * 06-01 Extending Suspension of Some Requirements of Local Civil Rules 10.1(b);
81.2(b); 501.1

- * 05-04 Suspension of Some Requirements of Local Civil Rule 10.1(b)
- * 05-03 Adoption and Implementation of the Model Third Circuit Electronic Device Policy
- * 05-02 Multiple, Unrelated Defendants in Matters
- * 05-01 Mandatory Electronic Filing
- * Guideline Sentencing

But some districts simply list their standing orders chronologically or by number, with no indication of subject matter. This requires the practitioner to open and review every standing order to see if it is relevant and to be sure that all relevant orders have been located.

One of the major concerns arising from standing orders is lack of notice, so it might be thought especially troubling that a practitioner will have difficulty even finding the district's standing orders and further difficulty in reviewing the orders for relevance. Few if any districts provide a search function for standing orders.

6. Standing orders of individual judges

In addition to standing or general orders of the district or division, most judges also issue standing or general orders to apply only to cases in their courts. Under section 205(a) of the E-Government Act of 2002, all such orders must be posted on the court's website. Nonetheless, in some districts, these individual-judge standing orders are not posted on the court website. In other districts, the individual-judge standing orders are posted as a single document for each judge; the link is found next to the judge's name, after "Judges" is clicked

on the main web page. These individual-judge standing orders are usually long – up to 50 pages – and are in .pdf format and so not easily searchable. These documents often repeat much of what is also in the district’s or division’s standing orders or local rules, but also include variations that range from significant to minor. These variations are usually not highlighted or readily identifiable. Individual-judge orders are also supplemented or revised from time to time, so that a review on one day does not assure complete familiarity on a later day.

IV. Case Law

The case law reviewing standing orders is relatively sparse. Four basic principles can be derived:

1) Standing orders (both by the district and by an individual judge) can be an appropriate exercise of a court’s inherent authority over management of its cases and control of the courtroom. *See, e.g., United States v. Ray*, 375 F.3d 980, 993 (9th Cir. 2004) (standing order requiring U.S. Attorney to assemble information required by PROTECT Act to be submitted to the Sentencing Commission was upheld as a proper exercise of “the court’s inherent authority to regulate the practice of litigants before it”).

2) Standing orders are invalid if they impose requirements beyond those imposed by (or in some other way conflict with) national rules. *See, e.g., Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) (standing order on Civil RICO pleading requirements invalidated because it imposed requirements “in excess of the

essential elements of a RICO claim”); *United States v. Zingsheim*, 384 F.3d 867 (7th Cir. 2004) (standing order invalidated because it required the government to provide information regarding downward departure motions that was not authorized by Criminal Rule 35; also, the order was used to defer downward departure decisions, and such deferral was not authorized by Rule 35).

3) Appellate courts have expressed concern about the lack of notice and public participation in the implementation of standing orders, and have sometimes suggested that matters addressed in standing orders would better be placed in local rules. *See, e.g., In re Fidelity/Micron Secs. Litig.*, 167 F.3d 735, 737 n.1 (1st Cir. 1999) (appellants claimed that they were not aware of the district court’s standing order regarding allocation of costs: “we urge the district courts to avoid incipient problems of this type by incorporating standing orders into local rules or, at least, making them readily available in the office of the Clerk of the district court.”). Judge Easterbrook emphasized this critical difference between standing orders and local rules in *In re Dorner*:

Adopting local rules through the device of standing orders contravenes the Rules Enabling Act in several ways beyond the vice of inconsistency. First, rules must be reviewed by an advisory committee. Second, rules may be adopted only after public notice and opportunity for comment. Third, rules adopted by district courts must be submitted to the council of the circuit for review. Finally, all local rules must be sent to the Director of the Administrative Office, who ensures their public availability. The [court] violated all of these requirements when it used a nonpublic standing order to contradict [Bankruptcy] Rules 8006 and 8007, which like all other national rules have the force of statutes.

In re Dorner, 343 F.3d 910, 913 (7th Cir. 2003) (internal citations omitted).

4) Standing orders are subject to invalidation to the extent they set forth inflexible standards that do not accommodate the particular circumstances of a case. *See, e.g., In re Fidelity/Micron Secs. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (district court’s standing order on allocation of costs “raises a core concern: it does not leave sufficient room for individualized consideration of expense requests”).

V. Distinguishing Between Standing Orders and Local Rules

No national rule provides guidance on when a matter can or should be treated with a standing order as opposed to a local rule. Standing orders, like local rules, are of course subject to Civil Rule 83 and Criminal Rule 57, which provide that such a rule must be consistent with, but not duplicative of, a national rule. But there is nothing to provide a ready dividing line between standing orders and local rules.

Perhaps a starting point for a proper delineation is to consider the basic difference between standing orders and local rules: *the lack of public notice and opportunity to comment*. There appear to be many issues that a court might address in which there is no need or justification for public notice or comment. These are the issues that are most appropriately covered by a standing order. What follows is a discussion of several possible categorizations, beginning with what are clearly appropriate uses of standing orders and attempting to identify the outer limits of such uses.

1. Rules of Internal Administration

The strongest case for standing orders is matters of internal administration. It would

appear that for such matters, notice and public comment is not necessary and in some cases not justified. Examples of standing orders covering matters of internal administration include the following:

- Court security: Southern District of Texas, Order 2001-05, In Re: Weapon Possession in Court Facilities (limits individuals who can possess a firearm in courthouses).
- Planning for emergencies: Northern District of Oklahoma, General Order 01-05 (adopting Occupant Emergency Plan for occupants of the courthouse).
- Using nonappropriated funds: Southern District of Texas, Order 1995-13, In the Matter of Operations Without Appropriations for Fiscal Year 1996.
- Court registry funds: Southern District of Text, Order 1992-10, Authorizing Withdrawal of Excess Securities.
- Directives to court personnel: Southern District of Texas, Order 1992-22, Order for Docketing Priority (directive to court personnel re importance of prompt docketing).
- Division of workload: Southern District of Texas, Order 2006-1, In the Matter of the Division of Work Calendar Year 2006.
- Referral to Magistrate Judges: Northern District of Florida, order dated 5/31/2000, Referral of Civil Cases to Full-time Magistrate Judges (ordering that all new social security cases be randomly assigned, on a rotating basis, to

the division's full-time magistrate judges).

