PRELIMINARY DRAFT

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

Request for Comments on Amendments to:

Appellate Rules	29 and 32; Appendix on Length Limits; and Form 4;
Bankruptcy Rules	1007, 3018, 5009, 9006, 9014, 9017, new Rule 7043, and Official Form 410S1; and
Evidence Rule	801

Written Comments Due By
February 17, 2025

Prepared by the
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
August 2024

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

MEMORANDUM

TO: The Bench, Bar, and Public

FROM: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

DATE: August 15, 2024

RE: Request for Comments on Proposed Amendments to Federal Rules and Forms

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The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) has approved publication for public comment of the following proposed amendments to existing rules and forms, as well as one new rule:

- Appellate Rules 29 and 32, Appendix on Length Limits, and Form 4;
- Bankruptcy Rules 1007, 3018, 5009, 9006, 9014, 9017, new Rule 7043 and Official Form 410S1; and
- Evidence Rule 801.

The proposals, supporting materials, and instructions on submitting written comments are posted on the Judiciary's website at:

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

Opportunity to Submit Written Comments

Comments concerning the proposals must be submitted electronically no later than **February 17, 2025**. Please note that comments are part of the official record and publicly available.

Opportunity to Appear at Public Hearings

On the following dates, the advisory committees will conduct public hearings on the proposals either virtually or in person:

- Appellate Rules on January 10, 2025, and February 14, 2025;
- Bankruptcy Rules on January 17, 2025, and January 31, 2025; and
- Evidence Rule on January 22, 2025, and February 12, 2025.

If you wish to appear and present testimony regarding a proposed rule or form, you must notify the office of Rules Committee Staff **at least 30 days before the scheduled hearing** by emailing RulesCommittee_Secretary@ao.uscourts.gov. Hearings are subject to cancellation due to lack of requests to testify.

At this time, the Standing Committee has only approved the proposals for publication and comment. After the public comment period closes, all comments will be carefully considered by the relevant advisory committee as part of its consideration of whether to proceed with a proposal.

Under the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, if any of the published proposals are later approved, with or without revision, by the relevant advisory committee, the next steps are approval by the Standing Committee and the Judicial Conference, and then adoption by the Supreme Court. If adopted by the Court and transmitted to Congress by May 1, 2026, absent congressional action, the proposals would take effect on December 1, 2026.

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

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 13, 2024*

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 10, 2024, in Denver, Colorado. * * *

* * * * *

* Revised to incorporate changes reflecting decisions at the June 4, 2024, meeting of the Committee on Rules of Practice and Procedure.

It also seeks publication of two amendments. The first proposed amendment is to Appellate Form 4, dealing with applications to proceed in forma pauperis, with a simplified version of Form 4. The second deals with amicus briefs and consists of amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits. (Part III of this report.)

* * * * *

III. Action Items for Approval for Publication

A. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

In 2019, the Civil, Criminal, and Appellate Rules Committees received suggestions calling for changes to the standards for granting IFP status and for simplification of the applicable forms. That same year, an article published in the Yale Law Journal proposed similar changes, noting the degree of variation among district courts. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1482, 1522 (2019). The issue was further complicated by confusion resulting from the 1996 amendment of the governing statute, 28 U.S.C. § 1915, by the Prison Litigation Reform Act (PLRA). Hammond, 128 Yale L.J. at 1490-1492.

Only the Appellate Rules Committee is actively pursuing reforms in this area. No advisory committee is seeking to try to establish standards for granting IFP status, an issue that might not be appropriate under the Rules Enabling Act in any event. As for the applicable forms, which specify the level of detail required in an IFP application, the district courts and the courts of appeals are differently situated. The forms used in the district courts are generally produced by the Administrative Office of the U.S. Courts, and therefore not subject to the rulemaking procedures of the Rules Committees. But Appellate Form 4 is a part of the Federal Rules of Appellate Procedure, adopted pursuant to the Rules Enabling Act. For these reasons, the Advisory Committee has focused its attention on possible revisions to Form 4.

The Advisory Committee has produced a simplified Form 4 and asks that it be published for public comment. The goal of the revised Form 4 is to reduce the burden on individuals seeking IFP status while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status. The Advisory Committee circulated an earlier draft to the senior staff attorney in each of the circuits. The response was overwhelmingly positive, and the Advisory Committee made some changes to the draft Form 4 based on comments from those senior staff attorneys.

Historical Background

Individuals have long been able to avoid prepaying fees and costs associated with litigation if they are unable to do so because of poverty. 28 U.S.C. § 1915. *See* Act of July 20, 1892, c. 209, 27 Stat. 252 (providing this opportunity to citizen plaintiffs); Act of June 25, 1910, c. 435, 36 Stat. 866 (extending IFP status to defendants and appellants); Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (extending IFP status to noncitizens); *cf. Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (holding that only natural persons qualify for IFP status).

In 1948, the Supreme Court explained that a person need not be destitute or a public charge to qualify for IFP status because "[t]he public would not benefit if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Adkins v. DuPont Co.*, 335 U.S. 331, 339 (1948). The Court observed that an affidavit in support of an application for IFP status is sufficient if it "states that one cannot because of his poverty, pay or give security for the costs . . . and still be able to provide himself and dependents with the necessities of life." *Id.* at 339. For years, the Court accepted an affidavit with those words and no more as sufficient. *See* Stern & Gressman's Supreme Court Practice § 8.7 (11th edition 2019).

When the Federal Rules of Appellate Procedure took effect in 1968, Form 4 contained five questions. 28 U.S.C. appendix (1964 edition, supp. I, 1968). In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which amended 28 U.S.C. § 1915. In 1998, Form 4 was revised and became a much more detailed questionnaire, including numerous questions about an applicant's spouse. 28 U.S.C. appendix (1994 edition, supp. V, 1995-2000).

The amendment to § 1915 produced a statute that makes little sense. It provides, in relevant part:

> [A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The Advisory Committee believes that proposed Form 4, which calls for a statement of "the total value of all your assets" is consistent with the statutory provision calling for a "statement of all assets," even though it does not call for an enumeration of those assets (and assuming that § 1915 requires all persons, not just all prisoners, to submit such an affidavit).

The Advisory Committee also believes that the statute does not require that Form 4 include an intrusive inquiry into information about an applicant's spouse. Prior to 1998, Form 4 did not include such questions, and nothing in the PLRA refers to spouses. Of course, there may be situations in which a spouse's income or assets are relevant. *See Escobedo v. Applebees*, 787 F.3d 1226, 1236 (9th Cir. 2015), but the same is true of other family members that existing Form 4 does not ask about. *See*, *e.g.*, *Zhu v. Countrywide Realty Co.*, 148 F. Supp. 2d 1154, 1156 (D. Kan. 2001) (close family members); *Williams v. Spencer*, 455 F. Supp. 205, 209 (D. Md. 1978) (parents of minors).

Nothing in proposed Form 4 would preclude a court from making further inquiry where appropriate. For example, if an applicant stated that he had little or no income or assets but substantial expenses, a court might inquire how those expenses were being paid. But based on the experience in the courts of appeals, the Advisory Committee does not believe that such cases are sufficiently common to warrant the detail required by current Form 4.

The foregoing analysis demonstrates that the streamlined proposal for Form 4 is consistent with the provisions of § 1915. Alternatively, if there were any question about the requirements of the statute, the level of detail required in an application for IFP status is a proper subject for the Rules Enabling Act process—as the history of Form 4 reveals—and a revised Form 4 can supersede any contrary requirement of the PLRA. 28 U.S.C. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999) (holding that a 1998 amendment to Federal Rule of Appellate Procedure 24 superseded provisions of the Prison Litigation Reform Act).

The proposed Form 4 would call for all persons, not just prisoners, to complete the form and require a statement of "the total value" of a person's assets, rather than an enumerated list of assets. Prisoners would continue to be required to provide statements from their institutional accounts. 28 U.S.C. § 1915(a)(2). The Advisory Committee believes the changes to Form 4 would serve the interests of the public, litigants, and the courts.

Proposed Form 4

Proposed Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP

status but also to provide the information that courts of appeals need and use, while omitting unnecessary information. The Advisory Committee learned from the various circuits that IFP status is denied far more frequently for lack of a non-frivolous issue on appeal than for lack of indigency. For that reason, the first page of proposed Form 4 informs the applicant of the need to show that there is a non-frivolous issue on appeal and visually highlights the requirement to state such issues at the outset. Page two contains eight questions. Questions one and two ask about monthly income, first from work and then from any other source. Questions three and four ask about costs (a topic not covered in the 1968 form), first for housing and then for any other necessary expenses. Questions five and six are devoted to assets and debt. For questions two through six, the proposed form includes appropriate illustrations, such as unemployment benefits, social security, childcare, transportation, bank accounts, credit cards, and student loans. Question seven asks how many people the applicant supports. Question eight asks about receipt of certain public benefits, which may provide a means-test verified by other government agencies that might yield a shortcut for approving eligibility. After informing prisoners of the need to provide a certified statement of their institutional accounts, the proposed form ends with space for an applicant to provide additional information.

