

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Phoenix, AZ
January 28, 2020**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 28, 2020 | Phoenix, AZ**

AGENDA

1. Opening Business

- A. Welcome and opening remarks
- B. Status of rules amendments
 - Report on new rules amendments effective December 1, 2019
 - Report on rules approved by the Judicial Conference at its September 2019 session and transmitted to the Supreme Court on October 23, 2019 (potential effective date December 1, 2020)
 - Report on rules out for public comment, including schedule of upcoming public hearings (potential effective date December 1, 2021)
- C. **Action item:** The Committee will be asked to approve the minutes of the June 25, 2019 Committee meeting

2. Multi-committee items

- A. Report on the work of the E-Filing Deadline Joint Subcommittee
- B. Report on the work of the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee
- C. Discussion of advisory committees' consideration of suggestion regarding calculation of filing deadlines
- D. Discussion of advisory committees' consideration of suggestion regarding *in forma pauperis* standards

3. Report of the Advisory Committee on Appellate Rules

Information items

- Report on proposed amendments published for public comment
- Report on the comprehensive review and possible additional amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing)

- Report on possible amendments to Rule 25 (Filing and Service) regarding privacy and appeals under the Railroad Retirement Act
- Report on suggestion under consideration regarding decisions on unbriefed grounds
- Report on items considered and removed from the committee’s agenda

4. Report of the Advisory Committee on Bankruptcy Rules

A. **Action item:** The Committee will be asked to retroactively approve, effective October 1, 2019, technical conforming amendments to the following official forms to address Bankruptcy Code changes made by the Honoring American Veterans in Extreme Need Act of 2019:

- Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income) and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period)

B. Information items

- Interim Rules and Official Forms to Implement the Small Business Reorganization Act of 2019
 - Recommendation to the courts to adopt the following as local rules (the “Interim Rules”): Interim Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 1020 (Chapter 11 Reorganization Case for Small Business Debtors), 2009 (Trustees for Estates When Joint Administration Ordered), 2012 (Substitution of Trustee or Successor Trustee; Accounting), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case), 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case), Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11), Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement), Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case)

- Technical conforming amendments to the following Official Forms effective February 19, 2020, approved by the Advisory Committee and the Committee by email votes in December, 2019: Official Forms 101 (Voluntary Petition for Individuals Filing for Bankruptcy), 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 309E1 (For Individuals or Joint Debtors; Notice of Chapter 11 Bankruptcy Case), 309E2 (For Individuals or Joint Debtors under Subchapter V; Notice of Chapter 11 Bankruptcy Case), 309F1 (For Corporations or Partnerships; Notice of Chapter 11 Bankruptcy Case), 309F2 (For Corporations or Partnerships under Subchapter V; Notice of Chapter 11 Bankruptcy Case), 314 (Class [] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11)
- Report on the status of Bankruptcy Rules Restyling

5. Report of the Advisory Committee on Civil Rules

Information items

- Report on proposed amendment to Rule 7.1 (Disclosure Statement) published for public comment
- Report on the work of the Subcommittee on Social Security Disability Review
- Report on the work of the Subcommittee on Multidistrict Litigation
- Report on consideration of suggestion regarding Rule 4(c)(3) and service by the U.S. Marshals Service in *in forma pauperis* cases
- Consideration of suggestion to amend Rule 12(a) (Time to Serve a Responsive Pleading) to include recognition of statutes that set different filing times
- Report on items considered and removed from the committee's agenda

6. Report of the Advisory Committee on Criminal Rules

Information items

- Consideration of amendment to Rule 16 (Discovery and Inspection)
- Update on status of measures to protect cooperators
- Referral of suggestion to specify a time for ruling on habeas motions to the Committee on Court Administration and Case Management

7. Report of the Advisory Committee on Evidence Rules

Information items

- Report on miniconference regarding best practices in managing *Daubert* issues
- Report on forensic expert testimony, *Daubert*, and Rule 702 (Testimony by Expert Witness)
- Report on possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements)
- Report on possible amendments to Rule 615 (Excluding Witnesses)
- Report on *Crawford v. Washington*

8. Other business

A. Legislative update

B. Judiciary strategic planning

- **Action item:** The Committee will be asked to review the *2015 Strategic Plan for the Federal Judiciary*, and to propose revisions and changes to be considered as the *Plan* is updated in 2020. As part of its discussion, the Committee will be asked to consider significant policy changes that have occurred since 2015, progress that has been achieved and challenges that remain regarding implementation of the 2015 *Plan*, and issues and trends likely to impact the judiciary over the next several years.

C. Next meeting: June 23, 2020 (Washington, DC)

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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TAB 1

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TAB 1A

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Welcome and Opening Remarks

Item 1A will be an oral report.

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TAB 1B

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Effective December 1, 2019

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2019); approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised January 2020

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code -- adding a subchapter V to chapter 11 -- made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Revised January 2020

Effective (no earlier than) December 1, 2020

Current Step in REA Process: transmitted to Supreme Court (Oct 2019)

REA History: approved by Judicial Conference (Sept 2019); approved by Standing Committee (June 2019); approved by relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised January 2020

Effective (no earlier than) December 1, 2021		
Current Step in REA Process: published for public comment (Aug 2019-Feb 2020)		
REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the <i>expressio unius</i> approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals. Also, the phrase “no mandate or other process may issue without a court order” is replaced in new (b)(3). A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised January 2020

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

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

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

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

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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

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

NOTICE

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

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

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

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

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

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

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

Rules and Forms Approved for Publication and Comment

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

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

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

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

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

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

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

Rule 42 (Voluntary Dismissal)

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

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

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

Information Items

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

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

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

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

Privacy in Railroad Retirement Act Benefit Cases

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

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

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

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

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

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

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

Rule 2004 (Examination)

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

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

Rule 8012 (Corporate Disclosure Statement)

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

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

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

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

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

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

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

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

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

Recommendation: That the Judicial Conference:

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

Rules Approved for Publication and Comment

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

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

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

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

Rule 3007 (Objections to Claims)

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

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

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

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

Rule 7007.1 (Corporate Ownership Statement)

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

Rule 9036 (Notice by Electronic Transmission)

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

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

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

Information Items

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

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

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

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

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

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

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

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

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

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

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

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

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

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

Rule Approved for Publication and Comment

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

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

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

Information Items

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

Multidistrict Litigation Subcommittee

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

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

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

Social Security Disability Review Subcommittee

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

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

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

Subcommittee on Final Judgment in Consolidated Cases

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

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

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

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

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

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

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

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

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

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

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

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

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

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

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

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

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

Information Items

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

Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

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

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

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

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

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

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

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

Possible Amendments to Rule 615 (Excluding Witnesses)

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

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

OTHER ITEMS

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

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

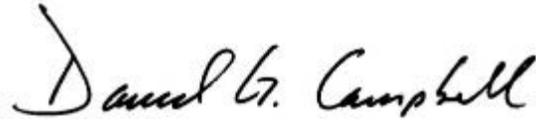
Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

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

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

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

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large initial 'D'.

David G. Campbell, Chair

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

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 25, 2019 | Washington, DC

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Washington, DC, on June 25, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.

Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan

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

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

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

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Washington, DC. This meeting is the last for two members, Judge Susan Graber and Judge Amy St. Eve. Judge Campbell thanked Judge Graber for her contributions as a member of the Committee and for her service as liaison to the Advisory Committee on Bankruptcy Rules. Judge Campbell thanked Judge St. Eve for her contributions as a member of the Committee and her leadership on the Task Force on Protecting Cooperators and wished her luck on her new assignment as a member of the Budget Committee. Judge Campbell also noted this would be the last Standing Committee meeting for Judge Donald Molloy, Chair of the Advisory Committee on Criminal Rules, and thanked him for his many years of service to the rules process. Judge Campbell also recognized Scott Myers for twenty years of federal government service, which has included time as a member of the United States Marine Corps, a law clerk, and counsel to the Rules Committees.

Rebecca Womeldorf reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that the rules adopted by the Supreme Court on April 25, 2019 will go into effect on December 1, 2019 provided Congress takes no contrary action.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the January 3, 2019 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules.

Action Items

Final Approval of Proposed Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). Judge Chagares asked the Committee to recommend final approval of proposed amendments to Rules 35 and 40 which will set length limits applicable to a response filed to a petition for en banc review or for panel rehearing. The proposed amendments were published for public comment in August 2018. The one written comment received was supportive and Judge Chagares reported receiving informal favorable comments from colleagues. No revisions were made after publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 35 and Rule 40 for approval by the Judicial Conference.**

Publication of Proposed Amendments to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares asked the Committee for approval to publish for public comment proposed amendments to Rule 3(c) regarding contents of the notice of appeal, along with conforming amendments to Rule 6 and Forms 1 and 2. Judge

Chagares noted by way of background the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act.

Judge Chagares explained that this proposal originated in a 2017 suggestion that pointed to a problem in the caselaw concerning the scope of notices of appeal. Some cases, the suggestion noted, apply an *expressio unius* approach to interpreting the notice of appeal. Under that approach, for example, if the notice of appeal designates a particular interlocutory order in addition to the final judgment, such courts might limit the scope of the appeal to the designated order rather than treating the notice as bringing up for review all interlocutory orders that merged into the judgment. Extensive research revealed confusion on the issue both across and within circuits. Professor Hartnett noted another problematic aspect of the caselaw: numerous decisions treat notices of appeal that designate an order that disposed of all remaining claims in a case as limited to the claims disposed of in the designated order. Judge Chagares noted that the Advisory Committee’s goal in proposing amendments to Rule 3(c) is to ensure that the filing of a notice of appeal is a simple, non-substantive act that creates no traps for the unwary.