- Use of resources: Northern District of Florida, Order dated 10/2/2006, Authorization for In-District Travel for Clerk of Court and Chief Probation Officer (also authorizing agency-financed travel to FJC or AO training sessions).
- Juror wheels: Southern District of Texas, Order 2005-09, In Re: Refilling the Master Jury Wheels.
- Setting dates for naturalization hearings: Southern District of Texas, Order 1990-44. Order Setting Naturalization Hearing Date.
- Court implementation of judicial resources for initial appearances: Southern District of Texas Order 1991-26, In the Matter of Guidelines for Coordination of Criminal Procedures (guidelines for coordinating criminal procedures in Houston Division to ensure that an apprehended defendant is brought before a Magistrate Judge as quickly as possible).
- Scheduling of motions: (Individual order of Judge Anderson, providing that civil motions are heard on Mondays at 1:30 p.m.; if Monday is a holiday, the next motion day is the following Monday).
- Appointments: Northern District of Florida, Order dated 12/14/2006, Criminal Justice Act Panel (appointing a new member).
- PACER fee exemptions: Northern District of Florida, Order dated 4/7/2006, Exemption from Fees to PACER (authorizing fee exemption for academic

researcher).

- Closing of court: Northern District of Oklahoma, General Order 06-19 (announcing closing of court on Friday, November 24, 2006).

2. *Temporary Problems*

A second category of appropriate uses for standing orders is to handle a temporary problem that might end up being resolved before notice and comment could be obtained. An example is the previously referenced order in the Northern District of Oklahoma, General Order 04-07 (announcing that the court was considering a moratorium on sentencing proceedings until the impact of *Blakely* could be analyzed, and directing the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act).

3. *Emergencies*

A third likely permissible use for a standing order as opposed to a local rule is to handle what amounts to an emergency. For example, some district courts entered a standing order adopting the Interim Rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other courts have used standing orders to deal with unanticipated issues arising from particular kinds of cases, such as cases involving terrorism charges. It could be argued that any “emergency” that extends beyond a temporary period should be handled by an interim local rule rather than a standing order. See 28 U.S.C. § 2071(e) (“If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment”). But so long as there is ultimately a local (or national) rule that is implemented within a

reasonably short time period to deal with the problem on a permanent basis, there is no real distinction between a standing order and an interim local rule. The difference between an interim local rule and a standing order for an “emergency” that was more than temporary would arise if the standing order were allowed to operate for the long term. An argument can be made that courts in these situations should issue interim local rules as opposed to standing orders, as a reminder of the need to adopt a permanent local rule.

4. Constant changes

A fourth possibly permissible use for a standing order — somewhat analogous to emergencies — arises where the subject matter arguably develops and changes too quickly to be handled by a local rule. The major example cited is electronic filing. The argument is that technology develops so quickly that by the time a local rule can be implemented, it is outmoded and a new local rule is needed. It could be argued, however, that the possibility of technological development does not justify the placement of all electronic filing rules in standing orders. The model local rule developed by the Judicial Conference is written flexibly enough to accommodate technological change. It is notable that many districts have *mandated* electronic filing by standing order rather than local rule; a standing order on such an important (and unchanging) matter seems difficult to justify as necessary to accommodate constant changes in electronic filing. Filing requirements have a significant impact on lawyers and litigants and the local rules comment process is important to developing workable and effective procedures. It is true, however, that the details of implementation of electronic filing may need fairly constant updating and to that extent might be the subject of a standing order or a user’s manual.

5. Rules on Courtroom Conduct

After the four categories set forth above, the proper line between standing orders and local rules becomes more murky and the use of standing orders becomes more controversial. There are, for example, many standing orders that concern conduct in the courtroom. These can be district- or division-wide standing orders or individual-judge standing orders. Subjects can include procedures for transcription of audio recordings entered as evidence; limits on questions during voir dire; time limits on opening statements; preparation of exhibit notebooks; eating and drinking in the courtroom; timeliness; use of juror notebooks, and the like. The public comment process of local rules might be useful on some of these courtroom-related subjects, as the particular rules have a direct impact on the participants, especially counsel, in ways that may not be fully apparent to judges. But the placement of some of these procedures and rules in individual-judge standing orders is inevitable.

No one quarrels with the fact that each judge has the inherent power to control his or her courtroom in the way that works best for that judge. It can be anticipated that judges will be unpersuaded that they should use only standardized local rules of courtroom management. On the other hand, the difficulty of finding and complying with individual-judge rules can become burdensome and a trap for the wary as well as the unwary. The fact that many of the same topics or matters are inconsistently addressed – in local rules in some courts, in district- or division-wide standing orders in other courts, in individual-judge orders in yet other courts, or repeated with variations in some or all of these categories in some courts – adds to the difficulty lawyers face in figuring out what standards apply. One approach is to try to limit individual-judge standing orders to the ways in which that particular judge’s rules

deviate from the district- or division-wide standing orders or local rules that otherwise govern courtroom management and conduct.

One outer limit is clear. Neither district- or division-wide nor individual-judge standing orders can be so inflexible or idiosyncratic that they are subject to being struck by a reviewing court. *See, e.g., In re Contempt Order of Peterson*, 441 F.3d 1266 (10th Cir. 2006), where the magistrate judge entered an order of criminal contempt against a government lawyer who was five minutes late to a pretrial detention hearing. The lawyer had violated the judge's "standing policy" that any lateness would be sanctioned in the amount of \$50, payable to the court — no excuses permitted. The court of appeals vacated the order, reasoning that it failed to take account of the circumstances of a particular case. It noted that the lawyer was in time to argue the motion, and that the judge made no effort to inquire into the reasons for the lawyer's tardiness. Moreover, the court was concerned that the lawyer had no notice of the "standing policy."