The Advisory Committee unanimously approved the proposed revised Form 4 with the recommendation that it be published for public comment. It is included in Attachment B to this report.

B. Amicus Curiae Briefs (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-A; 23-AP-B; 23-AP-E; 23-AP-I; 23-AP-K)**

After years of careful consideration, the Advisory Committee recommends publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs.*** Conforming amendments to Rule 32(g) and the Appendix of Length Limits are also proposed.

** At the June 4, 2024 meeting, minor changes were made to the proposed amendments to Rule 29. In Rule 29(a)(2), the phrase "may be of considerable help to the court" was replaced with "may help the court." A new subdivision (C) was added to Rule 29(a)(3), providing that the brief must also contain a statement with "the information required by Rules 29(a)(4)(A), (b), (c), and (e)" with a conforming change to the committee note. The phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both" in Rules 29(b)(3) and (b)(4). Finally, minor stylistic changes were made to the rule and committee note.

*** The Advisory Committee is particularly interested in receiving comments on the proposal to eliminate the option to file an amicus brief on consent during a court's initial consideration of a case on the merits. Unlike the proposed disclosure requirements—which the Advisory Committee has been discussing, refining, and reporting for years—this proposal emerged

Background

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In September 2020, the Clerk of the Supreme Court wrote to the Standing Committee on Rules of Practice and Procedure, attaching his correspondence with the Congressional sponsors of that bill. He noted that Appellate Rule 29 includes disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended. In February of 2021, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Significantly, the current rule requires disclosure of earmarked contributions not only by parties to the case, but by nonparties as well—with the exception of such contribution by the amicus itself, its members, or its counsel.

The Advisory Committee's early focus was on a close analysis of the proposed AMICUS Act and the concerns of its sponsors, including that parties could fund amicus briefs, that donors could anonymously fund a party or multiple amici, and that the existing rule was inequitable because it prohibited crowdfunding with small anonymous donations. *See* Spring 2021 agenda book at 133. At the same time, the Advisory Committee was also focused on respect for the First Amendment, asking "whether more expansive disclosure requirements could benefit the courts and the

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more recently. And the approach proposed is the opposite of the approach that the Advisory Committee reported that it was initially considering. The change can be seen in proposed Rule 29(a)(2). It is also reflected in conforming changes to proposed Rules 29(a)(6) and 29(f). The corresponding discussion in the committee note is at lines 232-41.

public without infringing on constitutional rights." *Id*. at 138 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958)).

The Advisory Committee determined early on that, unlike the proposed AMICUS Act, any additional disclosure requirements should apply to all non-government amici, not just to repeat filers. It also determined early on that amicus briefs are significantly different from lobbying. Amicus briefs are filed with a court, available to the public, and the arguments made by amici can be rebutted by the parties. Lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch. *See* 2 U.S.C. § 1602(8)(B) (excluding communications "distributed and made available to the public" or "submitted for inclusion in the public record of a hearing" from the definition of "lobbying contact").

The Advisory Committee also readily concluded that any possible loophole that could be produced by a narrow reading of the phrase "preparing or submitting" a brief was easily remedied by clarifying that every step of the brief writing process was covered.

Similarly straightforward was the conclusion that parties should not be able to evade disclosure of earmarked contributions by making earmarked contributions to amicus organizations of which they are members. That is, the specific disclosure requirement for parties in current Rule 29(a)(4)(E)(ii) should trump the general exception for members of an amicus in current Rule 29(a)(4)(E)(iii)—and if there were any doubt about this, the Rule could be amended to make it clear. Almost as easy was the idea that there should be some de minimis threshold for earmarked contributions by nonparties.

Several issues proved far more challenging.

One such issue was whether there should be additional disclosure requirements concerning the relationship between a party and an amicus, including non-earmarked contributions to an amicus by a party and, if so, at what level of contribution should disclosure be triggered.

A second such issue was whether there should be additional disclosure requirements concerning the relationship between a nonparty and an amicus, including non-earmarked contributions to an amicus by a nonparty and, if so, at what level of contribution should disclosure be triggered.

The third, and perhaps the most difficult, was whether to retain the existing exception for earmarked contributions by members of an amicus.

In addressing these issues, and in proposing all these amendments, the Advisory Committee seeks to improve the integrity and fairness of the federal judicial process. By providing more information about amici, these amendments would place judges, parties, and the public in a better position to assess the independence and credibility of the arguments and perspectives offered by amici. By clarifying arguably unclear language and closing potential loopholes, these amendments would reduce opportunities for evasion and gamesmanship. At the same time, the Advisory Committee has been careful to avoid placing unnecessary burdens on amici, their members, and their contributors, and kept in mind their First Amendment interests. The First Amendment cases discussed below arose in markedly different circumstances than the ones presented by these amendments. Those cases involved situations where disclosure was required because an entity engaged in political speech or solicited contributions as a charitable organization. These proposed amendments are far more limited, modifying disclosure requirements that already exist for those who choose to submit amicus briefs to assist a court in deciding a case.

The AFP Decision

The Advisory Committee was aware in the spring of 2021 of the pendency of *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). When the Committee met again in the fall of 2021 after that case was decided, it considered an analysis of that decision and focused on the government's interest in amicus briefs, its interest in disclosure by amici, and the burdens on amici from disclosure—including both the administrative burden of compliance and the possibility that a potential amicus might decline to file a brief rather than disclose what it did not want to disclose. *See* Fall 2021 agenda book at 164, 166.[1]

In *AFP*, the Supreme Court held California's charitable disclosure requirement to be facially unconstitutional. *AFP*, 141 S. Ct. at 2389. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.

To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 2383 (cleaned up) (opinion of Roberts, C.J.).[2] "While exacting scrutiny

[1] Some might even decline to join an association for fear that the organization might file an amicus brief that requires disclosure.

[2] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that

does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 2385.

The Court concluded that California's disclosure regime did not satisfy the narrow tailoring requirement. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 2385-86. But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 2386. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* A facial challenge was appropriate because the "lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id.* at 2387.

A fuller understanding of the First Amendment limits in this area can be gained by considering both the Supreme Court cases on which *AFP* built and the subsequent court of appeals cases applying *AFP*.

Pre-*AFP* Cases

The leading case prohibiting compelled disclosure because of a chilling effect on freedom of association is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). As Chief Justice Roberts described it:

> *NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. We held that the First Amendment prohibited such compelled disclosure. We explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group

strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

> association," and we noted "the vital relationship between freedom to associate and privacy in one's associations." Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of disclosure—we concluded that the State's demand violated the First Amendment.

AFP, 141 S. Ct. at 2382 (citation omitted).

NAACP did not use the term "exacting scrutiny." Instead, that term can be traced to a campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), where the Court said, "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Id*. at 64 (footnote omitted).

Buckley refused to distinguish *NAACP* on the grounds that *NAACP* involved members while *Buckley* involved donors. The Court explained that funds are often essential to advocacy, that financial transactions can reveal much about associations and beliefs, and observed that its "past decisions have not drawn fine lines between contributors and members but have treated them interchangeably." *Buckley*, 424 U.S. at 66 (citing *United States v. Rumely*, 345 U.S. 41 (1953); *Bates v. Little Rock*, 361 U.S. 516 (1960)).

But *Buckley* did distinguish *NAACP* on a different ground and upheld the disclosure requirements of the Federal Election Campaign Act. It concluded that there were three governmental interests of sufficient importance to justify the disclosure requirements: (1) providing the electorate with information; (2) deterring corruption and avoiding the appearance of corruption; and (3) gathering the data to detect violations of contribution limits. 424 U.S. at 66-69.

The Court elaborated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely

> to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And . . . Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.
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> * * *
>
> Third . . . disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations. . . .

424 U.S. at 66-69 (cleaned up).

Section 201 of the Bipartisan Campaign Reform Act of 2002 (BCRA) requires any person who spends more than $10,000 on electioneering communications within a calendar year to file a disclosure statement identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. 2 U.S.C. § 434(f). In *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003), the Court relied on *Buckley* to uphold this requirement. *Id*. at 195 (referring to the "important state interests" in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"). It criticized the plaintiffs for wanting to spend funds on ads referring to candidates in the sixty days before the election "while hiding behind dubious and misleading names." *Id*. at 197.

Even as *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010), overruled part of *McConnell* and held unconstitutional BCRA's restrictions on independent corporate expenditures, it continued to uphold BCRA's disclosure requirements, again relying on the public's interest "in knowing who is speaking about a candidate shortly before an election." *Id*. at 369. Noting that *McConnell* had recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed, the Court rejected Citizens

United's as-applied challenge because it offered no evidence that its members may face similar threats or reprisals. *Id*. at 370.