Professor Hartnett reviewed the rationale behind the Advisory Committee’s proposed amendments. Professor Hartnett noted that one source of the problem was Rule 3(c)(1)(B)’s current requirement that a notice of appeal “designate the judgment, order, or part thereof being appealed.” Some have read this provision to require designation of any order that the appellant wishes to challenge on appeal, rather than simply designation of the judgment or order that serves as the basis of the court’s appellate jurisdiction and from which time limits are calculated.

The Advisory Committee proposed four interrelated changes to Rule 3(c)(1)(B) to address the structure of the rule and to provide greater clarity. First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the terms “judgment” and “order” are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court’s appellate jurisdiction, the word “appealable” is added before the word “order.” Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction, the phrase “from which the appeal is taken” replaces the phrase “being appealed.” Finally, the phrase “part thereof” is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result requires the appellant to designate the judgment – or the appealable order – from which the appeal is taken. To underscore the distinction between an appeal from a judgment and an appeal from an appealable order, Professor Hartnett noted, the proposed conforming amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and a Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court).

Other proposed changes address the merger rule. A new paragraph (4) was added to underscore the merger rule, which provides that when a notice of appeal identifies a judgment or order, this includes all orders that merge into the designated judgment or order for purposes of appeal. The Advisory Committee also added to the Committee Note a paragraph discussing the

merger principle. In addition, the Advisory Committee added a fifth paragraph to the rule addressing two kinds of scenarios where an appellant’s designation of an order should be read to encompass the final judgment in a civil case. In one scenario, some pieces of the case are resolved earlier, and others only later; a notice of appeal designating the order that resolves all remaining claims as to all parties should be read as a designation of the final judgment. In the other scenario, a notice of appeal designates the order disposing of a post-judgment motion of a kind that re-started the time to appeal the final judgment; that notice should be read to encompass a designation of the final judgment. In both scenarios, the proposed rule operates whether or not the court has entered judgment on a separate document.

A new sixth paragraph was added providing that “[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.” The final sentence was added to expressly reject the *expressio unius* approach. The Advisory Committee settled on this approach to avoid the inadvertent loss of appellate rights while empowering litigants to define the scope of their appeal.

Finally, the Advisory Committee recommended conforming changes to Rule 6 to change the reference to “Form 1” to “Forms 1A and 1B,” and conforming changes to Form 2 to reflect the deletion of “part thereof” from Rule 3(c)(1)(B). The Advisory Committee consulted with reporters to the Advisory Committee on Bankruptcy Rules regarding the amendments to Rule 6.

A member asked why the Advisory Committee referenced but did not define the merger rule in the rule text. Professor Hartnett explained that the Advisory Committee did not want to limit the merger principle’s continuing development by codifying it in the rule. The rule’s reference to the merger rule will prompt an inexperienced litigant to review the Committee Note for more information. Judge Campbell observed that an attempt to define the merger rule in the Rule text could change current law by overriding existing nuances. Two judge members expressed concern that the Rule needs to be understandable to pro se litigants and unsophisticated lawyers. One of these members asked why the Rule text could not state in simple terms the outlines of the merger principle – e.g., “an appeal from a final judgment brings up for review any order that can be appealed at that time”? Professor Hartnett responded that the Advisory Committee was concerned that such a formulation in the Rule text might alter current law; he stated that the Advisory Committee wanted to alert litigants to the merger rule in the rule itself and provide additional guidance for litigants in the Committee Note. An attorney member suggested that the proposed draft offered the most elegant solution – using Rule text that serves as a placeholder for the merger doctrine. A judge member expressed agreement with this view.

That judge member next asked why the Advisory Committee proposed to retain, in new subdivision (c)(6), the appellant’s ability to designate only part of a judgment or order. Professor Hartnett suggested that a designation of just part of a judgment might serve the interest of repose by assuring other parties that the scope of the appeal was limited. Professor Cooper offered as an example an instance in which the plaintiff’s claims against both of two defendants have been dismissed but the plaintiff has no wish to challenge the dismissal as to one of the defendants; a

limited notice of appeal, in such a case, would reassure the defendant whom the plaintiff no longer wishes to pursue.

A judge asked about the potential for over-inclusion in notices of appeal as a result of the proposed amendments, and whether there is a benefit to requiring that parties be specific about what they are appealing. Professor Hartnett responded that the notice is not the place to limit the issues on appeal. A notice is just a simple document transferring jurisdiction from the district court to the appellate court. The scope of the appeal can be clarified in the ensuing briefing.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rules 3 and 6 and Forms 1 and 2.**

Professor Struve congratulated the Advisory Committee and Professor Hartnett for a clever solution to a very tough problem. Professor Hartnett thanked Professor Cooper for his assistance.

Publication of Proposed Amendments to Rule 42(b) (Voluntary Dismissal). Judge Chagares stated that the Advisory Committee sought publication of proposed amendments to Rule 42(b). Rule 42(b) currently provides that the clerk “may” dismiss an appeal if the parties file a signed dismissal agreement. Prior to the 1998 non-substantive restyling of the Appellate Rules, Rule 42(b) used the word “shall” instead of “may” dismiss. Following the 1998 restyling, some courts have concluded that discretion exists to decline to dismiss. Attorneys cannot advise their clients with confidence that an action will be dismissed upon agreement by the parties. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals.

Judge Chagares explained that the phrase “no mandate or other process may issue without a court order” in current Rule 42(b) has caused confusion as well. Some circuit clerks have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. These issues are avoided – and the purpose of that language served – by deleting the phrase and instead stating directly, in new subsection (b)(3): “A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.”

A member suggested that language from the proposed Committee Note be moved to the rule itself, creating a new subdivision stating that the Rule does not affect any law that requires court approval of a settlement. Four other members expressed agreement with the idea of putting such a caveat into the Rule text. A motion was made and seconded to amend the proposal to include such a caveat; the motion passed. The Committee discussed how to draft the caveat; it started by considering language that had been used in a prior draft, as follows: “If court approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand to consider whether to approve it.” Following a break and extensive discussion of

possible language, including suggestions from the style consultants, Judge Chagares proposed instead to add a new subdivision (c) which would modify both preceding paragraphs of Rule 42 and state as follows: “(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.” The Committee Note was revised to add a cite to “F.R.Civ.P. 23(e) (requiring district court approval)” and to explain that the “amendment replaces old terminology and clarifies that any order beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.” By consensus, this new subdivision (c) was incorporated into the proposed amendments to Rule 42, upon which the Committee proceeded to vote.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 42.**

Information Items

Possible Additional Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares advised that the Advisory Committee continued to study whether amendments were warranted to clarify and codify practices under Rules 35 and 40.

Rule 4 (Appeal as of Right – When Taken). Judge Chagares explained that the Advisory Committee has been considering whether to amend Rule 4(a)(5)(C) (which deals with extensions of time to appeal) in light of the Court’s decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court distinguished time limits imposed by rule from those imposed by statute, characterizing time limits set only by rules as non-jurisdictional procedural limits. Professor Hartnett noted that the Advisory Committee tabled its consideration of the issue pending the Court’s decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). In *Nutraceutical*, the Court held that a mandatory claim-processing rule was not subject to equitable tolling. After reviewing this holding, the Advisory Committee decided not to take action on a possible amendment to Rule 4(a)(5)(C).

Potential Amendment to Rule 36. The Advisory Committee considered an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk’s office. Consideration was tabled pending the Court’s decision in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), addressing whether a federal court may count the vote of a judge who dies before the decision is issued. The Court answered this question in the negative, explaining that “federal judges are appointed for life, not for eternity.” Since the Court has resolved the question, the Advisory Committee removed this item from its docket.

Suggestion Regarding the Railroad Retirement Act and Civil Rule 5.2. Judge Chagares noted that the U.S. Railroad Retirement Board’s General Counsel submitted a suggestion that cases brought under the Railroad Retirement Act should be among the cases excluded (under Civil Rule 5.2) from certain types of electronic access. Petitions for review of the Railroad Retirement Board’s final decisions go directly to the courts of appeals, not the district courts; thus, any change would need to be to the Federal Rules of Appellate Procedure. Judge Chagares has appointed a subcommittee to consider the suggestion and to investigate whether any other

benefit regimes would warrant similar treatment. The subcommittee is consulting with the Committee on Court Administration and Case Management.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules.

Action Items

Judge Dow first addressed proposed amendments to three rules published for comment last August: Rule 2002 (Notices), Rule 2004 (Examination), and Rule 8012 (Corporate Disclosure Statement).

Final Approval of Proposed Amendments to Rule 2002 (Notices). Judge Dow explained that Rule 2002 generally deals with requirements for providing notice in bankruptcy cases, and that the proposed changes affect three subparts of the Rule. The first change involves Rule 2002(f)(7), which currently directs notices to be given of the “entry of an order confirming a chapter 9, 11, or 12 plan.” Although it is unclear why the rule does not currently require notice of the entry of a Chapter 13 confirmation order, the Advisory Committee concluded that notice of a confirmation order is appropriate under all bankruptcy chapters. The one comment addressing this change argued that the amendment was not needed because at least one court already serves orders confirming Chapter 13 plans. Because that comment addressed a local practice only, however, the Advisory Committee recommended final approval of the amendment as proposed.

The Committee had no questions and Judge Campbell suggested that the Committee vote separately on the proposed amendments to each of the three relevant subparts of Rule 2002. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(f)(7) for approval by the Judicial Conference.**

The second change pertains to Rule 2002(h) which authorizes the court to direct that certain notices to creditors in chapter 7 cases be sent only to creditors that timely file a proof of claim. The proposed amendment would allow the court to exercise similar discretion in chapter 12 and 13 cases and would also conform time periods in the subdivision to the respective deadlines for filing proofs of claim set out in recently amended Rule 3002(c).