6. Rules on Filing, Pretrial Practice, and Motion Practice

There are many standing orders — both district- and division-wide and individual-judge orders — that control such matters as electronic filing; special pleading requirements (such as in civil RICO cases); sealing criteria and procedures; electronic discovery protocols; filing and litigating motions, including summary judgment motions; and filing memoranda of law. Many of these orders differ from the local or national rules, and an argument can be made that some of them are in tension with or even contradict those rules. More broadly, a strong argument can be made that issues relating to filing pleadings and motions, litigating motions, and developing criteria for sealing documents, are so important to the practicing bar

that notice and public comment are essential. Most of these topics are at the frontier of proper subject matters for standing orders and many are probably beyond.

7. Rules for other proceedings

Some districts have standing orders that essentially provide a complete set of rules for such proceedings as arbitration, ADR, mediation, sentencing (especially standards for probation and supervised release), and attorney disciplinary proceedings. Most districts have implemented such procedures in local rules, so it would appear that standing orders are not necessary for these kinds of proceedings. It seems difficult to justify the placement of an entire set of procedural rules in standing orders. The litigants participating in these proceedings have a legitimate interest in commenting on at least some of the rules.

8. Standing orders that duplicate a local or national rule

Under the terms of Civil Rule 83 and Criminal Rule 57, standing orders are not supposed to be duplicative of a national rule. Duplication must be distinguished from an order that simply *refers to* a national rule. But if a standing order actually duplicates a national rule, it is both unnecessary and improper.

There is no similar prohibition on a standing order duplicating a local rule. It could be argued that such duplication is problematic, because including the same subject matter in both a local rule and in a standing order is in itself confusing. The potential for confusion increases if one changes and the other does not, or if the standing order is close but not identical to the local rule. Minor variations, poor paraphrasing, or selective duplication will introduce even more confusion. On the other hand, duplicating some local rules into standing orders might increase the likelihood that the lawyers know of the requirements.

9. Standing orders that explicitly abrogate or modify a local rule

District courts have abrogated or modified a local rule by issuing a standing order, even without the justification of an emergency. This use of standing orders is problematic, because it requires the practitioner to master both the local rule and the standing order and then to determine how they interact. The transaction costs would appear to outweigh whatever benefit might be argued to exist from changing a local rule by way of standing order.

VI. Conclusion

The Judicial Council of each circuit has the authority to review local rules. The Rules Committee, of course, has no such authority. The Rules Committee hopes that this paper is responsive to those who have requested guidance in determining whether any of its standing orders would be better placed in local rules. The Rules Committee also hopes that this paper helps move toward workable standards for delineating between local rules and standing orders and for consistency in posting and describing the contents of standing orders.

1. Standards for Delineating Between Local Rules and Standing Orders

As this paper shows, there are significant problems arising from the lack of standards for distinguishing between the subjects that should be covered in local rules and the subjects that are appropriate for standing or general orders. The work by some districts to identify and state this standard provides an excellent starting point. Before deciding whether to develop national standards or guidelines delineating between local rules and standing orders, however, the Committee needs more information from judges.

This paper identifies subject matters that are likely to be addressed by standing orders. Four categories – internal administration, emergencies, temporary problems, and constantly changing areas – appear to be the most appropriate subjects for standing orders. At the other extreme are certain kinds of matters that should not be addressed in standing orders: matters that directly impact lawyers and litigants as to which public comment is important; matters that conflict with or abrogate national or local rules; or matters that are addressed so inflexibly as to be fundamentally unfair. Between these extremes is a murkier middle ground of matters that are harder to categorize as appropriate for local rule or standing order placement. These matters include courtroom-conduct rules; rules governing filing, pretrial practice, and motion practice; and rules on a variety of non-court proceedings. The Rules Committee seeks your assistance in developing workable and effective standards for the contents of local rules and standing orders. The cover letter to this paper lists specific questions that the Committee would appreciate you answering, to help decide whether and how to seek more consistency in local rules and standing orders.

2. Placement of Standing and General Orders on Websites

The Rules Committee can provide assistance, upon request, by reviewing a district's standing orders to identify those that may raise concerns because they directly conflict with a national rule, directly conflict with a local rule, or purport to abrogate or modify a local rule. In addition, the Rules Committee or AO staff could provide, on request, general advice on posting standing orders and individual-judge orders on each district's website and advice on making the contents of standing orders clearer. Districts that are interested in receiving the assistance of the Rules Committee on any of the matters discussed in this paper are

invited to contact the Rules Committee's Reporter on local rules matters and the principal author of this paper:

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140 West 62nd Street, New York, NY 10023
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Oral Report

SUBJECT: Long-Range Planning (Information)

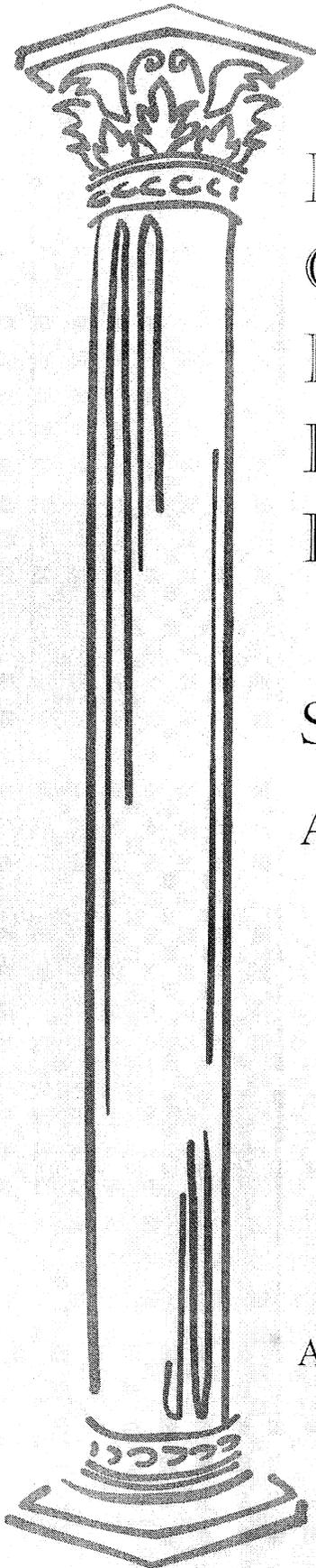
A report on the implementation of the 1995 *Long Range Plan for the Federal Courts* is attached. It reports on the status of the *Plan's* 93 recommendations and 81 implementation strategies based on reports from Judicial Conference committees.