Post-*AFP* Cases

In *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021), the court of appeals held that Rhode Island's campaign disclosure requirements—including disclosure of donors who contributed $1000 or more to an organization's general fund that was used to spend $1000 or more on independent expenditures or electioneering communication and on-ad disclosure of its top five donors—were constitutional under *AFP*. The court understood *AFP* to have increased the rigor of exacting scrutiny:

> Prior to the Court's recent decision in *Americans for Prosperity*, exacting scrutiny was widely understood to require only a "substantial relation" between the challenged regulation and the governmental interest. In refining its articulation of exacting scrutiny, the *Americans for Prosperity* Court heightened this requirement, emphasizing that in the First Amendment context, fit matters. The Court went on to say that exacting scrutiny requires a fit that is not necessarily perfect, but reasonable. A substantial relation is necessary but not sufficient for a challenged requirement to survive exacting scrutiny. And in addition, the challenged requirement must be narrowly tailored to the interest it promotes.

Id. at 85.

The court nevertheless concluded that the disclosure requirements were narrowly tailored. First, the challenged provisions apply only to organizations spending more than $1000 on independent expenditures or electioneering communications in a calendar year, thus tailoring the statute to reach only larger spenders in the election arena and helping the electorate understand who is speaking and properly weigh the message. Second, the temporal limitation links the disclosures to the objective of an informed electorate. Third, the definition of electioneering communication narrows the scope to the relevant electorate. Finally, the statute provides off-ramps: contribute less than $1000 or opt out of having the contribution used for independent expenditures or electioneering communication—effectively an opt-out earmark. Taken together, the statute requires "disclosure of relatively large donors who choose to engage in election-related speech." *Id*. at 88-89. And the on-ad disclosure of top donors "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." *Id*. at 91.

In *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023), the court of appeals affirmed the denial of a preliminary injunction against enforcement of a local law requiring the disclosure of the top three donors in all paid ads by independent expenditure committees. The court held that "[d]isclosure of who is speaking enables the electorate to make informed decisions and give proper weight to different speakers and messages," noting that "[a]n appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." *Id.* at 505 (cleaned up).

The court upheld a secondary disclosure requirement—that is, the disclosure of the top donors to certain donors—because such disclosure was "designed to go beyond the ad hoc organizations with creative but misleading names and instead expose the actual contributors to such groups." *Id.* (cleaned up).

The court also concluded that it was not fatal to the disclosure requirement that it "goes beyond donations that are earmarked for electioneering," because it is constrained in other ways, reaching "only the top donors to a committee that is, in turn, a top donor to a primarily formed committee." *Id.* at 510.

Nine judges dissented from the denial of rehearing en banc. They agreed "that the government has an interest in informing voters about who is funding political ads." *Id.* at 526 (VanDyke, J., dissenting). That's because "learning a political advertiser's financiers can serve as a reasonable proxy for informing the voter of where the speaker falls on the political spectrum. Or as I emphasized above, channeling the Greek moralist: 'A man is known by the company he keeps.' " *Id.* at 527 (quoting Aesop, Aesop's Fables 109 (R. Worthington, trans., Duke Classics 1884)). They dissented from the extension of this principle to secondary contributors, reasoning that a "man is not known by the company of the company he keeps," and that "a voter cannot reasonably infer any relevant information about a political speaker or an advertisement by knowing the speaker's secondary contributors," who "may contribute to the primary contributor for a variety of reasons unrelated to the primary contributor's support for a political speaker." *Id.*[3]

Smith v. Helzer, 95 F.4th 1207 (9th Cir. 2024), largely followed *No on E* in affirming the denial of a preliminary injunction against the enforcement of an Alaska campaign finance law. One of the statutory provisions requires that donors disclose their contributions of more than $2000 in a calendar year to an entity that makes independent expenditures in an election—and do so within 24 hours of making the donation. The court rejected the argument that because the recipients are already

[3] A separate dissent contended that the disclosure requirements took up too much space in the ads. *No on E*, 85 F.4th at 511 (Collins, J., dissenting).

required to report the receipt of such contributions, there is no state interest in requiring donors to also report, explaining that "[p]rompt disclosure by both sides of a transaction ensures that the electorate receives the most helpful information in the lead up to an election." *Id.* at 1216. Requiring prompt reporting at all times rather than just near elections gave the court some pause, but it ultimately concluded that it was not an onerous burden. *Id.* at 1218-19. A partial dissent concluded that the burdens on individual donors are too great and saw no justification for a year-round 24-hour reporting requirement. *Smith*, 95 F.4th at 1221 (Forrest, J., concurring in part and dissenting in part).

On the other hand, the court in *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023), concluded that the "public still has an interest in knowing who speaks through WyGO," despite its stand on gun rights being obvious from its name, but that the state statute is not narrowly tailored as applied. The statute requires disclosure of contributions that "relate to" electioneering communication, and the identity of the contributor if the contribution exceeds $100. But this vague standard is particularly burdensome for an organization that has no way of knowing which donor contributions "relate to" a particular expense. *Id.* at 1247. The alternative of disclosing all donors who give more than $100 is not narrow tailoring. *Id.* The court explained:

> Rather than leave WyGO to twist in the wind, the statute could have outlined an earmarking system. We have already recognized the role earmarking can play in tailoring a disclosure law. . . . . It is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny. *See, e.g., Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021). Instituting an earmarking system better serves the state's informational interest; it directly links speaker to content, whereas the Secretary's solution dilutes the statutory mission. The Secretary does not explain why this solution is beyond Wyoming's reach.

Gray, 83 F.4th at 1248. The Court distinguished a decision from the Court of Appeals for the Third Circuit which had upheld a disclosure requirement without an earmarking limitation (while conceding that such a limitation would result in a more narrowly tailored statute) as "a relic of pre-*[AFP]* exacting scrutiny." *Id.* at 1249 (citing *Delaware Strong Families v. Attorney General of Del.*, 793 F.3d 304 (3d Cir. 2015)).

The Advisory Committee's Resolution

With these First Amendment concerns in mind, the Advisory Committee resolved—at this publication for public comment stage—the three difficult issues noted above.

The starting point is the court's interest in amicus briefs in the first place: to help a court make the correct decision in a case before it. Unlike parties, a would-be amicus does not have a right to be heard in court. Amicus briefs may serve the *amicus* as a method of fundraising, as a method of showing its members that it is working on their behalf, as communication to the broader public, or as a method of advertising for the lawyers involved. But these are not the reasons that *courts* allow amicus briefs. Limitations on filing amicus briefs, whether direct prohibitions or indirect incentives caused by disclosure requirements, do not prevent anyone from speaking out—in books, articles, podcasts, blogs, advertisements, social media, etc.—about how a court should decide a case.

For an amicus brief to be helpful to a court, the court must be able to evaluate the information and arguments presented in that brief. Disclosure requirements in connection with amicus briefs serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them.

The Advisory Committee considered the perspective that the only thing that matters in an amicus brief is the persuasiveness of the arguments in that brief, so that information about the amicus is irrelevant. But the identity of an amicus does matter, at least in some cases, to some judges. In addition, members of the public can use the disclosures to monitor the courts, thereby serving both the important governmental interest in appropriate accountability and public confidence in the courts. Disclosure is especially valuable for any amicus who uses a dubious or misleading name.

Accordingly, the Advisory Committee decided to require all amicus briefs to include "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." Rule 29(a)(4)(D). To deal with the possibility that an amicus might have been created for purposes of this particular case, the proposed rule also requires an amicus that has existed for less than 12 months to state the date the amicus was created. Rule 29(a)(4)(D).

In addition to the interests involved regarding any amicus brief, there are additional government interests at stake with regard to the relationship between a party and an amicus. First, in our adversary system, parties are given a limited opportunity to persuade a court and should not be able to evade those limits by using a proxy. Second, a court should not be misled into thinking that an amicus is more independent of a party than it is.

For this reason, the Advisory Committee decided to treat the relationship between parties and amici differently than the relationship between nonparties and amici.

Just as the government interests are different in the two situations, so too are the burdens of disclosure. The burdens of disclosure are far greater with regard to nonparties. There are far more nonparties than parties in any given case. The more that an amicus has to disclose relationships with nonparties, the greater the administrative burden of identifying and producing the information. Similarly, the burden on associational rights is greater with regard to nonparties. There are far more people who might either choose not to associate with the amicus because of the risk of disclosure or whose fear of disclosure might lead the potential amicus to not submit a brief.

Relationship between a party and an amicus.

With regard to the relationship between a party and an amicus, the Advisory Committee concluded that two new disclosure requirements should be added. The first has been relatively uncontroversial: requiring the disclosure of whether "a party, its counsel, or any combination of parties or their counsel has a majority ownership interest in or majority control of a legal entity submitting the brief." Rule 29(b)(3). If a party has majority ownership or control of an amicus, a court should know that and be able to take that into account in evaluating the arguments in the amicus brief.