One of the comments on Rule 2002(h), while generally supportive, raised two issues. The first issue concerned whether the clerk’s noticing responsibilities in a chapter 13 case should extend 30 days beyond the proof-of-claim deadline to give the debtor or trustee time to file a claim on behalf of a creditor. The Advisory Committee rejected this suggestion because the rule does not currently address such a situation in a chapter 7 case and the purpose of the proposed amendment is simply to extend the rule to chapter 12 and 13 cases. In addition, because the rule is permissive, a court already has authority to continue to provide notices until after the expiration of a debtor or trustee’s derivative authority to file a proof of claim on behalf of a creditor.

The second issue raised was whether notice of the proposed use, sale, or lease of property of the estate and the hearing on approval of a compromise or settlement should be given to all

creditors otherwise entitled to service of the noticed motion, even if they have not timely filed a proof of claim. No justification was provided for this suggestion and the Advisory Committee saw no reason to amend the rule in this respect. It recommended that Rule 2002(h) be approved as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(h) for approval by the Judicial Conference.**

The final amendment to Rule 2002 concerned subdivision (k) which addresses providing notices under specified parts of Rule 2002 to the U.S. trustee. The change adds a reference to subdivision (a)(9) of the rule, corresponding to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The change ensures that the U.S. trustee will continue to receive notice of this deadline.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(k) for approval by the Judicial Conference.**

Judge Dow next addressed the proposed amendments to Rule 2004. He explained that the rule provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case, and that it includes provisions to compel the attendance of witnesses and the production of documents. The Advisory Committee received a suggestion that the rule be amended to impose a proportionality limitation on the scope of the production of documents and electronically stored information.

The Advisory Committee considered this issue over three meetings. By a close vote, the Committee ultimately decided not to add proportionality language because the rule already allows the court to limit the scope of a document request, and because the change might prompt additional litigation. The Advisory Committee did, however, decide to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

After considering the comments, the Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. Two of the three comments submitted supported the proposal as published. Although a third comment urged inclusion of proportionality language, the Advisory Committee declined to revisit that issue as it had been carefully considered and rejected by the Advisory Committee prior to publication.

Judge Campbell recalled discussion at the Advisory Committee meeting of the fact that debtor examinations in bankruptcy are intended to be broad in scope and of a concern that adding proportionality language might signal an intent to limit those examinations. Judge Dow agreed.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2004 for approval by the Judicial Conference.**

Final Approval of Proposed Amendments to Rule 8012 (Corporate Disclosure Statement). Current Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is based on Federal Rule of Appellate Procedure 26.1. Amendments to Rule 26.1 were promulgated by the Supreme Court on April 25, 2019 and are scheduled to go into effect December 1, 2019 absent contrary action by Congress.

The Advisory Committee's proposed amendments to Rule 8012 track the relevant amendments to Appellate Rule 26.1. An amendment to 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors, and a new subsection (b) requires disclosure of debtors' names and requires disclosures about nongovernmental corporate debtors. Publication of the proposed amendments to Rule 8012 elicited three supportive comments and no suggestions for revision.

Judge Dow noted that, during the consideration of the proposed amendments, one member of the Advisory Committee suggested a need for additional amendments that would extend the Rules' disclosure requirements to a broader range of entities. Judge Dow said such an undertaking would require coordination with the other advisory committees and should not delay the current round of amendments, which are designed to conform Rule 8012 to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 8012 for approval by the Judicial Conference.**

Judge Dow then addressed several proposed amendments that the Advisory Committee considered to be technical in nature and appropriate for the Standing Committee's final approval without publication.

Proposed Amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Rule 2005(c), which addresses conditions to ensure attendance and appearance, refers to provisions of the federal criminal code (previously codified at 18 U.S.C. § 3146) that were repealed more than 30 years ago. The Advisory Committee considered the matter and recommended a technical amendment updating the statutory citation in the rule to 18 U.S.C. § 3142, the part of the criminal code that now addresses conditions to ensure attendance or appearance. Judge Dow explained, however, that after the Standing Committee's agenda book was published there was discussion among the reporters about whether such a change would be appropriate without publication.

Professor Struve explained her concerns with a technical amendment. Current Section 3142 contains a number of features that were not present in the old Section 3146. For example, it refers to statutory authorization for the collection of DNA samples. Presumably it is implausible to think that a debtor apprehended under Rule 2005 would be subjected to DNA collection as a condition of release. But, she suggested, such differences between the former and

present statutory provisions provided reason to send the proposed amendment through the ordinary process of notice and comment.

Professor Capra raised the issue of whether statutory citations should be included in the Rules at all given that statutes change. Perhaps it would be better for the Rule to direct the court to consider “the applicable requirement in the criminal code” in considering conditions to compel attendance or appearance. Professor Kimble suggested that a general reference would not help readers. If a particular statute is relevant it should be cited and updated as needed.

A member suggested that there was little risk that inapposite provisions of § 3142 would be applied under Rule 2005(c), and Professor Bartell stated that bankruptcy debtors are not arrestees, so there is not a realistic danger that they would be subjected to DNA collection.

Judge Campbell observed that the Committee must decide whether citation to an updated statutory cross reference was appropriate, or whether the prior statutory language should be inserted into the rule. In addition, even if only a statutory cross reference was appropriate, the Committee also needed to decide the separate issue of whether approval would be appropriate without public comment.

Professor Garner suggested that “applicable” or “relevant” be inserted prior to the Rule’s reference to the “provisions and policies of” the statutory provision.

After further discussion Judge Campbell observed that it seemed clear that the Committee did not support amending the rule as a technical matter without publication, and Judge Dow amended the request on behalf of the Advisory Committee to seek the Standing Committee’s approval to publish the amendment for public comment, with a slight revision. Instead of a simple change to replace the existing statutory citation with the new statutory citation, the proposed amendment to Rule 2005(c) would state that in determining the conditions that would reasonably ensure attendance the court would be “governed by the **relevant** provisions and policies of title 18 U.S.C. § 3142.” In addition, a new sentence was added to the Committee Note: “Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the ‘relevant’ provisions and policies of § 3142.”

The Committee approved the proposed amendments to Rule 2005(c) for publication in August 2019.

Judge Dow next discussed proposed technical conforming amendments to Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The amendments would revise these Rules to accord with the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system and would revise Rule 8015 to accord with the pending amendment to Rule 8012.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendments to Rules 8013, 8015, and 8021 for approval by the Judicial Conference without prior publication.**

The final recommended technical change concerned Official Form 122A-1, the first part of a two-part form used to calculate the debtor's disposable income and to determine whether it is appropriate for the debtor to file under Chapter 7 of the Bankruptcy Code. An instruction at the end of Official Form 122A-1 tells the filer not to complete the second part of the form (Official Form 122A-2) if the box at line 14a is checked. Line 14a, in turn, should be checked if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. The Advisory Committee received a suggestion that the instruction at the bottom of the form is often overlooked, and that it should also be included at the end of line 14a. The Advisory Committee agreed that the suggested amendment would make it more likely that the forms would be completed correctly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendment to Official Form 122A-1 for approval by the Judicial Conference without prior publication.**

Professor Gibson next reported on three proposed amendments recommended for publication.

Rule 3007 (Objections to Claims). The proposed amendment addresses the narrow issue of how credit unions should be served with objections to their claims. Rule 3007 was amended in 2017 to clarify that objections to claims are generally not required to be served in the manner of a summons and complaint, as provided by Rule 7004, but instead may be served on most claimants by mailing them to the person designated on the proof of claim. Rule 3007 contains two exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." Rule 3007(a)(2)(A)(ii). The purpose of this exception is to comply with a legislative mandate (enacted as part of the Bankruptcy Reform Act of 1994 and set forth in Rule 7004(h)) providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The Advisory Committee concluded that the exception set out in Rule 3007(a)(2)(A)(ii) is too broad because it does not qualify the term "insured depository institution" by the definition set forth in section 3 of the Federal Deposit Insurance Act, as is the case in Rule 7004(h) itself. Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 which required special service requirements for insured depository institutions as defined under the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under Rule 3007(a)(2)(A)(ii). The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 3007.**

Rule 7007.1 governs disclosure statements in the bankruptcy court. Like the amendment to Rule 8012 discussed earlier, the proposed amendment to Rule 7007.1 would conform the rule to the pending amendments to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7007.1.**

The proposed amendment to Rule 9036 would implement a suggestion from the Committee on Court Administration and Case Management that high-volume-paper-notice recipients (initially defined as recipients of more than 100 court-generated paper notices in a calendar month) be required to sign up for electronic service, subject to exceptions required by statute.

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

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

Proposed amendments to Rule 2002(g) and Official Form 410 were previously published in 2017. These proposed amendments (like the proposed amendments to Rule 9036) are designed to increase electronic noticing and service. The proposed amendments to Rule 2002 and Form 410 would create an 'opt-in' system at an email address indicated on the proof of claim. The Advisory Committee has not yet submitted those proposed amendments for final approval, however, because the comments recommended a delayed effective date of December 1, 2021 to provide time to make needed implementation changes to the courts' case management and electronic filing system. Because that is the same date the proposed changes to Rule 9036 would be on track to go into effect if published this summer, the recommended changes to Rules 2002(g) and 9036 and Official Form 410 could go into effect at the same time.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 9036.**

Information Items

Professor Bartell reported on two information items, beginning with the ongoing project to restyle the bankruptcy rules. The style consultants provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. Professor Bartell reported that she and Professor Gibson have been delighted at what the style consultants have done. She thinks the bench and bar will welcome the improvements to the Rules. She praised the style consultants for their work. When the consultants respond to the reporters' comments and produce another draft, the Restyling Subcommittee will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way.