The long-range planning meeting of Judicial Conference committee chairs was held on March 10, 2008. A report of the meeting is included as Attachment 2. At the meeting, Judge Charles R. Breyer, the long-range planning coordinator for the Executive Committee, informed participants about the Executive Committee's consideration of the judiciary's long-range planning process.

The next long-range planning meeting will be held on September 15, 2008. Ideas about crosscutting planning issues that should be discussed at future planning meetings should be provided to Cathy McCarthy at the Administrative Office.

Attachment 1. *Implementation of the Long Range Plan for the Federal Courts: Status Report, April 2008.*

Attachment 2. Report of the Judicial Conference Committee Chairs' Long-Range Planning Meeting, March 10, 2008.



IMPLEMENTATION
OF THE
LONG RANGE PLAN
FOR THE
FEDERAL COURTS

Status Report

April 2008

Administrative Office of the U.S. Courts

Implementation of the Long Range Plan for the Federal Courts

is Available on the Judiciary's Intranet Web Site at

http://jnet.ao.dcn/Judges/LongRange_Planning/Implementation_Long_Range_Plan.html

and the Rules Committee Support Office

**Judicial Conference Committee Chairs
Long-Range Planning Meeting**

March 10, 2008

Report

**Administrative Office of the United States Courts
Office of Management, Planning and Assessment**

SUMMARY REPORT

MARCH 2008 LONG-RANGE PLANNING MEETING

The March 10, 2008 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, the Judicial Conference Executive Committee's long-range planning coordinator.

Participants in the meeting included Judicial Conference committee chairs, members of the Executive Committee, the magistrate and bankruptcy judge observers to the Judicial Conference, and the Director of the Federal Judicial Center. Administrative Office (AO) participants included Director James C. Duff, Deputy Director Jill C. Sayenga, and Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the long-range planning process. A list of participants is included as Appendix A.

Enhancing Judiciary Planning

Judge Breyer spoke about the Executive Committee's consideration of enhancements to the judiciary's planning process. Meeting participants also received a document describing issues considered by the Executive Committee (Appendix B). Judge Breyer described the Executive Committee's task as one of determining which aspects of the current planning process should be preserved and which elements should be strengthened.

Judge Breyer informed the group that he and the AO's long-range planning staff had researched different approaches to planning, including the planning process conducted by the federal judiciary in the early 1990s to develop the *Long Range Plan for the Federal Courts*. Judge Breyer and staff also met with California judicial branch officials—including its Chief Justice and Administrative Director of the Courts—and learned about their approach to strategic planning.

Judge Breyer noted that the California state court system is large and reasonably well run. California judicial branch officials reported that their strategic planning efforts have been critical to their success in garnering legislative support and resources. They have a multi-tiered planning process including a high-level strategic plan supplemented with an operational plan. The strategic plan describes the mission of the California judicial branch, identifies fundamental issues facing the system, and establishes long-range goals. The strategic plan is a key tool for communicating with California's legislature. The operational plans, which are frequently refreshed, are action-oriented plans that define how the system will proceed toward the strategic goals over the course

of the next three years. Having a strategic and an operational planning cycle has helped the California court system to be both proactive and quick to respond to unanticipated challenges.

The Executive Committee reviewed suggestions from Judge Breyer and discussed the planning process at its February 2008 meeting. The Committee agreed it would be preferable for new strategic plans to be developed and approved in a relatively short period of time. Judge Breyer stressed that the Executive Committee is not interested in a lengthy planning process resulting in a publication that would quickly become dated. He also emphasized that the Executive Committee does not want to disturb the committee system and recognizes the importance of developing policies and recommendations through the committees. The Executive Committee is particularly interested in identifying and formulating responses to crosscutting planning issues, especially those that are congressionally driven. In considering specific proposals for a new planning process, Judge Breyer said that the Executive Committee would consider whether a new process would help the judiciary to respond better to changing circumstances.

The Executive Committee responded favorably to the idea of developing strategic and operational plans. A subcommittee of Judges Breyer, Paul Michel, and Lawrence Piersol was appointed to develop specific proposals. At the suggestion of the subcommittee, the Executive Committee agreed on March 10, 2008 that Chief Judge Thomas F. Hogan, Executive Committee chair, and AO Director Duff should consult with Chief Justice Roberts to seek his support for, and guidance regarding, a new judiciary planning initiative.

Implementation of the 1995 *Long Range Plan for the Federal Courts*

A draft status report on the implementation of the 1995 *Long Range Plan* was distributed. The Executive Committee had requested an assessment, and following their winter 2007-2008 meetings, committees reported on the status of implementation of the *Plan's* 93 recommendations and 81 implementation strategies. A comprehensive status report was compiled by the AO's long-range planning staff. Cathy McCarthy noted that the committees accomplished much of what the *Long Range Plan* envisioned. She mentioned some findings of the report:

- Many of the *Plan's* recommendations represented long-term goals or aspirations that can never be fully achieved, such as encouraging congressional restraint in assigning new civil and criminal jurisdiction to the federal courts. More than half of the recommendations and implementation strategies from the *Plan* were characterized by committees as 'effected through policy or practice.'

- Some recommendations and strategies were more specific, such as eliminating the option to appeal the judgment of a magistrate judge in a civil consent case to a district court judge. Nearly all of the specific or tangible recommendations and strategies have been implemented.