The Advisory Committee also concluded that—at some level—contributions by a party to an amicus created a sufficient risk of party influence that disclosure was warranted. There is an unavoidable trade-off here: the lower the threshold, the more information provided but the greater the burden on the amicus. The AMICUS Act would set the disclosure threshold at 3% of the revenue of the amicus. One member of the Advisory Committee, whose term has since expired, argued that the threshold should be 50%, reasoning that at any level less than that, other contributors had a greater voice than the party. Another possibility was 10%, drawing on the corporate disclosure rule, Rule 26.1.

The Advisory Committee settled on 25%, reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure, thereby enabling a judge to consider that potential influence in evaluating the brief. Rule 29(b)(4). The administrative burden of such disclosure is likely to be low: top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all. So, too, is the burden on associational rights: An amicus would be unable to submit a brief ostensibly designed to help the court decide a case without revealing that a party to that case is a major contributor. Instead, it would have to choose between filing an amicus brief with such a disclosure or refrain from filing.

The Advisory Committee took other steps to narrowly tailor this disclosure requirement. Most obviously, but worth reiterating, disclosures are limited to those seeking to file amicus briefs. They do not reach (for example) all charities, as in *AFP*, or all speakers. A putative amicus who refrains from filing an amicus brief to avoid disclosure is not silenced in any way. Limiting required disclosures to such high value contributions is also an important aspect of narrow tailoring to serve the goal of helping courts understand how much the party may be speaking through an amicus and properly weigh the message. In addition, the temporal limit, which requires disclosure only of contributions with the 12-month prior to the filing of the brief, serves to narrowly tailor the requirement to focus on a connection between the contribution and the filing of the brief.[4] The Advisory Committee also crafted the method of computation to relieve burdens: the threshold for disclosure is calculated using the total revenue for the prior fiscal year, making for simple and infrequent determination.

The proposed amendment requires self-disclosure by any party or counsel who knows that he should have been disclosed by an amicus but was not. This is not duplicative, but merely a backstop if an amicus fails to comply with the rule.

The Advisory Committee considered using a standard rather than a rule for disclosure of contributions, such as requiring disclosure if a party has made sufficient contributions to the amicus curiae that a reasonable person would, under the circumstances, attribute to the party a significant influence over the amicus curiae with respect to the filing or content of the brief. In a sense, such a standard would be exactly tailored to the government interest because it would require disclosure in all

[4] This temporal limitation significantly reduces the risk that someone might decline to make a significant contribution to avoid disclosure, unless they are already a party to litigation (or see it on the near horizon) in which the organization might file an amicus brief.

cases (but only those cases) where a reasonable person would see a significant influence by the party over the amicus. But the Advisory Committee rejected such an approach, precisely because of the burdens it would place on amici. It would be difficult for an amicus to be sure when disclosure would be required, leading scrupulous amici to over-disclose or unnecessarily refrain from filing. (It could also lead less scrupulous amici to under-disclose.)

Relationship between a nonparty and an amicus.

With regard to the relationship between a nonparty and an amicus, the Advisory Committee considered the addition of parallel disclosure requirements of major contributors to an amicus. But it decided against it. First, the information obtained would be less useful in evaluating the arguments made in an amicus brief. Entities that submit amicus briefs come in all shapes and sizes. For some, amicus briefs may be a regular and important part of what they do. For some, amicus briefs may be a rarity. Most engage in a wide variety of activities other than submitting amicus briefs. As a result, people contribute to organizations that submit amicus briefs for reasons that have nothing to do with the submission of amicus briefs, making disclosure of their identity less useful in evaluating an amicus brief—and a requirement to do so less narrowly tailored to that interest. Second, the burdens of such disclosure would be much greater. Amici would have to determine and reveal major contributors (or decide not to file to avoid disclosure) in all cases, not only when the major contributor is a party to that case. With such a broad disclosure requirement, not limited to cases in which the contributor is a party, people might decline to make significant contributions to avoid disclosure.

Membership exception for earmarked contributions.

Perhaps the most difficult issue the Advisory Committee faced was whether to retain the existing exception for earmarked contributions by members of an amicus. The existing rule requires the disclosure of all earmarked contributions, both by parties and nonparties. But the current rule does not require disclosure of earmarked contributions by the amicus itself, its counsel, or members of the amicus.

Disclosure of earmarked contributions by a party is not controversial. It is in the existing rule, and the proposed amendment, by treating parties and nonparties separately, makes this requirement even clearer.

In general, disclosure of earmarked contributions provides more useful information and is less burdensome than disclosure of non-earmarked contributions. Knowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who

made a contribution to a candidate helps evaluate that candidate. Disclosure is less burdensome because it is limited to contributions to fund that brief, not general contributions to an organization. Limiting required disclosure to earmarked contributions is an important aspect of narrow tailoring. *See, e.g.*, *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023).

A reason to exempt members of the amicus from such disclosure, as the existing rule does, is that an organization speaks for its members and its members speak through the organization. From that perspective, one might think that no information is gained by knowing the members of the organization, and the willingness to join an organization is burdened by disclosure.

On the other hand, a member who makes earmarked contributions for a particular amicus brief deliberately stands out from other members with regard to the brief, and therefore additional information is provided by disclosure of that earmarked contribution. The views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor. At the extreme, the amicus may be serving simply as a paid mouthpiece for that contributor.

For that reason, the Advisory Committee considered eliminating the member exception. But it was persuaded that doing so would unfairly distinguish between those organizations (typically larger) that regularly file amicus briefs and therefore budget for them from general revenue and those organizations (typically smaller) that do not and therefore have to pass the hat for an amicus brief.

Yet retaining the member exception as is would leave a gaping loophole in the rule: a person who wished to underwrite a brief anonymously need only join the organization to do so. To close this loophole, the Advisory Committee decided to retain the member exception, but to limit the exception to those who have been members for the prior 12 months. A new member making contributions earmarked for a particular brief is effectively treated as a non-member for these purposes and must be disclosed. This limitation is narrowly tailored to the problem and imposes a minimal burden. New members are free to join the amicus, and their general contributions are not subject to disclosure. And old members can make earmarked contributions without disclosure. It is only nonmembers and new members who choose to make contributions earmarked for a particular brief who must be identified in that brief to help the court evaluate the arguments in that brief.

That solution raised another issue: what to do with newly-formed amici? The Advisory Committee decided that requiring the disclosure of *all* earmarked contributions would be too burdensome. Doing so would effectively treat any new organization as having no members, a mere façade. Instead, the Advisory Committee

decided to extend the membership exemption to these new organizations but require that they disclose the date of their formation.

The point is not to treat these new organizations more favorably than older, more established organizations. To the contrary, a requirement that such new organizations reveal themselves in this way may serve to unmask organizations established for the purpose of the litigation, particularly if there are multiple such new organizations created for the purpose of artificially creating the appearance of widespread support for a position. But some new organizations might not fit such a description, and stripping all new organizations of member protection would effectively treat all new organizations with the same broad brush. Under the approach in the proposed rule, it is up to a new amicus to provide sufficient information about itself to inform the court's evaluation of that brief.

Leave of Court or Consent of the Parties

Current Rule 29(a)(2) requires that non-governmental amicus briefs receive either leave of court or consent of the parties to be filed during the initial consideration of a case on the merits. Current Rule 29(b) requires that non-governmental amicus briefs receive leave of court to be filed during consideration of whether to grant rehearing.

The Advisory Committee considered eliminating both of these requirements. The Supreme Court made such a change to its own rules, freely allowing the filing of amicus briefs. Supreme Court Rule 37.2 (effective January 1, 2023). Initially, the Advisory Committee did not see any reason not to follow the Supreme Court's lead here. But further reflection led the Advisory Committee in the opposite direction: amending Rule 29(a)(2) to require leave of court for all amicus briefs, not just those at the rehearing stage.

Amicus practice in the Supreme Court differs from that in the courts of appeals in at least two relevant ways.

First, amicus briefs in the Supreme Court, unlike those in the courts of appeals, must be in the form of printed booklets. Supreme Court Rule 33.1(a) (6 1/8 by 9 1/4 booklet using a standard typesetting process); Supreme Court Rule 37 (requiring that amicus briefs, except in connection with an application, be filed in booklet format). This operates as a modest filter on amicus briefs.

Second, under the Supreme Court's recently announced Code of Conduct, "[n]either the filing of a brief amicus curiae nor the participation of counsel for amicus curiae requires a Justice's disqualification." S. Ct. Code of Conduct, Canon 3(B)(4). Existing Federal Rule of Appellate Procedure 29(a)(2), which permits a court to

prohibit the filing of or strike an amicus brief, rests on the assumption that an amicus brief can result in recusal in the courts of appeals. And that assumption reflects practice: circuit judges do recuse on the basis of amicus briefs. *See* Committee on Codes of Conduct Advisory Opinion No. 63: Disqualification Based on Interest in Amicus that is a Corporation (addressing whether recusal is required when a judge has an interest in a corporation that is an amicus curiae, but not other recusal questions that may arise in relation to amici, such as when a law firm that is on a judge's recusal list represents an amicus, or when a judge has an interest in a nonprofit organization that is an amicus).

The unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues. These would be particularly acute at the rehearing en banc stage, making it especially important to retain the requirement of court permission at that stage. Yet amicus briefs filed without court permission can cause problems at the panel stage as well. The requirement of consent is not a meaningful constraint on amicus briefs because the norm among counsel is to uniformly consent without seeing the amicus brief. The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it could cause the recusal of a judge at the panel stage without the judge even knowing. By contrast, if the consent option is eliminated, a judge is involved in deciding whether to deny leave to file the brief or to recuse. While this does impose a burden on an amicus to make a motion, requiring the filing of a motion is hardly a severe burden on someone who seeks to participate in the court system—bearing in mind that the point of an amicus brief is to be helpful to the court. See Rule 27(a) ("An application for an order or other relief is made by motion unless these rules prescribe another form.").

Other Matters

Existing Rule 29(a)(5) sets the length limit for amicus briefs at the initial merits stage as one-half of the length authorized for a party's principal brief. There appear to be two reasons why it is phrased that way, rather than simply as a word limit—which is the way existing Rule 29(b)(4) is phrased for amicus briefs at the rehearing stage.

First, it preserves the ability of an amicus to rely on page limits. That seems to be of significance only to pro se litigants, and it is hard to see any reason to retain it for amici. Second, it means that the length limits for amicus briefs in other proceedings might be shorter where the length limit for party briefs is shorter than 13,000 words. But the occasion for such reductions seems sufficiently small that the Advisory Committee thinks that the simplicity of a flat number of 6,500 words is worth it. Rule 32(e) continues to permit a court of appeals, by local rule or order in a particular case, to accept documents that do not meet the length limits set by these rules, so this change does not create a problem in those circuits that generally permit

party briefs that are longer than 13,000 words or amicus briefs that are longer than 6,500 words.

By limiting amicus briefs to 6,500 words, the requirement to file a certification under Rule 32(g)(1) can be simplified to require a certification in all cases, rather than just when length is computed using a word or line limit.

In the course of evaluating Rule 29, the Advisory Committee also considered other concerns that have been raised about amicus practice, including arguments that courts sometimes inappropriately rely on waived or forfeited arguments or untested factual information in amicus briefs. But the Committee decided against dealing with such concerns by rule making. For example, some arguments cannot be waived, some forfeitures can be excused, and some factual information is properly considered as subject to judicial notice or as legislative facts rather than adjudicative facts. It would be difficult to draft a rule that accurately captured what information is and is not properly considered, and different judges on a panel might disagree. In addition, a rule that sought to bar certain arguments or information from amicus briefs would likely invite unproductive motions to strike.

The Advisory Committee unanimously recommends that the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits be published for public comment. * * *

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

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may help the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored. The United States ~~or~~, its officer or agency, or a state may file an amicus brief

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

without ~~the consent of the parties or~~ leave of court. Any other amicus curiae may file a brief only with ~~by~~ leave of court ~~or if the brief states that all parties have consented to its filing, but a court of appeals~~. The court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; ~~and~~

(B) the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why it serves the purpose set forth in Rule 29(a)(2); and ~~the matters asserted are relevant to the disposition of the case.~~

(C) the information required by Rules 29(a)(4)(A), (b), (c), and (e).

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ The cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes, and other authorities, ~~— with~~

~~references to~~ together with the pages ~~of the brief~~ where they are cited;

(D) a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus curiae, ~~its interest in the case, and the source of its authority to file~~ together with an explanation of how the brief and the perspective of the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E)~~(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by Rules 29(b), (c), and (e); ~~curiae is one listed in the~~

~~first sentence of Rule 29(a)(2), a statement that indicates whether:~~

~~(i) a party's counsel authored the brief in whole or in part;~~

~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and~~

~~(iii) a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not

include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus curiae must file its brief~~, accompanied by a motion to filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support

either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must disclose whether:

(1) a party or its counsel authored the brief in whole or in part;

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

(3) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(4) a party, its counsel, or any combination of parties, their counsel, or both has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year.

(c) Naming the Party or Counsel. Any disclosure required by Rule 29(b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by Rule 29(b) or (c), the party or counsel must do so.

(e) Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date the amicus was created.

~~(b)~~**(f) During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during

a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in Rules 29(f)(2) and (3), and unless a local rule or order in a case provides otherwise.

~~(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.~~

~~(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~(2) ~~Contents, Form, and~~ **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(3) **Time for Filing**. An amicus curiae supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief~~, accompanied~~

~~by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures

about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already mentioned by the parties that may help the court. By contrast, if an amicus curiae brief is redundant with the parties' briefs or

other amicus curiae briefs, it is a burden rather than a help. The amendment also eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. Most parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter. Some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion. Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief; the motion must also include the disclosures required by Rules 29(a)(4)(A), (b), (c), and (e).

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in

separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control

over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Because the concern is about contributions or pledges made sufficiently near in time to the filing of the brief to influence the brief, contributions or pledges made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for its prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. A non-tax-exempt entity is likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs

(and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who have been members of the amicus for the prior 12 months. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(E) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

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

Rule 32. Form of Briefs, Appendices, and Other Papers[2]

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(2) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation.

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

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

		* * *			
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500 2,600	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable
	~~29(b)(4)~~ 29(f)(2)	• Amicus brief during consideration of whether to grant rehearing			
		* * *			

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

1.	What is your monthly take-home pay from work?	$_____
2.	What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)?	$_____
3.	How much are your monthly housing costs (such as rent and utilities)?	$_____
4.	How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?	$_____
5.	What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?	$_____
6.	How much debt do you have (such as credit cards, mortgage, and student loans)?	$_____
7.	How many people (including yourself) do you support?	
8.	Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)?	Yes No

No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

Committee Note

Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information.

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 6, 2023

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on Sept. 14, 2023. Four Committee members attended remotely; the rest of the Committee met in person. * * * *

At the meeting, the Advisory Committee voted to seek publication for comment of proposed amendments to Bankruptcy Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), * * * * and Official Form 410S1 (Notice of Mortgage Payment Change).

Part II of this report presents those action items.

* * * * *

II. Action Items

Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2024. * * * *

Action Item 1. Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Bankruptcy Judge Catherine Peek McEwen made a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest, devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306, each of which includes property that "the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted" and "earnings from services performed by the debtor" during that period.

In some circuits there is a well-developed body of judicial estoppel law that is driven by non-disclosure in chapter 13 cases. Debtors lose the right to pursue undisclosed claims, and creditors lose the benefit of those claims. The issue often arises from the nondisclosure of personal injury and employment discrimination cases. Judge McEwen suggested that an amendment to Rule 1007(h) would help bring to the attention of debtors' counsel the importance of disclosure, since failure to do so could end up hurting their clients if they later sought to pursue such claims outside bankruptcy.

Caselaw and commentary are mixed on whether a debtor has a statutory duty, absent a request from the court, the United States Trustee, or any party in interest, to disclose property that comes into the estate by virtue of § 1115, 1207, or 1306. Without such a duty, a failure to disclose a postpetition claim does not trigger the application of judicial estoppel. In jurisdictions that have not found a statutory duty to disclose postpetition claims, the imposition of such an obligation under the rules would provide a basis for applying judicial estoppel that does not currently exist.

The differing impact of a national rule on bankruptcy courts led the Advisory Committee to conclude that the issue should continue to be left to local regulation. Attempting to strike a middle ground, the Advisory Committee approved for publication an amendment to Rule 1007(h) that would explicitly allow the court to require the debtor to file a supplemental schedule to list property or income that becomes property of the state under § 1115, 1207, or 1306.

* * * *

Action Item 3. Official Form 410S1 (Notice of Mortgage Payment Change). After publication in 2021 of proposed amendments to Rule 3002.1 and implementing forms, the National Consumer Law Center ("NCLC") filed a comment suggesting an amendment to existing Form 410S1. The amendment would reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit ("HELOCs"). The NCLC

suggested changes to the form to include disclosure of the one-time next payment that includes the reconciliation amount under Rule 3002.1(b)(3)(C) and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). The Advisory Committee treated the comment as a suggestion.

The current Form 410S1 has three parts plus a signature box – Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. The Advisory Committee recommends for publication amendments modifying the form by creating a new Part 3 for the Annual HELOC Notice. Existing Part 3 would become Part 4. At the top of the form, the following direction would be added under "New total payment": "For HELOC payment amounts, see Part 3."

Because the process for amending official forms is one year shorter than the period for amending rules, the amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the proposed amendments to Rule 3002.1, which were published for comment in 2023.