The second information item concerns part of a larger project within the judiciary to address the problem of unclaimed funds in the bankruptcy system. The Committee on the Administration of the Bankruptcy System created an "Unclaimed Funds Task Force" to address this issue. Among other things, the Unclaimed Funds Task Force proposed adoption of a Director's Bankruptcy Form (along with proposed instructions and a proposed order) for applications for withdrawal of unclaimed funds in closed bankruptcy cases. The Advisory Committee concluded that standard documentation would be appropriate, made minor modifications to the draft submitted by the task force, and recommended that the Director of the Administrative Office adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

Judge Campbell praised the restyling effort and observed that the Advisory Committee is on track to consider the first batch of restyled rules at its fall 2019 meeting. Judge Campbell noted that the time is ripe to send a letter to the appropriate congressional leaders making sure they know the restyling effort is underway.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates provided the report of the Advisory Committee on Civil Rules, with support from Professors Cooper and Marcus. Judge Bates noted the Advisory Committee had two action items, one for final approval and the second for publication, and several information items.

Action Items

Rule 30(b)(6). The Advisory Committee recommended final approval of an amendment to Rule 30(b)(6), the rule that deals with depositions of an organization. This issue drew intense interest from the bar. After the proposed amendment was published for comment in August 2018, two public hearings were held. The first hearing in Phoenix drew twenty-five witnesses. Fifty-five witnesses testified at the second hearing in Washington, DC. Some 1780 written comments were submitted, although that number overstates the substance of the comments as many of those comments repeated points made in previous comments.

After considering the public comments, the Advisory Committee approved a modified version of the proposed amendment that was published for comment. Compared with the current rule, the central change made by the revised proposal is to require the party taking the deposition and the organization to confer in advance of the deposition about the matters for examination. Many commenters observed that conferring in advance of the deposition reflects best practice; this modest proposed rule change did not cause great concern from commenters and was uniformly supported by the Advisory Committee. The Advisory Committee made several changes to the proposed amendment as compared with the version that went out for comment. It deleted the proposed requirement that the parties confer about the identity of the witnesses that the organization would designate, and it also deleted the requirement that the parties confer about the “number and description of” the matters for examination. Because the conferring-in-advance requirement would be superfluous in connection with a deposition by written questions, the Advisory Committee added to the Committee Note the observation that the duty to confer about the matters for examination does not apply to depositions by written questions under Rule 31(a)(4).

Other proposed changes to Rule 30(b)(6) were the subject of active discussion and debate, although the Advisory Committee ultimately decided not to recommend them. One change considered by the Advisory Committee would have required the organization to identify the designated witness or witnesses at some specified time in advance of the deposition. Another change would have added a 30-day notice requirement for 30(b)(6) depositions. It was agreed that these changes would have likely required re-publication. After a great deal of discussion, the Advisory Committee determined, in a split but clear vote, not to pursue these amendments.

Professor Marcus agreed with the summary of the process of considering changes to Rule 30(b)(6) as related by Judge Bates and noted that the Standing Committee had also engaged in a vigorous discussion of the issues at previous meetings. Judge Bates noted that the Advisory Committee voted to approve the Committee Note language line-by-line, and virtually word-by-word. The ultimate proposal reflects the hard work of a subcommittee chaired by Judge Joan Ericksen.

A member voiced support for changes to a rule both sides of the bar agree is problematic but wondered whether much is accomplished by imposing a requirement to confer without specifying what must be discussed; this member suggested that the proposed amendment had “no meat on the bone.” The Committee Note could provide additional guidance, but the current version does not do so. The member noted the difficulty in changing the rule given the differing views on what should be a required disclosure prior to a deposition. A judge member echoed the concern that the modest amendment does not add that much given that Rules 26 and 37 provide a process to handle any objection to a 30(b)(6) notice.

Judge Bates agreed that the amendment is modest and will not lead to a wholesale change in 30(b)(6) deposition practice. The amendment does put existing best practice in the rule itself, which may lead to improvements in some cases. The Advisory Committee ended up with this limited recommendation because it found agreement within the bar on this narrow issue, while in general other suggestions were met with intense disagreement from one side or the other.

A judge member stated that he understood the disagreement and the reasons for it but wondered why the Committee should endorse such a limited change given the presumption that something notable has changed. Judge Campbell responded that often rules are written for the weakest lawyers and gave his view that the modest change would improve practice in some cases. In his experience, the most frequent complaint from one side is that the witness is not adequately prepared while the most frequent complaint by the other is that the notice is not precise enough on what the matters are for examination. These complaints usually come to him from the lawyers who do not talk to each other in advance of the deposition. He has often thought if you could get people to talk in advance of the deposition both sides would have greater understanding going into the deposition and a better-prepared witness. It is a marginal change but one that will help. Judge Bates stated that this was the sentiment of the Advisory Committee.

Responding to the suggestion that Rules 26 and 37 already provide a process to handle disputes over Rule 30(b)(6) depositions, Professor Marcus noted that those rules address the handling of disputes that have already become combative; the proposed amendment to Rule 30(b)(6), by contrast, would require the parties to confer *before* conflict has a chance to arise. A member noted that he viewed the amendment as a warning of sorts not to engage in gamesmanship. If this does not work, this rule will come back to the Committee. Judge Bates noted that this rule comes back to the Advisory Committee every few years. The Federal Magistrate Judges Association, Professor Marcus noted, supported the proposed amendment while also suggesting that further changes might be warranted depending on how this change works in practice.

Professor Beale complimented the Advisory Committee on the consideration of a huge amount of input received from the public. She stated that Professor Marcus's presentation of that input could serve as a model for how to handle a large volume of comments. Judge Bates and Professor Coquillette echoed similar praise for the work of the Advisory Committee and Professor Marcus. Professor Coquillette emphasized that it is not just the result that matters, it is the public perception of the process. The Reporters and the Committee, he observed, had done much to build confidence in that process among members of the bar. Another member emphasized that with this particular rule, most changes proposed by one party were changes thought to alter the negotiating balance vis-à-vis the opposing party. The Advisory Committee's careful and impressive effort had been to improve the Rule without seeming to favor one side or the other.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 30(b)(6) for approval by the Judicial Conference.**

Rule 7.1. Judge Bates introduced the second action item from the Advisory Committee, a proposal to publish for comment amendments to Rule 7.1, the rule concerning disclosure statements. The first proposed amendment conforms Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) so that a disclosure statement is required of a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement, as that requirement has been rendered superfluous by electronic court dockets.

A second proposed amendment would add a new subsection 7.1(a)(2) requiring parties to disclose the name and citizenship of those whose citizenship is attributable to the party for purposes of determining diversity jurisdiction. A prominent example of the need for this amendment arises in cases where a party is a limited liability company (LLC). Many judges now require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a significant matter, and it protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery – perhaps even on appeal – that there is no diversity.

Judge Bates observed that a member of the Standing Committee had raised a question about the applicability of 7.1(b)(2), which requires a supplemental filing whenever information changes after the filing of a disclosure statement. Given that diversity is determined at the time of filing, a supplemental filing is irrelevant for diversity purposes. Accordingly, Judge Bates suggested a slight modification of the proposed language to 7.1(a)(2) to state: “at the time of filing.” This would remove the obligation to make a supplemental filing when it is not relevant to the diversity determination.

A judge member spoke in favor of the proposal, as modified by the friendly amendment just described. He suggested a conforming change to the Committee Note (at page 232, line 273 of the agenda book).

Judge Campbell pointed to the language “unless the court orders otherwise” in proposed new subdivision (a)(2) as a safety valve for situations in which a party has a privacy concern connected to disclosure. In such an instance, the party could seek court protection from public disclosure of the information but would still need to provide the information bearing on the existence (or not) of diversity jurisdiction.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7.1.**

Information Items

Consideration of Proposals to Develop MDL Rules. Judge Bates reviewed the continuing examination of proposals to formulate rules for multidistrict litigation (MDL) proceedings, the work on which has been done by the MDL Subcommittee, chaired by Judge Robert Dow. Judge Bates described efforts by the subcommittee to obtain information on this complex set of issues. He noted that the Judicial Panel on Multidistrict Litigation (JPML) has been very helpful and engaged. Judge Bates observed that the consideration of possible MDL rules has generated a great deal of discussion among lawyers and judges, and the MDL process will likely be improved as a result, even if rules are not ultimately proposed.

Judge Bates described the focus of ongoing work, primarily on four subjects: (1) the use of Plaintiff Fact Sheets (PFSS) – and perhaps Defendant Fact Sheets (DFSS) – to organize MDL personal injury litigation, particularly in MDLs with a thousand or more cases, and to “jump start” discovery; (2) the feasibility of providing an additional avenue for interlocutory appellate review of district court orders in MDLs; (3) addressing the court's role in relation to global

settlement of multiple claims in MDLs; and (4) third-party litigation funding (TPLF), which is not unique to the MDL setting.

TPLF. Judge Bates noted that the general topic of TPLF has received a great deal of attention. TPLF is not unique to MDL proceedings, and indeed might be less prevalent in MDLs than other settings. Many courts require disclosure of TPLF information. TPLF is a rapidly evolving area. The TPLF topic remains on the subcommittee's agenda; it is not clear whether the subcommittee will recommend a rules response to this issue.