Ms. McCarthy described how the assessment of the *Long Range Plan's* implementation will assist in the development of new strategic and operational plans. It would be one of several sources of input into the development of new plans. A new strategic plan could draw upon the *Long Range Plan's* expression of the mission and core values of the judiciary. Some aspirational recommendations could be adapted into broad long-term goals. Tangible items that are still incomplete could be adapted into an operational plan that would include specific milestones. Items that have been completed, those that are not strategic in nature, or that are no longer relevant due to changed circumstances would not be included in new strategic or operational plans (See Appendix C).

The Work and Staffing of Senior Judges

Judge Kenneth F. Ripple was invited to the long-range planning meeting to discuss the work of the Judicial Resources Committee's newly-created Ad Hoc Subcommittee on Staffing Resources for Senior Judges. The subcommittee is studying the chambers staffing needs of senior judges. This task requires an understanding of the work they do, and their significant contributions to the judiciary. Approximately 20 percent of dispositions by Article III judges are handled by senior judges. Their contributions also include non-case-related activities, including participation in judicial administration and governance, education, mentoring and public service activities. Judge Ripple said the subcommittee will approach its work carefully and thoughtfully. Judge Breyer noted that one of the most important functions of senior judges is their service as mentors to new judges.

Judge Ripple identified key premises. One is that the Judicial Conference has made it clear that with respect to the performance of the judicial function, senior judges should be treated like active judges. Also, the authority and responsibility for determining a senior judge's need for staff rests with the circuit judicial councils. The subcommittee intends to collect data, review it carefully, and share it with other interested parties, when appropriate.

One of the subcommittee's tasks is the review of current staffing policies to ensure that they are understandable and defensible. Judge Ripple noted that several circuit

judicial councils use a formula for senior judge staffing based on their anticipated work. He cautioned against policies that are too rigid and do not account for temporary fluctuations in a judge's workload, such as a temporary illness or disability.

Judge Ripple discussed a number of trends. He noted that senior judges are handling more criminal cases than they used to. Technology, including secure remote access, assisted listening devices, and video phones, has made it easier for senior judges to continue to handle cases. Judge Ripple also commented that changes in the characteristics of judges, such as the age at appointment, may affect decisions to take senior status, and the length of service as a senior judge. However, it would be difficult to predict the factors that influence the decisions of individual retirement-eligible judges to take senior status, work, or retire.

Breakout Discussions on Crosscutting Planning Issues

Enhancements to judiciary planning are likely to focus on identifying, analyzing, and addressing issues that affect the work of multiple committees. To provide participants the opportunity to discuss several crosscutting issues, the long-range planning meeting included five breakout discussions. Highlights of the small group discussions follow.

1. Addressing the challenges of pro se cases

The judges participating in this discussion noted that the numbers of pro se cases are not increasing, but there is a growing awareness of pro se cases because they require additional work and present specific challenges. For example, pro se cases are likely to have repeat motions or even abusive motions. Courts' treatment of pro se cases must balance a number of competing objectives, including helping pro se filers to proceed on their own, and assisting pro se filers in finding affordable or pro bono attorneys. The group noted the potential for meritorious claims in pro se cases, and the importance of working against the tendency to become cynical.

Prisoner pro se cases pose their own unique challenges. Courts of appeals handle many prisoner pro se filings, which require considerable staff time to screen cases and redirect the filer, when necessary, to district or state courts. In district courts, where the majority of pro se cases are filed by prisoners, electronic filing is impossible for nearly all prisoner pro se filers because of the lack of computer or internet access in the prisons. Prisoner pro se filers sometimes repeatedly ask for more time to make filings, given their lack of resources and the irregularities of the mail system.

The group discussed the need to provide additional assistance and training for pro se litigants. Among other initiatives, they talked about the Bankruptcy Judges Advisory Group's development of guidance on helping pro se parties in bankruptcy cases, including information that should be available at clerks' offices, model content for local court websites, procedures for alerting pro se parties about deficient filings, and the establishment of pro bono programs. They also discussed the work of the American Bar Association's Litigation Section in helping judges identify best practices in handling pro se cases. An effort to translate the most-used district court forms into Spanish may provide some assistance to Spanish-speaking pro se filers.

The group also identified some unmet needs. They observed that, due to the unique challenges of prisoner cases, the system would benefit if there was some way to smooth the transition between the state and federal systems. They also noted that some pro se filers pose security threats. Additional coordination between state and federal courts could aid in the detection of potential threats.

2. Judicial workload imbalances, chambers management challenges and resource requirements.

The judiciary employs a number of mechanisms to address judicial workload imbalances, including the use of senior and visiting judges (both intracircuit and intercircuit), provisions for hiring temporary law clerks or secretaries for judges during judicial emergencies, and assistance for clerks' offices. In this breakout discussion, judges discussed long-range resource requirements for judges, given workload imbalances across circuits and districts. They also discussed pros and cons of decentralizing chambers budgets.

In discussing the current approaches to addressing workload imbalances, the judges agreed that existing mechanisms work well, particularly the processes for using visiting judges. The chair of the Committee on Intercircuit Assignments briefs each incoming circuit chief judge about the intercircuit assignment process, and informs them about a roster of judges willing to take intercircuit assignments. Another important factor in balancing workload is the contribution of senior judges, who provide the majority of visiting judge assistance. Ultimately, the group felt that passage of an omnibus judgeship bill reflecting Judicial Conference recommendations is needed to address squarely workload imbalances.

In considering the potential for decentralized chambers-level budgets, it was noted that judges would be most comfortable making decisions about personnel budgets, because they already make decisions about the composition of their chambers staff

(judges can hire an additional law clerk in lieu of a secretary). The group felt that most judges would not be comfortable managing a budget that included other spending categories, such as information technology.