* * * *

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2024*

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Denver on April 11, 2024. Two Committee members attended remotely; the rest of the Committee met in person. * * *

* * * * *

* Revised to incorporate changes reflecting decisions at the June 4, 2024, meeting of the Committee on Rules of Practice and Procedure.

The Advisory Committee also agreed to seek publication for comment of proposed amendments to Bankruptcy Rules 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan); and Bankruptcy Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). At the fall 2023 meeting, the Advisory Committee approved for publication amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions), and those amendments are also presented to the Standing Committee at this meeting.

Part II of this report presents those action items. They are organized as follows:

* * * * *

B. Items for Publication

- Rule 3018;
- Rules 9014, 9017, and new Rule 7043;
- Rules 1007, 5009, and 9006.

* * * * *

II. Action Items

* * * * *

B. Items for Publication

The Advisory Committee recommends that the following rule amendments be published for public comment in August 2024. * * * *

Action Item 5. Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan). At the January Standing Committee meeting, the Advisory Committee sought publication of amendments to Rule 3018(c) in response to a suggestion from the National Bankruptcy Conference. The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent. Conforming amendments were also proposed and approved for Rule 3018(a). The Standing Committee gave its approval.

As approved by the Standing Committee for publication, the rule provides as follows:

Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan.

(a) In General.

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. The court may also do so as provided in (c)(1)(B).

* * * * *

(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.

(1) ***~~Form~~ Alternative Means*.**

(A) *In Writing.* Except as provided in (B), ~~An~~ an acceptance or rejection must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record.* The court may also permit an acceptance—or the change or withdrawal of a rejection—in a statement that is:

(i) part of the record, including an oral statement at the confirmation hearing or a stipulation; and

(ii) made by an attorney for—or an authorized agent of—the creditor or equity security holder.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more and may indicate preferences among those accepted.

* * * * *

After the meeting a member of the Standing Committee and the committee's reporter suggested a few wording changes to the amendments. Because publication would not occur until August and both the Advisory and Standing Committees would meet again before then, the decision was made to ask the Advisory Committee to consider these additional changes. It did so

at the spring meeting and approved for publication the rule as revised. It now resubmits Rule 3018(a) and (c) to the Standing Committee for approval for publication.

Proposed Changes

1. Because new subdivision (c)(1)(B) would allow an acceptance to be made by a written stipulation, as well as by an oral statement on the record, it was suggested that the heading for subdivision (c)(1)(A) (line 15) be changed from "*In Writing*" to "*By Ballot.*" This title would more accurately indicate the difference between subparagraphs (A) and (B).

2. The proposed conforming amendment to subdivision (a) (lines 9-10) says that the court may also "do so" as provided in (c)(1)(B). The language that "do so" refers to includes changing or withdrawing both acceptances and rejections, whereas (c)(1)(B) just allows changing or withdrawing rejections. Therefore, it was suggested that the sentence be changed to read, "The court may also permit the change or withdrawal of a rejection as provided in (c)(1)(B)."

3. In light of the second change, it was further suggested that subdivision (a)(3) be revised to read as follows:

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance ~~or rejection~~. The court may ~~also~~ permit the change or withdrawal of a rejection as provided in (c)(1)(B).

Because there is no need to address changes or withdrawals of rejections twice, the Advisory Committee agreed with this suggestion as well.

Action Item 6.[**] **Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony)**. The National Bankruptcy Conference (NBC) submitted a suggestion (23-BK-C) to amend Bankruptcy Rules 9014 and 9017 and introduce a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

Currently, Rule 9017 makes applicable to bankruptcy cases Fed. R. Civ. P. 43 (Taking Testimony). Fed. R. Civ. P. 43(a) allows a court to permit testimony in open court by contemporaneous transmission from a different location "for good cause in compelling circumstances." The proposal would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would make Fed. R. Civ. P. 43 applicable in adversary proceedings; and (3) amend Rule 9014 to

[**] After the June 4, 2024 meeting, the Standing Committee gave approval by email vote to publish for public comment new Rule 7043 and amended Rules 9014 and 9017. In response to comments raised during the meeting, the Advisory Committee on Bankruptcy Rules revised the committee note to Rule 9014 as reflected in the redline and clean versions starting on page 656 of the revised agenda book.

allow a court to "permit testimony in open court by contemporaneous transmission from a different location" but only "for cause and with appropriate safeguards."[1]

Remote hearings have become commonplace in bankruptcy practice since the COVID-19 pandemic and were justified during that period by "compelling circumstances." But bankruptcy courts have recognized that there are many advantages to remote hearings, including to the debtors. As the NBC suggestion notes, "Remote transmission of court hearings removes a barrier to access for individual debtors who are unable to travel to the federal courthouse because the travel expense, parking expense, childcare needs, lack of job leave, and no public transportation make live attendance not possible." Remote hearings also, as the NBC points out, "allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive."

Unlike adversary proceedings, which are comparable to civil actions governed by Fed. R. Civ. P. 43, contested matters are often of very short duration and do not typically turn on the credibility of witnesses. Therefore, the concerns about the inability to confront witnesses in person are much less pressing for bankruptcy contested matters. The proposed amendments and new rule would retain the general rule that testimony in a contested matter will be in person, but give the court more discretion to permit remote testimony by setting a less stringent standard for allowing exceptions to the rule.

The Advisory Committee, at the request of Judge Bates, has conferred with the Committee on Court Administration and Case Management, which is also examining the issue of video conferencing in court proceedings, and has been assured that "the content of the proposed amendments do[es] not appear to create any conflict with existing Conference policy regarding remote access or remote proceedings" and that "the timing of the publication of the proposed amendments in 2024 is unlikely to hinder work on this issue."

The Advisory Committee approved the amendments to Rules 9014 and 9017 and the new Rule 7043 for publication.

Action Item 7. Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). As we have previously reported, the Advisory Committee received two suggestions regarding the Bankruptcy Code's requirements that most individual debtors complete a course on personal financial management while their case is pending in order to receive a discharge. Code § 727(a)(11) provides, subject to limited exceptions, that a debtor will not receive a discharge if "after filing the petition, the debtor failed to complete an [approved] instructional course concerning personal financial management." This restriction applies to individual debtors in chapter 7, in certain chapter 11 cases (*see* § 1141(d)(3)), and in chapter 13 (*see* § 1328(g)(1)).

[1] The restyled Bankruptcy Rules use the term "cause" rather than "good cause," so that variation from Civil Rule 43(a) is not meant to be substantive.

Rule 1007(b)(7) implements these provisions by requiring such a debtor to file a certificate of completion of the course.[2] Rule 1007(c) provides the deadline for filing the certificate: in a chapter 7 case, 60 days after the first date set for the meeting of creditors; in a chapter 11 or 13 case, no later than the date that the debtor makes the last payment as required by the plan or a motion is filed for a hardship discharge. In order to promote the debtor's compliance with these requirements, Rule 5009(b) provides that, if an individual debtor in a chapter 7 or 13 case who is required to file a certificate under Rule 1007(b)(7) fails to do so by 45 days after the first date set for the meeting of creditors, the court must promptly notify the debtor of the obligation to do so by the prescribed deadline. The notice must also explain that the failure to comply will result in the case being closed without a discharge.

Professor Laura Bartell submitted a suggestion (22-BK-D) to change the timing of the reminder notice to chapter 7 and 13 debtors under Rule 5009(b). Tim Truman, a chapter 13 trustee, submitted a related suggestion (22-BK-K) to change the deadline for chapter 13 debtors to file the certificate.

The Advisory Committee supports the goal of reducing the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course. Some of these debtors eventually receive a discharge after getting their cases reopened—at additional expense—but others never do, despite having satisfied all of the other requirements for receiving a discharge. The question for the Advisory Committee was how best to achieve a reduction in noncompliance. The Consumer Subcommittee considered whether changing the deadlines for filing the certificate or the timing of the reminder notice would make a difference. In the end, the Subcommittee recommended amendments to Rules 1007, 5009, and 9006, and the Advisory Committee agreed that they should be published for comment. The proposed changes consist of the following:

1. *The deadlines in Rule 1007(c) for filing the certificate of course completion would be eliminated.* The Code only requires that the course be taken before a discharge can be issued, and members of the Advisory Committee were concerned that some debtors might be deprived of a discharge merely because they failed to file their certificates by the times specified in the rules.

The Advisory Committee approved for publication an amendment to Rule 1007 to eliminate the deadlines. It would delete subdivision (c)(4), which sets out the deadlines for filing the certificate of course completion in chapter 7, 11, and 13 cases. If this amendment is approved, references to the deadlines in Rule 9006(b) and (c) would also be deleted.