Judicial Involvement in MDL Settlements. The subcommittee continues to study judicial involvement in review of MDL settlements. Both the plaintiffs' and the defense bar would like to avoid rules that would require more judicial involvement in settlements. Current practice varies a lot by judge; transferee judges are split on it, with some being very active in settlements and others not. The issues are different than in a class action because every individual MDL plaintiff has an attorney.

PFSs/DFSs. Judge Bates stated that most of the subcommittee's attention has focused on PFSs and interlocutory appellate review. PFSs are used in some 80% of the big MDLs, although there is some definitional issue about what counts as a PFS. DFSs are also often used in large MDLs. A more recent proposal concerns something called an initial census of claims, which is similar to a PFS but more streamlined, and would be used early in the litigation to capture exposure and injury, not expert testimony or causation. This proposal has some support from both sides of the bar, which may mean there is no reason to have a rule. One problem with a PFS is the length of time to get those negotiated – sometimes as long as eight months – as well as the time necessary to produce responsive information. Something simpler that could be routinely used might be advantageous. The subcommittee continues to look for ideas that could get support from transferee judges as well as the plaintiffs' and defense bars.

Interlocutory Review. Judge Bates described the subcommittee's ongoing examination of issues concerning interlocutory review in MDL proceedings, a subject on which plaintiff and defense counsel have very different perspectives. One area of dispute is the utility of review under 28 U.S.C. § 1292(b). Different studies have reached different conclusions. The Advisory Committee received one study on the subject compiled by the defense bar. At a recent event in Boston, the plaintiffs' bar presented additional and contrary data in an oral presentation. The Advisory Committee asked the plaintiffs' bar to put their empirical data in writing. The defense bar felt it had not responded fully to the plaintiffs' presentation. The subcommittee is awaiting further information from both sides of the bar.

Professor Marcus noted that the process of considering rulemaking has generated good discussion about best practices that may ultimately be more beneficial than new rules.

A member asked whether the subcommittee had analyzed the grant rate for § 1292(b) applications by circuit. This member has asked an associate to look at this question but the research is not completed yet. The question, this member suggested, is whether the district court should continue to serve as a gatekeeper for these interlocutory appeals. This member noted that Rule 23(f) works well in the class action context and wondered about comparing the grant rate for Rule

23(f) petitions. Judge Bates responded that the bar is providing that data, and sometimes conflicting data. One might also investigate whether the defense bar sometimes opts not to seek review under § 1292(b). Professor Marcus indicated that the data are currently contested.

A judge member asked why the proposal under discussion would expand the availability of interlocutory review only for mass tort MDLs and not other complex litigation. Professor Marcus characterized the current issue as responding to the “squeaky wheel” and pointed to proposed legislation that addresses claims in the MDL setting. Professor Marcus noted that in rulemaking applicable to one type of case, you will always have to define what the rule does not apply to, which can be difficult. An attorney member suggested that expanded interlocutory review should apply to all MDLs, not merely a subset of them. Judge Bates observed that the more one increases the number of MDLs eligible for expanded interlocutory review, the harder it would become to provide expedited treatment for those appeals.

Judge Campbell noted that requiring PFSs in cases over a certain threshold, for example, MDLs over a thousand cases, will raise the issue that MDLs grow over time; by the time a given MDL hits the threshold, it might be late to require a PFS. Professor Marcus noted that because MDL centralization may often occur before a given threshold number of cases is reached, it is difficult to draft an applicable rule. Who monitors this, and how do you write that in a rule? Judge Bates stated this is an example of why transferee judges say they need flexibility.

Another judge member noted that there are two different things going on with regard to PFS proposals. The first is use of the PFS to jump start discovery. The second is use of the PFS to screen out meritless cases. These are two different objectives, which may require different solutions.

Social Security Disability Review. The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the handling of actions to review disability decisions under 42 U.S.C. § 405(g). This proposal originated from the Administrative Conference of the United States. Professor Cooper has worked on this effort along with the chair of the subcommittee, Judge Sara Lioi.

The Social Security Administration (SSA) is very enthusiastic about the idea of national rules, even the pared-down discussion draft that the subcommittee has discussed with SSA and other groups most recently. The DOJ is not as enthusiastic but is not voicing an objection. The plaintiffs’ bar is coalescing in opposition to national rules, which it views as unnecessary. The subcommittee met on June 20, 2019 with claimants’ representatives, the SSA, the DOJ, magistrate judges, and others who are familiar with present practices. The purpose of the meeting was to focus on getting input from the claimants’ bar. It was a good meeting with positive input that will lead to changes in the working draft.

Professor Cooper stated the subcommittee hopes to make a recommendation at the Advisory Committee’s October meeting on whether to proceed further with a rulemaking proposal on this topic. Such rulemaking, he noted, would be in tension with the important principle of trans-substantivity in the rules. Even so, Professor Cooper cautioned that the subcommittee should not lightly turn away from a proposal that could improve the lives of those

who deal with these cases. Social Security cases, he observed, constitute a large share (8%) of the federal civil docket. Another issue is how to draft a rule that would supersede undesirable local rules while permitting the retention of valuable ones.

Professor Coquillette emphasized the need to exercise caution when departing from the principle of trans-substantivity in rulemaking. As soon as one permits the insertion into the national Rules of substance-specific provisions, one increases the risk of lobbying by special interests. If there is a need for rules on Social Security review cases, one solution might be to create a separate set of rules for that purpose.

Other Information Items. Judge Bates briefly summarized the following additional information items:

(1) Questions have arisen about the meaning of the provisions in Civil Rule 4(c)(3) for service of process by a United States marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service.

(2) The Civil and Appellate Rules Committees have formed a joint subcommittee to consider whether to amend the rules – perhaps only the Civil Rules – to address the effect (on the final judgment rule) of consolidating initially separate actions. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely the actions have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291. The subcommittee has begun its deliberations with a conference call to discuss initial steps. The opinion in *Hall v. Hall* concluded by suggesting that if “our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.”

(3) Rule 73(b)(1) was reviewed after the Advisory Committee received reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that “[a] district judge or magistrate judge may be informed of a party’s response to the clerk’s notice only if all parties have consented to the referral.” No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature, but there may be a work-around that would obviate the need for a rule. The Advisory Committee has suspended consideration of possible rule amendments while a system fix is explored.

(4) The Advisory Committee continues to consider the privacy of disability filings under the Railroad Retirement Act. The Appellate Rules Committee is taking the lead because review of those cases goes to the courts of appeals in the first instance.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules. Judge Livingston explained that the Advisory Committee had one action item – the proposed amendment to Rule 404(b) for final approval – and three information items related to Rules 106, 615, and 702.

Proposed Amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts). The Advisory Committee sought final approval of proposed amendments to Rule 404(b). Professor Capra explained that the Advisory Committee had been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. He stated that the Advisory Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law because such amendments would make the rule rigid and more difficult to apply without achieving substantial improvement.

The Advisory Committee determined, however, that it would be useful to amend Rule 404(b) in some respects, especially with regard to the notice requirement in criminal cases. As to that requirement, the Committee determined that the notice should articulate the purpose for which the evidence will be offered and the reasoning supporting the purpose. Professor Capra noted issues that the Committee had observed with the operation of the current Rule. In some cases a party offers evidence for a laundry list of purposes, and the jury receives a corresponding laundry list of limiting instructions. Some courts rule on admissibility without analyzing the non-propensity purpose for which the evidence is offered. And some notices lack adequate specificity.

Professor Capra stated that the proposal to amend Rule 404(b) was published for comment in August 2018. Given how often 404(b) is invoked in criminal cases, Professor Capra expected robust comments, but only a few comments were filed, and they were generally favorable. In response to public comments and discussion before the Standing Committee, the Advisory Committee made two changes to the proposed Rule text as issued for public comment. Most importantly, the Committee changed the term “non-propensity” purpose to “permitted” purpose. Secondly, the Committee changed the notice provision to clarify that the “fair opportunity” requirement applies to notice given at trial after a finding of good cause.

A Committee member suggested replacing the verb “articulate” in the proposed amendment because, he suggested, the term usually refers to a spoken word rather than written material. He noted that the term is not used elsewhere in the Federal Rules. Professor Capra pointed out that the proposed amendment was an effort to get beyond merely stating a purpose. The terms “specify” or “state” were suggested as substitutions for “articulate.” Judge Campbell stated that the use of the term “articulate” suggests both identifying the purpose and explaining the reasoning. Professor Capra noted that the word “articulate” is what the Advisory Committee agreed to, and it suggests more rigor. A DOJ representative noted that the language in the proposed amendment was the subject of painstaking negotiation, and that she preferred to retain

the negotiated language to avoid unintended consequences. The Committee determined to retain the term “articulate.”

A judge member noted that the Committee Note still used the term “non-propensity” purpose even though that term had been removed from the text of the rule. Professor Capra explained that the use of the term was intentional and resulted from significant discussion at the Advisory Committee’s meeting. Judge Campbell added that part of the reason for retaining the language in the Committee Note was to provide guidance to judges in applying the rule. Judge Livingston explained that the term propensity is embedded in caselaw and the Committee Note’s use of that term would provide a good signal to readers to focus their caselaw research on that term.

Another judge member asked about the use of the term “relevant” in the Committee Note’s statement that “[t]he prosecution must ... articulate a non-propensity purpose ... and the basis for concluding that the evidence is relevant in light of this purpose.” Judge Livingston explained that this passage reflected a complex underlying discussion, and that the Committee was attempting to avoid undue specificity in the Committee Note.

Upon motion by a member, seconded by another, and on a voice vote: **The Committee decided to recommend the amendments to Rule 404(b) for approval by the Judicial Conference.**

Professor Capra thanked the DOJ for all its work on the rule. A DOJ representative noted the sensitivity of Rule 404(b) and thanked Professor Capra, Judge Livingston, and prior chair Judge Sessions for more than five years’ work on the rule.