The group discussed whether enough is being done to help individual judges with heavy workloads. They noted that many judges are reluctant to ask for help. This reluctance places an additional responsibility on chief judges, and the group observed that chief judges are becoming more proactive in reaching out to the judges in their courts to let them know about resources that are available.

3. Challenges and opportunities for courts resulting from the use of technology, particularly the ability to work from anywhere.

The judges in this breakout group noted that technology creates opportunities for the improved handling of cases, but also presents challenges. Proceedings conducted remotely by video- or teleconference present a tradeoff between the right to be present in court and the time and other costs that can be saved by parties who are at a distance from the court. Whether it is appropriate to conduct proceedings remotely may depend on the type of proceeding. One judge observed that technology “permits us to do things that push at the Constitution.”

The group identified several planning issues relating to the use of technology, including:

- With electronic discovery, the volume of material has grown tremendously and now exceeds the ability of judges and parties to sift through it.
- Balancing privacy and accessibility will continue to be a challenge. The judiciary may need to consider the creation of additional policies for data and information that should not be completely accessible via the internet but should not be redacted or sealed.
- More planning is needed to assess the advantages and downsides of emerging technologies and make conscious decisions about accepting or rejecting their use.

4. Maintaining accountability and ethics standards.

Judges in this group discussed “accountability gaps” in the areas between committee jurisdictions. For example, the Committee on Codes of Conduct fulfills individual judges' requests for advisory opinions about their own behavior, and the

Committee on Judicial Conduct and Disability can act on specific complaints about judicial conduct. The Codes of Conduct Committee can provide general guidance to a chief judge about whether certain behavior comports with the Code of Conduct for United States Judges, but the Judicial Conduct and Disability Committee is called upon to determine whether such conduct is "prejudicial to the effective and expeditious administration of the business of the courts."

The judges in this group also noted that behavior not in violation of the law or the codes of conduct may still appear questionable in the eyes of the public. It may be helpful for the judiciary to consider whether this issue can be addressed institutionally and, in particular, to explore the idea of informing judges on how better to protect their reputations as well as the reputation of the judiciary as a whole.

5. Influencing policies and initiatives pursued by the other branches that affect the federal judiciary.

The judges in this breakout group discussed the extent to which the judiciary can and should try to influence the actions of the executive branch and Congress. They expressed reservations about the use of the term "influence," and felt that the appropriate role of the judicial branch is to educate the other branches about the impact of laws and policies on court operations. The group discussed whether the judiciary should refrain from commenting on pending legislation or regulations where a matter is seen as a policy choice that is the prerogative of the other branches.

The group also discussed how the judiciary can provide effective and timely advice to Congress to avoid drafting problems in statutes. They noted that, once Congress begins legislating, it is difficult to delay the process to correct drafting errors.

Participants noted several existing mechanisms for interbranch communications, including regular meetings between the Judicial Conference Executive Committee and the Attorney General; an upcoming two-branch conference for the judiciary and Congress; and enhanced communications between the Administrative Office and key judiciary partners in the executive branch. It was also noted that representatives from executive branch agencies regularly attend meetings of some Judicial Conference committees. The judges felt that local efforts involving informal meetings with members of Congress are very helpful and should be increased.

The judges in this breakout discussion agreed that more can be done in the area of public education and media outreach. Public support is often critical to a more favorable view of judicial perspectives. The group observed that the public does not distinguish

between the state and federal court systems, and suggested that it would be beneficial for state and federal courts to collaborate on educational efforts, particularly around common concerns such as judicial independence. They also noted a generation gap in thinking about communication channels—in particular the influence of YouTube and other internet sources.

Conclusion

Judge Breyer recognized the efforts of AO Director James Duff in enhancing communication with Congress and the executive branch. He encouraged participants to contact Cathy McCarthy with ideas about crosscutting planning topics that would benefit from additional research and analysis, and agenda topics for future long-range planning meetings. The next long-range planning meeting will be held on September 15, 2008.

Appendix A: Participants in the March 2008 Long-Range Planning Meeting

Executive Committee

Hon. Thomas F. Hogan, Chair
Hon. Charles R. Breyer, Long-Range
Planning Coordinator
Hon. Danny J. Boggs
Hon. Paul R. Michel
Hon. Lawrence L. Piersol
Hon. Anthony J. Scirica
James C. Duff, Director of the
Administrative Office

Committee on the Administrative Office

Hon. Roger L. Gregory, Chair

Committee on the Administration of the Bankruptcy System

Hon. Barbara M. G. Lynn, Chair

Committee on the Budget

Hon. Julia Smith Gibbons, Chair
Hon. Robert C. Broomfield

Committee on Codes of Conduct

Hon. Gordon J. Quist, Chair

Committee on Court Administration and Case Management

Hon. John R. Tunheim, Chair

Committee on Criminal Law

Hon. Julie E. Carnes, Chair

Committee on Defender Services

Hon. John Gleeson, Chair

Committee on Federal-State Jurisdiction

Hon. Janet C. Hall, Chair

Committee on Financial Disclosure

Hon. Ortrie D. Smith, Chair

Committee on Information Technology

Hon. Thomas I. Vanaskie, Chair

Committee on Intercircuit Assignments

Hon. Royce C. Lamberth, Chair

Committee on International Judicial Relations

Hon. Robert H. Henry, Chair

Committee on the Judicial Branch

Hon. D. Brock Hornby, Chair

Committee on Judicial Resources

Hon. George Z. Singal, Chair
Hon. Kenneth F. Ripple

Committee on Judicial Security

Hon. David Bryan Sentelle, Chair

Committee on the Administration of the Magistrate Judges System

Hon. Dennis M. Cavanaugh, Chair

Committee on Rules of Practice and Procedure

Hon. Lee H. Rosenthal, Chair

Advisory Committee on Appellate Rules

Hon. Carl E. Stewart, Chair

Advisory Committee on Bankruptcy Rules

Hon. Laura Taylor Swain, Chair

Advisory Committee on Civil Rules

Hon. Mark R. Kravitz, Chair

Advisory Committee on Criminal Rules
Hon. Richard C. Tallman, Chair

Advisory Committee on Evidence Rules
Hon. Robert L. Hinkle, Chair

Committee on Space and Facilities
Hon. Joseph F. Bataillon, Chair

Hon. Barbara J. Rothstein
Director, Federal Judicial Center

Hon. David Stewart Kennedy
Bankruptcy Judge Observer, Judicial
Conference of the United States