2. *Rule 5009(b) would provide for two reminder notices to be sent, rather than one.* This change would allow one notice to be sent early in the case—when the debtor would be more likely to be reachable and still represented by counsel—and another toward the end of the case before eligibility for a discharge would be determined. The first notice would be sent to any

[2] If Congress takes no action to the contrary, an amendment to Rule 1007(b)(7) that will change the requirement for filing a statement to requiring the filing of a certificate of course completion issued by the course provider will go into effect on December 1, 2024. This report will therefore refer to the filing of a certificate.

chapter 7 or chapter 13 debtor for whom a certificate of course completion has not been filed within 45 days after the petition was filed. This date will be 21 to 50 days earlier than Rule 5009(b)'s current requirement.[3]

The second notice in a chapter 7 case would be sent to any debtor for whom a certificate has not been filed within 90 days after the petition was filed, and it would advise the debtor that the case is subject to dismissal[**] without the entry of a discharge if the certificate is not filed within the next 30 days.

In a chapter 13 case, the second notice would be sent as part of the closing process. The proposed amendment would require the notice to be sent to any debtor for whom a certificate has not been filed when the trustee files a final report and final account. It would advise the debtor that the case is subject to being closed without the entry of a discharge at the end of 60 days.

* * * * *

[3] Under the current rule, the 5009(b) notice is sent to debtors for whom a certificate has not been filed within 45 days after the first date set for the meeting of creditors. Under Rule 2003(a), the U.S. trustee must call the meeting between 21 and 40 days after the order for relief in a chapter 7 case and between 21 and 50 days after the order for relief in a chapter 13 case.

[**] Should be "can be closed" not "subject to dismissal," see proposed Rule 5009(b)(2), line 25, infra at page 72.

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

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File[2]

* * * * *

(b) Schedules, Statements, and Other Documents.

* * * * *

(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete one as a condition to discharge, an individual debtor in a Chapter 7 or Chapter

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

[2] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

13 case—or in a Chapter 11 case in which
14 § 1141(d)(3) applies—must file a certificate
15 of course completion issued by the provider.
16 * * * * *
17 **(c) Time to File.**
18 * * * * *
19 ~~(4) *Financial-Management Course*. Unless the~~
20 ~~court extends the time to file, an individual~~
21 ~~debtor must file the certificate required by~~
22 ~~(b)(7) as follows:~~
23 ~~(A) in a Chapter 7 case, within 60 days~~
24 ~~after the first date set for the meeting~~
25 ~~of creditors under § 341; and~~
26 ~~(B) in a Chapter 11 or Chapter 13 case, no~~
27 ~~later than the date the last payment is~~
28 ~~made under the plan or the date a~~
29 ~~motion for a discharge is filed under~~
30 ~~§ 1141(d)(5)(B) or § 1328(b).~~

* * * * *

(h) Interests in Property Acquired or Arising After a Petition Is Filed.

(1) ***Property Described in § 541(a)(5).*** After the petition is filed in a Chapter 7, 11, 12, or 13 case, if the debtor acquires—or becomes entitled to acquire—an interest in property described in § 541(a)(5), the debtor must file a supplemental schedule and include any claimed exemption. Unless the court allows additional time, the debtor must file the schedule within 14 days after learning about the property interest. This duty continues even after the case is closed but does not apply to property acquired after an order is entered:

(~~1~~A) confirming a Chapter 11 plan (other than one confirmed under § 1191(b)); or

(~~2~~B) discharging the debtor in a Chapter 12 case, a Chapter 13 case, or a case under Subchapter V of Chapter 11 in which the plan is confirmed under § 1191(b).

(2) ***Property That Becomes Estate Property Under § 1115, 1207, or 1306.*** The court may also require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306.

* * * * *

Committee Note

The deadlines in (c)(4) for filing certificates of completion of a course in personal financial management have been eliminated. When Code § 727(a)(11), 1141(d)(3), or 1328(g)(1) requires course completion for the entry of a

discharge, the debtor must demonstrate satisfaction of this requirement by filing a certificate issued by the course provider, unless the provider has already done so. The certificate must be filed before the court rules on discharge, but the rule no longer imposes an earlier deadline for doing so.

Subdivision (h) is amended to clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 1115, 1207, or 1306.

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

Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan[2]

(a) In General.

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance ~~or rejection~~. The court may permit the change or withdrawal of a rejection as provided in (c)(1)(B).

* * * * *

(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.

---

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

[2] The changes indicated are to the version of Rule 3018 on track to go into effect December 1, 2024.

(1) ~~***Form***~~ ***Alternative Means*.**

(A) *By Ballot.* Except as provided in (B), ~~An~~ an acceptance or rejection must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record.* The court may also permit an acceptance—or the change or withdrawal of a rejection—in a statement that is:

(i) part of the record, including an oral statement at the confirmation hearing or a stipulation; and

(ii) made by an attorney for—or an authorized agent of—the creditor or equity security holder.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more plans and may indicate preferences among those accepted.

* * * * *

Committee Note

Subdivision (c) is amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance or rejection by written ballot, the rule now authorizes a court to permit a creditor or equity security holder to accept a plan by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. This change reflects the fact that disputes about a plan's provisions are often resolved after the voting deadline and, as a result, an entity that previously rejected the plan or failed to vote accepts it by the conclusion of the confirmation hearing. In such circumstances, the court is permitted to treat that change in position as a plan

acceptance when the requirements of subdivision (c)(1)(B) are satisfied.

Subdivision (a) is amended to take note of the means in (c)(1)(B) of changing or withdrawing a rejection.

Nothing in the rule is intended to create an obligation to accept or reject a plan.

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

Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied[2]

* * * * *

(b) Chapter 7 or 13—Notice of a Failure to File a Certificate of Completion for a Course on Personal Financial Management.

(1) ***Applicability.*** This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a certificate under Rule 1007(b)(7). ~~and~~

(2) ***Clerk's First Notice to the Debtor.*** If the certificate is not filed ~~fails to do so~~ within 45 days after the ~~first date set for the meeting of~~

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

[2] The changes indicated are to the restyled version of Rule 5009, not yet in effect.

~~creditors under § 341(a)~~ petition is filed~~. The~~ the clerk must promptly notify the debtor that the case ~~will~~ can be closed without entering a discharge if the certificate is not filed ~~within the time prescribed by Rule 1007(c)~~.

(3) ***Clerk's Second Notice to the Debtor.***

(A) *Chapter 7.* In a Chapter 7 case, if the certificate is not filed within 90 days after the petition is filed and the court has not yet sent a second notice, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date.

(B) *Chapter 13.* In a Chapter 13 case, if the certificate has not been filed when the trustee files a final report and final

account, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 60 days after the notice's date.

* * * * *

Committee Note

Subdivision (b) is amended in order to reduce the number of cases in which a discharge is not issued solely because a certificate of completion of a personal-financial-management course is not filed as required by Rule 1007(b)(7). When that occurs, a debtor who is otherwise entitled to a discharge must seek to have the case reopened—at added cost—in order to obtain the ultimate benefit of the bankruptcy.

Subdivision (b) now provides for two reminder notices to be sent to debtors who have not satisfied the requirement of Rule 1007(b)(7). The clerk must send the first notice to any chapter 7 or 13 debtor for whom a certificate has not been filed within 45 days after the petition was filed, an earlier date than under the prior rule. Then if a chapter 7 debtor has not complied within 90 days after the petition date and a second notice has not already been sent, the clerk must send a second reminder notice. In a chapter 13 case, as part of the case closing process, the clerk must send a second notice to any debtor who has not complied by the time the trustee files a final report and final account. Both notices must explain that the consequence of not complying

with Rule 1007(b)(7) is that the case is subject to being closed without a discharge being entered.

Nothing in the rule precludes a court from taking other steps to obtain compliance with Rule 1007(b)(7) before a case is closed without a discharge.

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

Rule 7043. Taking Testimony

Fed. R. Civ. P. 43 applies in an adversary proceeding.

Committee Note

Rule 7043 is new and, as was formerly true under Rule 9017, makes Fed. R. Civ. P. 43 applicable to adversary proceedings. Unlike under former Rule 9017, Fed. R. Civ. P. 43 is no longer applicable to contested matters under new Rule 7043.

[1] New material is underlined in red.

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

Rule 9006. Computing and Extending Time; Motions[2]

* * * * *

(b) Extending Time.

* * * * *

(3) ***Extensions Governed by Other Rules.*** The court may extend the time to:

(A) act under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033—but only as permitted by those rules; and

(B) file the ~~certificate required by Rule 1007(b)(7), and the~~ schedules and statements in a small business

[1] Matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 9006, not yet in effect.

case under § 1116(3)—but only as permitted by Rule 1007(c).

(c) Reducing Time.

* * * * *

(2) ***When Not Permitted.*** The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). ~~Also, the court may not reduce the time set by Rule 1007(c) to file the certificate required by Rule 1007(b)(7).~~

* * * * *

Committee Note

The references in (b)(3)(B) and (c)(2) to the certificate required by Rule 1007(b)(7) have been deleted because the deadlines for filing those certificates have been eliminated.