Information Items

Professor Capra summarized the Advisory Committee’s ongoing consideration of possible amendments to Rule 106, sometimes known as the rule of completeness. The Advisory Committee is considering two kinds of potential amendments – one that would provide that a completing statement is admissible over a hearsay objection, and another that would provide that the rule covers oral as well as written or recorded statements. In an illustrative scenario, the defendant makes the statement “this is my gun, but I sold it two months ago,” and the prosecution offers the first portion of the statement and objects to the admission of the latter portion on hearsay grounds. Some courts admit a completing oral statement into evidence over a hearsay objection, but other courts do not admit the completing statement. The Advisory Committee reached consensus on the desirability of acting to resolve the conflict but is carefully considering how such an amendment should be written and what limitations should govern when such a completing statement should be admitted over a hearsay objection. The Advisory Committee has received information about how completing oral statements are handled in other jurisdictions, including California and New Hampshire.

The next information item concerns Rule 615, the sequestration rule. The Advisory Committee is considering whether to propose an amendment addressing the scope of a Rule 615 order. The Rule text contemplates the exclusion of witnesses from the courtroom; one question is

whether a Rule 615 order can also bar access to trial testimony by witnesses when they are outside the courtroom. Most courts have answered this question in the affirmative, but others apply a more literal reading of the rule. The Advisory Committee is considering an amendment that would specifically allow courts discretion to extend a Rule 615 order beyond the courtroom. The rule would not be mandatory. One potentially challenging issue is how to treat trial counsel's preparation of excluded witnesses.

Professor Capra next reported on the Advisory Committee's ongoing work with regard to Rule 702. In September 2016 the President's Council of Advisors on Science and Technology issued a report which contained a host of recommendations for federal scientific agencies, the DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of possible changes to Rule 702. Judge Livingston appointed a Rule 702 Subcommittee to study what the Advisory Committee might do to address concerns relating to forensic evidence. In fall 2017 the Advisory Committee held a symposium on forensics and *Daubert* at Boston College School of Law.

Following discussion by the Advisory Committee, the main issue the subcommittee is considering concerns how to help courts to deal with overstatements by expert witnesses, including forensic expert witnesses. Professor Capra noted that the DOJ is currently reviewing its practices related to forensic evidence testimony, and some have suggested waiting to see the results of the DOJ's efforts. Judge Livingston stated that one threshold issue is whether the problems should be addressed by rule, or perhaps by judicial education. Judge Livingston thanked the DOJ and Professor Capra for putting together a presentation for the Second Circuit on forensic evidence that is available on video. Professor Capra noted that there will be a miniconference in the fall at Vanderbilt Law School to continue discussion of these issues and *Daubert*.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy presented the report of the Advisory Committee on Criminal Rules, which consisted of four information items.

Judge Molloy first reported on the Advisory Committee's decision not to move forward with suggestions that it amend Rule 43 to permit the court to sentence or take a guilty plea by videoconference. The Advisory Committee has considered suggestions to amend Rule 43 several times in recent years. The first suggestion came from a judge who assists in districts other than his own and who sought to conduct proceedings by videoconference as a matter of efficiency and convenience. The Advisory Committee concluded that an amendment to Rule 43 was not warranted to address that circumstance.

The second suggestion to amend Rule 43 came from the Seventh Circuit's opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), which included the specific statement that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. In *Bethea*, the defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to

broken bones, doing so might have been dangerous for him. After *Bethea* was permitted to appear by videoconference for his plea and sentencing as requested by his counsel, *Bethea* appealed and argued that the physical-presence requirement in Rule 43 was not waivable. The Seventh Circuit in *Bethea* concluded that even under the exceptional facts presented “the plain language of Rule 43 requires all parties to be present for a defendant’s plea” and “a defendant cannot consent to a plea via videoconference.” *Id.* at 867. Advisory Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment.

A subcommittee that was formed to consider the issue and chaired by Judge Denise Page Hood recommended against amending the rule to permit use of videoconferencing for plea and sentencing proceedings. The subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of videoconferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three reasons. First, and most important, the subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where videoconferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Finally, the subcommittee was concerned that there would inevitably be constant pressure from judges to expand any exception to the requirement of physical presence at plea or sentencing. The Advisory Committee unanimously agreed with the subcommittee’s recommendation not to amend Rule 43.

Shortly after that determination, the Advisory Committee received a request for reconsideration of that determination. Judges who serve in border states asked for the ability to use videoconferencing for pleas and sentencing. These judges explained that their courts were dealing with thousands of cases brought under 8 U.S.C. § 1326 against defendants charged with illegal reentry. Their districts cover vast distances and, under existing rules, either the judge must travel, or the U.S. Marshals Service must transport defendants. While sympathetic to the issue, the Advisory Committee determined that it would be undesirable to open the door to videoconferencing for these critical procedures. There is a slippery slope and once exceptions are made to the physical presence requirement, exceptions could swallow the rule in the name of efficiency.

Professor King noted that several years ago when the rules were reviewed with an idea of updating them to account for technological advancements, including enhanced audio/visual capabilities, some rules were amended but Rule 43’s physical-presence requirement was left unchanged.

Judge Molloy next addressed the Advisory Committee's consideration of a suggestion received from a magistrate judge to amend Rule 40 to clarify the procedures for arrest for violations of conditions of release set in another district. The issue arises from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3). Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily be heard by the judicial officer who ordered the release. After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Advisory Committee decided Rule 40 could benefit from clarification but agreed with an observation by Judge Campbell that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Advisory Committee decided to take no action at this time. Judge Bruce McGiverin greatly assisted the Advisory Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

Judge Molloy next introduced the Advisory Committee's consideration of Rule 16, an issue he noted ties in with the Evidence Rules Advisory Committee's report about expert testimony as well as Civil Rule 26's requirements for expert discovery. Judge Molloy noted that he has served on the Advisory Committee for eleven years and for most of that time Rule 16 has been on the agenda. Judge Kethledge chairs the Rule 16 Subcommittee that has been asked to review suggestions to amend Rule 16 so that it more closely follows Civil Rule 26's provisions for disclosures regarding expert witnesses. Back in the early 1990s, there was a suggestion that discovery rules on experts in criminal cases be made parallel to rules governing civil cases. The Criminal Rules did not change, although changes to Civil Rule 26 went forward.

To address the questions before the subcommittee, Judge Kethledge convened a miniconference to discuss possible amendments to Rule 16. There was a very strong group of participants, from various parts of the country, including six or seven defense practitioners, and five or six representatives from the DOJ. Most had significant personal experience with these issues and had worked with experts.

Judge Kethledge organized discussion at the miniconference into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule. Second, they were asked to provide suggestions to improve the rule.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures with sufficiently detailed information to allow them to prepare to cross examine the witness. In contrast, the DOJ representatives stated that they were unaware of problems with the rule and expressed opposition to making criminal discovery more akin to Rule 26.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, participants made significant progress in identifying some common ground. The DOJ representatives said that framing the problems in terms of timing and sufficiency of the

notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the DOJ personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The subcommittee came away from the miniconference with concrete suggestions for language that would address timing and completeness of expert discovery.

Judge Molloy stated that the subcommittee plans to present a proposal to amend Rule 16 at the Advisory Committee's September meeting.

A DOJ representative noted that the Department views this less as a need for a rule change and more as a need to train lawyers so that prosecutors and defense counsel alike understand what the rules are. Prosecutors need to understand what the concerns are and the Department needs to conduct training to ensure this understanding. The DOJ has worked with Federal Public Defender Donna Elm to highlight the problematic issues; a training course presented by the DOJ's National Advocacy Center will be shown to all prosecutors. Even if a rule change were to go forward, it would take years. Collaboration on training means that the Department can begin to address problems now.

Judge Molloy provided a brief update on progress in implementing the recommendations of the Task Force on Protecting Cooperators. Task Force member Judge St. Eve reported on the status of efforts by the Bureau of Prisons to implement certain recommendations. One recommendation is to adopt provisions for disciplining inmates who pressure other inmates to "show their papers."

Judge Campbell thanked the advisory committee chairs and reporters for all the work that goes into the consideration of every suggestion. He noted that even a five-minute report on a given issue may be the result of long and painstaking effort.

OTHER COMMITTEE BUSINESS

Proposal to Revise Electronic Filing Deadline. Judge Chagares explained his suggestion that the Advisory Committees study whether the rules should be amended to move the current midnight electronic-filing deadline to earlier in the day, such as when the clerk's office closes in the respective court's time zone. The Supreme Court of Delaware has adopted such a practice. Judge Campbell delegated to Judge Chagares the task of forming a subcommittee to study the issue and provide an initial report at the January meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019, and she described several bills that have been introduced or reintroduced that are of interest to the rules process or the courts generally. There has been no legislative activity to move these bills forward. Ms. Wilson reviewed several pieces of legislation of general interest to the courts. Scott Myers provided an overview of H.R. 3304, a bipartisan bill introduced the week before the Committee meeting that would extend for an additional four years the existing exemption from the means test for chapter seven filers who are certain National Guard reservists. The bill is expected to pass; absent passage, an amendment to the

Bankruptcy Rules would be required. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Judge Campbell discussed the Judiciary’s strategic planning process and the Committee’s involvement in that process. He solicited comments on the Committee’s identified strategic initiatives and the extent to which those initiatives have achieved their desired outcomes. Judge Campbell also invited input on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020. Judge Campbell will correspond with the Judiciary’s planning coordinator regarding these matters.