Hon. Robert B. Collings
Magistrate Judge Observer, Judicial
Conference of the United States

Administrative Office Staff:

Jill C. Sayenga
Cathy A. McCarthy
Brian Lynch
Carolyn M. Peake

Staff Recorders for Breakout Sessions:

Susan M. Del Monte
Frances E. Pickering
Bret G. Saxe
Patrick J. Walker
Ralph E. Watkins

Issues Under Consideration by the Executive Committee to Enhance Judiciary Planning

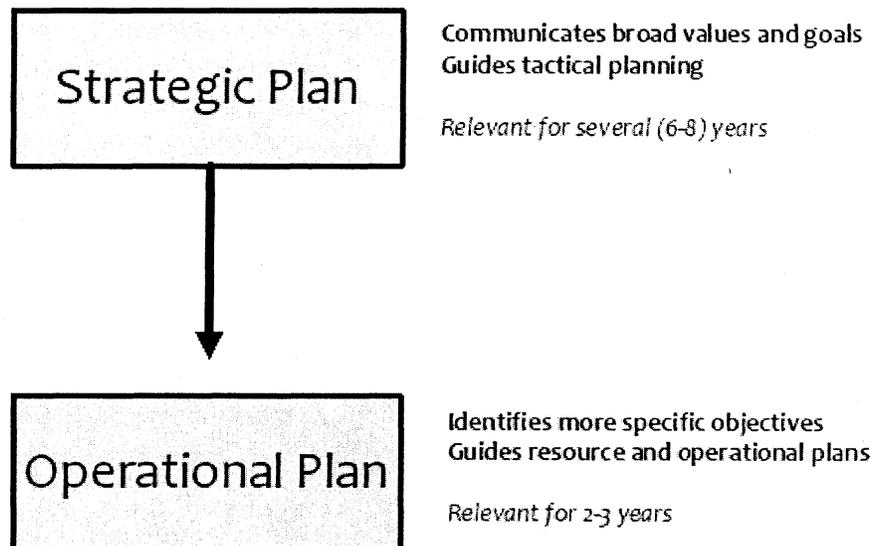
There is growing interest in enhancing the long-range planning process to identify broad judiciary issues and goals, and to define needs, critical objectives, and priorities. Through better planning, the judiciary can do more to shape its own future. The judiciary can anticipate and prepare for changes, assess areas of concern, define appropriate strategies, and take action—**before** issues compel congressional involvement. The judiciary has benefitted from self-initiated planning efforts such as the development of the Judicial Conference’s cost-containment strategy, through which it determined for itself how to reduce budget requirements.

Discussions at the September 2007 long-range planning meeting demonstrated that many of the key challenges facing the judiciary do not fall within the jurisdiction of a single committee and require broad consideration and collaboration. A new planning process can build upon the strengths of committee-based planning and expand the capacity to develop comprehensive plans. In February 2008, the Executive Committee considered a report from Judge Charles R. Breyer, the Committee’s long-range planning coordinator, that discussed options to enhance planning.

The Executive Committee considered whether there is a need to reprise the long-range planning effort of 1991-1995 and produce an extensive plan. Judge Breyer’s report pointed out two drawbacks: it requires so much effort to produce such a document that it is bound to be out of date before another can be developed; also, some strategic goals and objectives have a relatively long life span, but other issues of equal importance need to be analyzed and addressed in a shorter time period. The Executive Committee agreed that an extensive planning effort should not be pursued, and favored a planning process that is more responsive to changing needs.

Judge Breyer suggested a basic planning model that can identify long- and short-term priorities relatively quickly. A high-level strategic plan would describe the judiciary’s mission, values, and goals. If written broadly enough, it could stand for six years or longer. It would draw from the 1995 *Long Range Plan for the Federal Courts* and serve as a public document. It would also be the foundation for shorter-term planning efforts at a more operational level. The operational plan would assess trends and issues, and define specific initiatives and objectives. It would describe crosscutting judiciary needs and interests, and integrate related committee components. Both plans would underpin the judiciary’s legislative, policy, program and resource strategies, and the operational plan would help guide annual planning and budget decisions.

Potential Judiciary Planning Model



The Executive Committee had a positive response to the idea of a new planning effort for the Judicial Conference that is both strategic and operational.

The proposed model draws upon research about different approaches to planning, and the types of plans produced by others. The planning approach of the California Judicial Branch, which Judge Breyer and staff closely examined, features the development of strategic and operational plans. That court system is even larger in some key aspects than the federal judiciary and it is nearly as complex. It has a budget of \$3.5 billion, 20,000 employees, and is in the process of assuming responsibility for 451 courthouses.

California's Chief Justice and Administrative Director of the Courts launched a planning effort fifteen years ago, and it has matured into a process that serves them well. Their policy body equivalent to our Judicial Conference uses the planning process to define priorities and objectives. Committees play a key role in this process. Perhaps most notably, the California court leaders make use of the strategic plans with enormous success in pursuing their legislative agenda. Not all aspects of their process are suited to the federal judiciary, but some elements could well serve its needs.

The Executive Committee asked Judges Breyer, Paul R. Michel, and Lawrence L. Piersol to develop proposals for a new planning process.

Transition of the 1995 Long Range Plan for the Federal Courts to New Plans

New strategic and operational plans for the judiciary can draw upon the 1995 Long Range Plan for the Federal Courts, which, despite its age, still articulates core values and principles that continue to be valid and relevant. (New judiciary plans would also draw upon other sources, particularly the planning activities of Judicial Conference committees.)