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

Rule 9014. Contested Matters[2]

* * * * *

(d) Taking Testimony ~~on a Disputed Factual Issue~~; Interpreter. ~~A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.~~

(1) ***In Open Court.*** A witness's testimony on a disputed material factual issue must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For cause and with appropriate safeguards, the court may permit

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

[2] The changes indicated are to the restyled version of Rule 9014, not yet in effect.

testimony in open court by contemporaneous transmission from a different location.

(2) ***Evidence on a Motion.*** When a motion in a contested matter relies on facts outside the record, the court may hear the motion on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(3) ***Interpreter.*** Fed. R. Civ. P. 43(d) applies in a contested matter.

* * * * *

Committee Note

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case, and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Terms used in Rule 9014(d) have the same meaning as they do in Fed. R. Civ. P. 43. However, consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended.

Under new Rule 7043, all of Fed. R. Civ. P. 43—including the "compelling circumstances" standard—continues to apply to adversary proceedings. An adversary proceeding in bankruptcy is procedurally like a civil action in district court. Because assessing the credibility of witnesses is often required, there is a strong presumption that testimony will be in person.

A contested matter, however, is a motion procedure that can usually be resolved expeditiously by means of a hearing. Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice. They occur with frequency over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

The need to quickly resolve most contested matters is recognized in existing Rule 9014, by making presumptively inapplicable the disclosure requirements of Fed. R. Civ. P. 26(a)(2) and 26(a)(3) and the mandatory meeting under Fed. R. Civ. P. 26(f). Under Rule 9014, the court has the discretion to direct that one or more of the other rules in Part VII apply when a contested matter warrants heightened process. The court has similar discretion under Rule 9014(d) to deny a request to testify remotely.

Although the amendment to Rule 9014(d) removes the "compelling circumstances" requirement in Fed. R. Civ.

P. 43(a), the court still must find cause to permit remote testimony and must impose appropriate safeguards. In other words, the presumption of in-person testimony in open court is retained, and remote testimony in contested matters should not be routine. In-person testimony would be particularly appropriate in disputed contested matters where it is necessary for the court to determine the witness's credibility. On the other hand, the greater flexibility to allow remote testimony in contested matters could be useful in consumer cases if the matters are straightforward and witness attendance is cost prohibitive or infeasible due to travel, job, or family obstacles.

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

Rule 9017. Evidence[2]

The Federal Rules of Evidence and Fed. R. Civ. P. ~~43, 44,~~ and 44.1 apply in a bankruptcy case.

Committee Note

The Rule is amended to delete the reference to Fed. R. Civ. P. 43. Under new Rule 7043, Fed. R. Civ. P. 43 is applicable to adversary proceedings but not to contested matters. Testimony in contested matters is governed by Rule 9014(d).

[1] Matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 9017, not yet in effect.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/25

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any
For HELOC payment amounts, see Part 3
$ _____

Part 1: Escrow Account Payment Adjustment

1. **Will there be a change in the debtor's escrow account payment?**

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. **Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?**

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Annual HELOC Notice

3. **Will there be a change in the debtor's home-equity line-of-credit (HELOC) payment for the year going forward?**

❑ No
❑ Yes.

Current HELOC payment: **$_____**

Reconciliation amount: **+ $_____ or**
- $_____

Amount of next payment (including reconciliation amount) **$_____**

Amount of the new payment thereafter (without reconciliation amount) **$_____**

Part 4: Other Payment Change

4. Will there be a change in the debtor's mortgage payment for a reason not listed above?

❑ No
❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 5: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

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

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Committee Note

Official Form 410S1, *Notice of Mortgage Payment Change*, is amended to provide space for an annual HELOC notice. As required by Rule 3002.1(b)(2), new Part 3 solicits disclosure of the existing payment amount, a reconciliation amount representing underpayments or overpayments for the past year, the next payment amount (including the reconciliation amount), and the new payment amount thereafter (without the reconciliation amount). The sections of the form previously designated as Parts 3 and 4 are redesignated Parts 4 and 5, respectively.

Excerpt from the May 15, 2024 Report of the Advisory Committee on Evidence Rules
(revised August 15, 2024)

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2024*

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 19, 2024, at the Administrative Office in Washington, D.C. On the morning of the meeting, the Committee convened a panel of experts who discussed developments in Artificial Intelligence (AI) and machine learning and provided guidance on how the rules of evidence might need to be adjusted to handle evidence that is the product of AI. At its subsequent meeting, the Committee processed the comments of the panelists, and also considered three possible amendments to the rules. The Committee approved a proposed amendment to Rule 801(d) for public comment and agreed to

* Revised to incorporate changes reflecting decisions at the June 4, 2024, meeting of the Committee on Rules of Practice and Procedure.

continue to consider a possible amendment to Evidence Rule 609 and a possible amendment that would add a rule governing evidence of prior false accusations of sexual misconduct made by alleged victims in criminal cases.

* * * * *

II. Action Item

Proposed Amendment to Rule 801(d)(1)(A)[**]

The Committee recommends that a proposed amendment to Rule 801(d)(1)(A) be released for public comment. Currently, Rule 801(d)(1)(A) provides for a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness: the prior statement is substantively admissible only when it is made under oath at a formal proceeding. While all prior inconsistent statements are admissible for impeachment purposes, only a very few are admissible as substantive evidence. So in the typical case, a court upon request will have to instruct the jury that a prior inconsistent statement may be used to impeach the witness's credibility, but may not be used as proof of a fact.

The amendment approved by the Committee for public comment would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject, of course, to Rule 403. The amendment would track the 2014 change to Rule 801(d)(1)(B), which provides that all prior consistent statements admissible to rehabilitate a witness are also admissible as substantive evidence (again, subject to Rule 403). This convergence of substantive and credibility use dispenses with the need for confusing limiting instructions with respect to all prior statements of a testifying witness.

The amendment adopts the position of the original Advisory Committee, which proposed that all prior inconsistent statements would be admissible over a hearsay objection. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). The amendment is consistent with the practice of a number of states, including California.

The current Rule 801(d)(1)(a) limitations are based on three premises. The first premise is that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the very person who made the prior statement is present at trial and, while under oath, is subject to cross examination about it. The

[**] After the June 4, 2024 meeting, minor changes were made to the committee note for Rule 801. The word "prior" was added before "inconsistent statements" in the first sentence. "Timing requirement" was changed to "requirements" in the last sentence and one sentence ("[t]he rule is one of admissibility, not sufficiency") was deleted.

problem with hearsay is that the declarant is not subject to cross-examination, but with prior statements of testifying witnesses, the declarant is by definition subject to cross-examination. Moreover, if an oath at the time of the statement is so critical, no explanation is given for why prior identifications under Rule 801(d)(1)(C) are admissible without an oath requirement. It is anomalous that a prior identification that is inconsistent with a witness's in-court testimony is admissible substantively under Rule 801(d)(1)(C) but not under Rule 801(d)(1)(A), when the rationale for admissibility is the same under both rules.

The second premise for the current rule was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403 -- as the Committee recently recognized in the 2023 amendment to Rule 106, which allows admission of oral unrecorded statements for completion purposes.

The third premise was that if a witness denies making the prior statement, then cross-examination about the statement might be difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] 'affirmed the statement as his'").

A majority of the Committee concluded that the amendment would remove an unreasonable limitation on admissibility and end the need for trial judges to give (in virtually all trials) a limiting instruction that is difficult for lay jurors to understand and thus follow.

The Committee approved the proposed amendment to Rule 801(d)(1)(A) for public comment. Two Committee members dissented, and the Department of Justice abstained.

The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

(B) is consistent with the declarant's testimony and is offered:

[1] Matter to be omitted is lined through.

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * * * *

Committee Note

The amendment provides for substantive admissibility of prior inconsistent statements of a testifying witness. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement

and the underlying subject matter, and the trier of fact "has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly

have produced, had [the declarant] 'affirmed the statement as his'").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense.

The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement.

APPENDIX

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. 35.

§ 440.10 Overview

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

§ 440.20 Advisory Committees

§ 440.20.10 Functions

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

§ 440.20.20 Suggestions and Recommendations

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

§ 440.20.30 Drafting Rule Changes

(a) Meetings

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

(b) Preparing Draft Changes

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

(c) Considering Draft Changes

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

§ 440.20.40 Publication and Public Hearings

(a) Publication

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

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

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

(b) Public Comment Period

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

(c) Hearings

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

(d) Expedited Procedures

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

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

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

(b) Advisory Committee Review; Republication

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

(c) Submission to the Standing Committee

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

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

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

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

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

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

(b) Records

The advisory committee's records consist of:

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

(c) Public Access to Records

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

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

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

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

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the

reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

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

(c) Action on Proposed Rule Changes or Committee Notes

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

(d) Transmission to the Judicial Conference

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

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

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

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Last revised (Transmittal 01-026) May 27, 2022

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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544
uscourts.gov