Certain elements of the Plan, which describe principles and long-term goals, would be used in a strategic plan. An operational plan would have more specific objectives and initiatives that would be pursued in a 2-3 year period. In the assessment of the implementation status of the Long Range Plan, committees reported that they intended to re-visit some recommendations and strategies that have not yet been fully implemented. This unfinished work can be reflected in an operational plan.

Many of the 1995 Plan's recommendations and strategies, which were often very specific, would not be adapted into new plans. Some recommendations and strategies have been fully implemented. In other cases, there have been changes in Judicial Conference policy, or in the nature of the issue or circumstances, that may render a given strategy obsolete or significantly affect its scope or terms. Some items from the 1995 Plan describe current policies or practices that are not strategic in nature and can be left out of future planning documents.

Figure 1: Transition of the 1995 Long Range Plan to New Plans

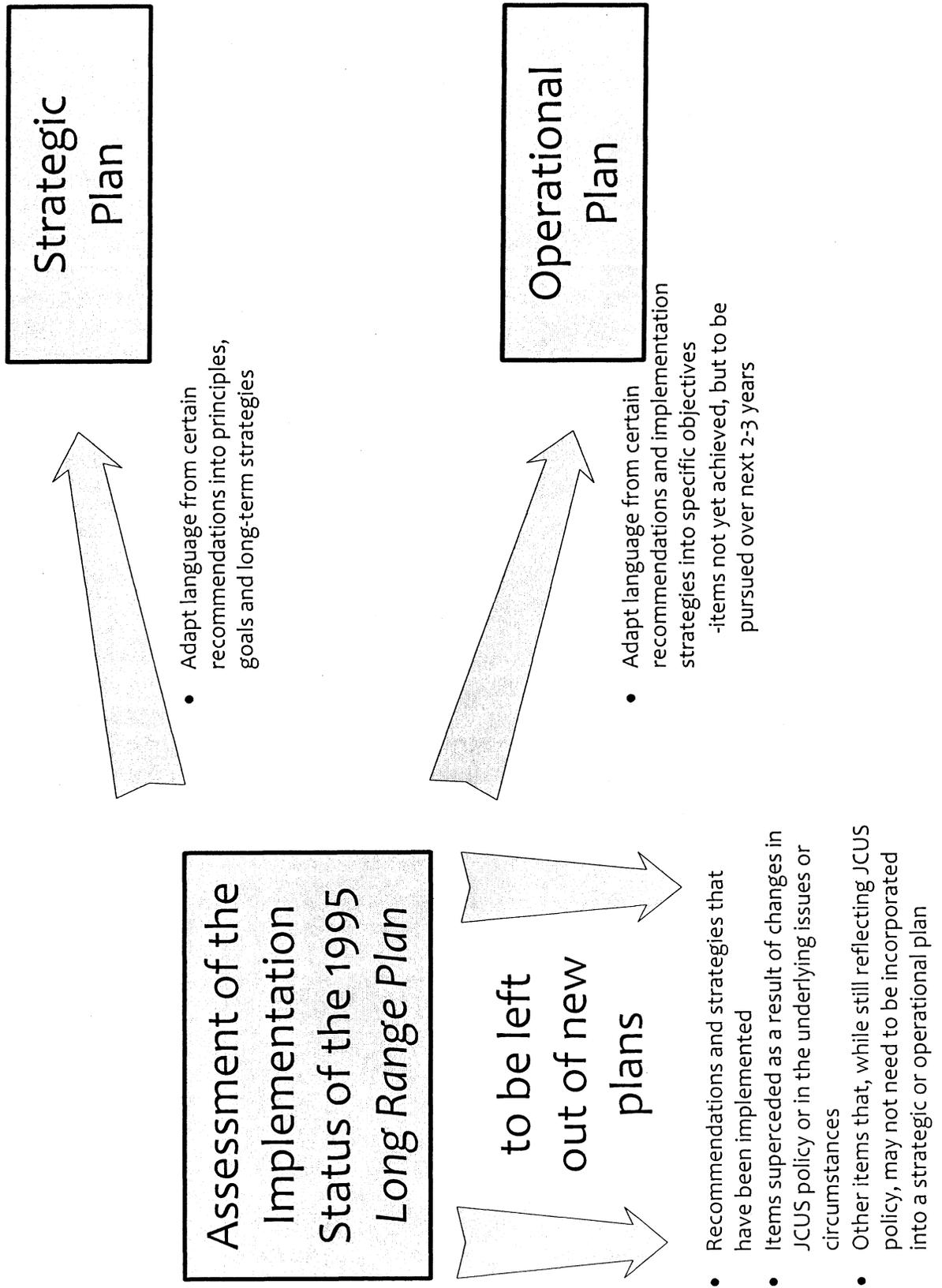


FIGURE 2: ILLUSTRATION

1995 Long Range Plan Recommendations and Implementation Strategies

Recommendation 8. The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.

Implementation Status: Partially Implemented. While 45 states authorize certification of questions of state law from federal courts of appeal, only 19 states authorize district courts to certify such questions. Three other states authorize certification of questions by bankruptcy courts, but do not refer to district courts.

Recommendation 92. The federal and state courts should communicate and cooperate regularly and effectively.

Implementation Status: Effected through Current Practices. This recommendation embodies the purpose of the Committee on Federal-State Jurisdiction, which for 20 years has pursued enhanced communication and coordination between federal and state courts. In addition to specific efforts, such as the review of proposed legislation to assess its potential impact on federal-state relations and jurisdiction, there is significant interchange. Four state court chief justices are members of the Committee on Federal-State Jurisdiction, and federal judges attend meetings of the Conference of (state) Chief Justices. State court judges also sit on federal rules advisory committees.

Potential New Strategic Plan Goal

Goal: Maintain effective communications and cooperation with state court systems on matters relating to judicial federalism, the administration of justice, and other mutual interests.

Potential New Operational Plan Objective

Objective: Ask states to adopt certification procedures that allow federal circuit, district and bankruptcy courts to submit novel or difficult state law questions to state supreme courts.