Procedure for Handling Public Input Outside the Established Public Comment Period. Judge Campbell summarized prior discussions by the Committee concerning how public submissions received outside the formal public comment period should be handled, including submissions addressed directly to the Standing Committee. Professor Struve explained the revised draft principles concerning public input during the Rules Enabling Act process and welcomed additional comments on the draft. These procedures are proposed to be posted on the website for the Judiciary. *See Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process* (agenda book, p. 495).

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the principles concerning public input.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee’s members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Phoenix, Arizona on January 28, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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Multi-Committee Items

Item 2 will be an oral report.

Please see the relevant sections of the Advisory Committees' reports.

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TAB 3

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TAB 3A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Michael Chagares, Chair
Advisory Committee on Appellate Rules

DATE: December 27, 2019

RE: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, October 30, 2019, in Washington, DC. It discussed several matters, but did not take any formal action on proposed amendments to the Rules. It therefore does not seek any action by the Standing Committee at the January 2020 meeting of the Standing Committee.

The Committee anticipates that, at the June 2020 meeting of the Standing Committee, it will seek final approval of proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. Most of these proposed amendments deal with the content of notices of appeal; the proposed amendment to Rule 42 deals with agreed dismissals (Part II of this report).

It also anticipates that, at the June 2020 meeting, it will seek approval for publication of proposed amendments to Rule 35, dealing with rehearing en banc, and to Rule 25, dealing with privacy in Railroad Retirement Act cases (Part III of this report).

The Committee discussed two matters that are under consideration by joint subcommittees:

- earlier deadlines for electronic filing; and
- finality in consolidated cases (Part IV of this report).

The Committee gave initial consideration to two matters that it decided to retain on its agenda:

- a proposal to require that a court of appeals give notice if it is contemplating a decision based on grounds not argued by the parties; and
- a proposal to regularize the handling of applications to proceed in forma pauperis (Part V of this report).

The Committee also considered two other items, removing them from its agenda (Part VI of this report). The draft minutes from the October 30, 2019 meeting are attached to this report.

II. Proposed Amendments Published for Public Comment

At the spring 2019 meeting, the Standing Committee approved for publication proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. They were published in August 2019.

The proposed amendment to Rule 3 is the most significant. It is designed to reduce the inadvertent loss of appellate rights. The proposed amendments to Rule 6 and Forms 1 and 2 are conforming amendments.

The proposed amendment to Rule 42 would restore mandatory dismissal of appeals when the parties agree to such a dismissal.

A. Rules 3 and 6; Forms 1 and 2

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, the proposed amendment would require the designation of “the judgment—or the appealable order—

from which the appeal is taken,” and delete the phrase “or part thereof.” In most cases, because of the merger principle, it is appropriate to designate only the judgment.

To alert readers to the merger principle without attempting to codify it, the proposed amendment would add a new provision: “The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.”

In order to overcome various traps that decisions have created, the proposed amendment would also add these new provisions:

“In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates: (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A).”

and

“An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.”

The Appendix to this report contains all of the proposed Rules and Committee Notes as published for public comment. For convenience, the text of proposed Rule 3 is shown here:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

- (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;
- (B) designate the judgment, ~~—or the appealable order—~~from which the appeal is taken, ~~or part thereof being appealed~~; and
- (C) name the court to which the appeal is taken.

- (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.
- (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.
- (4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.
- (5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:
- (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
- (B) an order described in Rule 4(a)(4)(A).
- (6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.
- ~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.
- ~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of a ~~notice~~s of appeal.

* * * * *

The Committee has received two responsive comments, one favorable and one critical. It also received two completely irrelevant comments discussing bankruptcy.

The favorable comment urges that these amendments be adopted “as written without delay” in order to overcome “traps for the unwary” that “undermine confidence in the fairness and openness of the appellate process.”

The critical comment, submitted by Michael Rosman, contends that the proposal is inconsistent with Civil Rule 54(b). If he is right, the proposal needs to be rethought. But no member of the Committee agreed with his analysis.

Mr. Rosman contends that Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists “all the claims in the action . . . and the counterclaims, cross-claims, and intervenors’ claims, if any—and identify what has become of all of them.” On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6) and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction.

He observes that Civil Rule 54(b) provides that an order “that adjudicates fewer than *all* the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims.” (emphasis added). He emphasizes that Civil Rule 54(b) does not—as the proposed amendment to Appellate Rule 3 does—refer to all *remaining* claims, and contends that it may not reasonably be interpreted as if it did.

Mr. Rosman concedes that “it has not always worked” this way and that “District Court judges have not been trained to file judgments adjudicating all of the claims of all of the parties, they frequently fail to do so, [and] parties tend not to raise this failure, and Courts of Appeals tend not to call them on it.” In his view, “[t]his has not been good for the clarity of practice.”

What Mr. Rosman views as an unreasonable interpretation of Civil Rule 54(b) is not only consistent with the actual practice he acknowledges, but also is precisely how a leading treatise interprets Civil Rule 54(b). That treatise provides:

Any order that did not contain both the required determination and direction, even though it adjudicated one or more of the claims, is subject to revision anytime before a judgment is entered adjudicating the *remaining* claims.

10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2653 (4th ed.) (emphasis added); *cf.* Moore’s Federal Practice § 54.259[3] (“If an order is not certified under Rule 54(b), but a notice of appeal is nevertheless filed, any subsequent order of the district court that completely adjudicates the remaining claims is sufficient to validate the otherwise premature notice of appeal.”).

Because it is generally understood that a decision disposing of all remaining claims of all remaining parties to a case is a final judgment, without the need for the district judge to recite the prior disposition of all previously decided claims, the Committee does not recommend any changes in response to Mr. Rosman’s comment.

B. Rule 42

The proposed amendments would restore the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It would also replace old terminology and clarify that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order. It would also

clarify that the Rule does not alter the legal requirements governing court approval of settlements or the like.

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ **must** dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any **court** fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

The Committee has received no comments on the proposed amendments to Rule 42, and does not recommend any changes.

III. Proposed Amendments for Possible Publication in 2020

The Committee anticipates that, at the spring 2020 meeting, it will seek approval for publication of proposed amendments to Rule 35, dealing with rehearing en banc, and to Rule 25, dealing with privacy in Railroad Retirement Act cases.

A. *Rules 35 and 40—Rehearing*

Amendments to Rule 35 and 40 imposing length limits on responses to petition for rehearing have been approved by the Judicial Conference and submitted to the Supreme Court for its consideration. They are on track to take effect on December 1, 2020.

The Committee has also been looking at more comprehensive changes to these Rules. But it has been dissuaded from doing so, aware that there is no demonstrated problem calling for such a comprehensive solution, and having balanced the benefits of consistency against the harms of disruption. In particular, it has considered, but rejected, a number of options, including:

- (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing;
- (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21;
- (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and
- (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

After conducting a review of the local rules, internal operating procedures, and the like from the various courts of appeals, the Committee has also decided against adding a provision that would empower any judge on a panel to cause a petition for panel rehearing to be treated as a petition for rehearing en banc. It saw insufficient reason to disrupt local practices with regard to the role of visiting and senior judges.

At this point, the Committee is focused on the relationship between petitions for panel rehearing and rehearing en banc. It is inclined to:

- (1) codify the widespread practice that allows a petition for rehearing en banc to be treated by the panel as a petition for panel rehearing;
- (2) remind litigants that if the criteria for en banc review are not met, panel rehearing may be available; and
- (3) assure litigants that a panel will not be able to block access to the full court.

This last point requires some explanation. There are cases in which a panel will state in an order that no subsequent petitions for rehearing en banc may be filed. The Committee suspects that this happens when the members of the panel, based on confidential communication between the panel and the non-panel members of the court, know that other members of the court are satisfied with the changes made by the panel. But the parties do not know what has been said by off-panel members of the court, and the court does not know what the parties might have to say in response to the changes made by the panel. For this reason, the Committee is inclined to recommend making clear that parties have a right to seek review by the full court.

The Committee is continuing to work on this proposal.

One question under discussion is whether the ability to file a new petition should be limited to situations where the panel changes the substance of the decision. At first blush, such a limitation makes good sense, so as not to invite new petitions when the panel makes an insignificant change, such as fixing a typo or a citation. On the other hand, such a limitation might invite battles over what counts as significant.

Another question under discussion is whether the ability to file a new petition should be limited to petitions for rehearing en banc. On the one hand, if the panel has made an error in attempting to fix its prior decision, the aggrieved party should be able to point it out. On the other hand, allowing repeated petitions for panel rehearing endangers finality and risks confusion about issuance of the mandate. Whichever is chosen merely sets the default rule, a default rule that can be overcome pursuant to Rule 2.

Here is a working draft, with options noted in brackets:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered.

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

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

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

* * * * *

(4) If neither of the criteria in (b)(1) is met, panel rehearing pursuant to Rule 40 may be available.

(5) A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing. If the panel changes the [substance of its] decision, a party may—within the time specified by Rule 40(a), counted from the day of filing of the amended decision—file a new petition for rehearing [en banc].

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment calls attention to the different standards for the two kinds of rehearing.

The amendment also explicitly provides for the common practice of treating a petition for rehearing en banc as including a petition for panel rehearing, so that the panel can address issues raised by the petition for rehearing en banc and grant relief that is within its power as a panel. It also provides that if the panel changes the [substance of its] decision, a party is given time to file a new petition for rehearing [en banc].

B. Rule 25—Privacy in Railroad Retirement Act Cases

The Committee has been considering a suggestion from Ana Kocur, General Counsel of the Railroad Retirement Board, that the privacy protections afforded in Social Security benefit cases be extended to Railroad Retirement Act benefit cases.

Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): “An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal.”

This piggyback approach works fine for categories of cases that can be heard in both the district courts and the courts of appeals. But unlike Social Security benefit cases, Railroad Retirement benefit cases go directly to the courts of appeals. The Railroad Retirement Board does not generally litigate cases in the federal district courts. For that reason, this Committee took up this matter.

There is little doubt that there are close parallels between the Social Security and Railroad Retirement programs. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 898 (2019) (“Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other.”). Accordingly, the Committee believes that it makes sense to accord the same kind of privacy protection to both kinds of cases.

The Committee checked with the Committee on Court Administration and Case Management, and found no objection to this Committee proceeding. A limited number of lawyers who practice in the area were also consulted, and none objected.

The Committee also considered the possibility of including other kinds of cases that go directly to the courts of appeals and implicate similar privacy concerns. It found only two statutory schemes that might possibly warrant similar privacy treatment: the Longshore and Harbor Workers' Compensation Act, *see* 33 U.S.C. § 921, and the Black Lung Act, *see* 30 U.S.C. § 932. But the Department of Labor raised some concerns about categorically treating those cases the same as Social Security cases, because the administrative process in those cases differs in important respects from the process in Social Security cases. For this reason, the Committee expects to propose publication of a proposed amendment limited to the Railroad Retirement Act.

Here is a working draft:

Rule 25. Filing and Service

(a) Filing

* * * * *

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

IV. Matters Before Joint Subcommittees

A. Earlier Deadlines for Electronic Filing

A cross-committee subcommittee is studying the possibility of rolling back electronic filing deadlines from midnight to some earlier time. The Federal Judicial Center is looking at deadlines across the country, including Delaware, which has adopted an earlier deadline. Information being sought includes when clerks' offices actually close, what opportunities there are for after-hours filings, who actually files at late hours, and the extent to which pro se litigants may file electronically. The ABA and other membership organizations have been asked to comment.

Some members of the Appellate Rules Committee recalled that, before electronic filing, they would use after-hours drop boxes or the latest Federal Express drop off box to file documents after the Clerk's Office closed. They urged caution about how any change might interact with the mailbox rule. Some noted the value of the flexibility provided by a midnight filing deadline.

B. Finality in Consolidated Cases

A joint Civil/Appellate subcommittee is considering the issue of finality in consolidated cases. When cases are consolidated, and all of the issues in one such case are resolved, can (and must) an immediate appeal be taken? This question produced a four-way split among the circuits prior to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the Supreme Court decided that the consolidated actions retain their separate identities so that an immediate appeal is available, and presumably must be taken at that time or lost.

In addition to the problem of possible lost appellate rights if litigants do not realize that they need to appeal, there is also a potential for inefficiency in the courts of appeals dealing with related issues in multiple appeals.

The Federal Judicial Center is undertaking a study of how large a problem there might be. But even if the statistics do not reveal a large problem, there may nevertheless be a large problem. Cases in which one consolidated case has reached a final judgment may be overlooked by both litigants and courts. So, it is problematic to have a jurisdictional rule that is difficult to detect, and difficulties are compounded if additional claims or parties are added after consolidation. Moreover, there may well be cases that are consolidated in the district of filing prior to being transferred to an MDL district.

Any changes would likely be made to the Civil Rules. The joint subcommittee may propose a rule that would allow for delayed appealability, with a district judge empowered to dispatch cases for appeal, as with Civil Rule 54(b).

V. Matters Initially Considered and Retained on Agenda

A. *Decision on Grounds Not Argued*

The American Academy of Appellate Lawyers (AAAL) submitted a suggestion that would require a court of appeals, if it is contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground.

A subcommittee was appointed to consider the suggestion. Questions to be addressed include whether the matter is appropriate for rulemaking.

B. *In Forma Pauperis Standards*

The Civil, Criminal, and Appellate Committees have received a suggestion regarding how courts decide whether to grant IFP status. IFP status is governed by statute. 28 U.S.C. § 1915 provides, in relevant part, that:

any 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.

The standard of poverty required for IFP status is not absolute destitution. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338–40 (1948). “The public would not be profited 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.” *Id.* A recent article in the Yale Law Journal, which focuses on IFP practice in the district courts, contends that “there is a dizzying degree of variation across and within the ninety-four U.S. district courts.” Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1482 (2019). Hammond proposes eligibility for IFP status based on any one of the following 1) net income at or below 150% of federal poverty level and assets less than \$10,000, excluding home and vehicle; 2) eligibility for public assistance; 3) representation by pro bono attorney, including one funded by Legal Services; or 4) judicial discretion to determine that fees and costs cannot be paid without substantial hardship. *Id.* at 1522. He provides a proposed IFP form as well. *Id.* at 1565.

There is some support on the Committee for potential rulemaking to establish a default rule, or a few easy-to-apply rules such as those suggested in the Yale article.

Even if there is consensus among other committees not to undertake rulemaking, there is an aspect unique to the Appellate Rules that may warrant it. The official forms have been largely eliminated in the Civil Rules. The IFP forms available for use in district court proceedings are AO forms. By contrast, the Appellate Rules still have official forms as part of the Appellate Rules. When someone seeks leave to pursue an appeal IFP, Appellate Rule 24 requires the use of Appellate Form 4. Moreover, Supreme Court Rule 39 requires a party seeking IFP status in the

Supreme Court to use Appellate Form 4. If the AO changes the forms used in the district court, the Committee might want to reconsider whether to continue to have its own form as part of the Rules.

VI. Items Removed from Agenda

A. Specifying “Good Cause” for an Extension of Time to File a Brief

A lawyer who was quite sure that the government did not have good cause for an extension it received submitted a suggestion to specify criteria for good cause.

The Committee, without dissent, agreed to remove this item from its agenda.

B. Court Calculated Deadlines

The Appellate, Bankruptcy, Civil, and Criminal Committees received a suggestion that courts calculate deadlines and provide the information to the parties so the parties can rely on them.

Although Committee members believed that calculating deadlines is a real problem for pro se litigants, the proposal would put an enormous burden on the clerks’ offices or the judges’ staffs—as well as risk being misleading because of jurisdictional deadlines that are fixed even if a court provides a litigant with incorrect information.

There was some discussion of whether deadlines that CM/ECF generates automatically could be made available, but even this is impractical because there are case-to-case variables and these deadlines are sometimes wrong.

The Committee, without dissent, agreed to remove this item from its agenda.

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APPENDIX

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

1 **Rule 3. Appeal as of Right—How Taken**

2 * * * * *

3 **(c) Contents of the Notice of Appeal.**

4 (1) The notice of appeal must:

- 5 (A) specify the party or parties taking the
6 appeal by naming each one in the caption or
7 body of the notice, but an attorney
8 representing more than one party may
9 describe those parties with such terms as
10 “all plaintiffs,” “the defendants,” “the
11 plaintiffs A, B, et al.,” or “all defendants
12 except X”;

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

13 (B) designate the judgment, or the appealable
14 order from which the appeal is taken, ~~or~~
15 ~~part thereof being appealed~~; and

16 (C) name the court to which the appeal is taken.

17 (2) A pro se notice of appeal is considered filed on
18 behalf of the signer and the signer's spouse and
19 minor children (if they are parties), unless the
20 notice clearly indicates otherwise.

21 (3) In a class action, whether or not the class has
22 been certified, the notice of appeal is sufficient
23 if it names one person qualified to bring the
24 appeal as representative of the class.

25 (4) The notice of appeal encompasses all orders that
26 merge for purposes of appeal into the designated
27 judgment or appealable order. It is not
28 necessary to designate those orders in the notice
29 of appeal.

- 30 (5) In a civil case, a notice of appeal encompasses
31 the final judgment, whether or not that judgment
32 is set out in a separate document under Federal
33 Rule of Civil Procedure 58, if the notice
34 designates:
- 35 (A) an order that adjudicates all remaining
36 claims and the rights and liabilities of all
37 remaining parties; or
- 38 (B) an order described in Rule 4(a)(4)(A).
- 39 (6) An appellant may designate only part of a
40 judgment or appealable order by expressly
41 stating that the notice of appeal is so limited.
42 Without such an express statement, specific
43 designations do not limit the scope of the notice
44 of appeal.
- 45 ~~(4)~~ (7) An appeal must not be dismissed for
46 informality of form or title of the notice of
47 appeal, or for failure to name a party whose

48 intent to appeal is otherwise clear from the
49 notice.

50 (5) (8) Forms 1A and 1B in the Appendix of Forms

51 are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

52 * * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of “the judgment—or the appealable order—from which the appeal is taken”—and the phrase “or part thereof” is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): “The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): “An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal

from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties.”

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment

before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A).” This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

1 **Rule 6. Appeal in a Bankruptcy Case**

2 * * * * *

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

6 (1) **Applicability of Other Rules.** These rules apply
7 to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1)
8 from a final judgment, order, or decree of a district court or
9 bankruptcy appellate panel exercising appellate jurisdiction
10 under 28 U.S.C. § 158(a) or (b), but with these
11 qualifications:

12 (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20,
13 22–23, and 24(b) do not apply;

14 (B) the reference in Rule 3(c) to “Forms 1A and
15 1B in the Appendix of Forms” must be read
16 as a reference to Form 5;

17 (C) when the appeal is from a bankruptcy
18 appellate panel, “district court,” as used in

19 any applicable rule, means “appellate
20 panel”; and

21 (D) in Rule 12.1, “district court” includes a
22 bankruptcy court or bankruptcy appellate
23 panel.

24 * * * * *

Committee Note

The amendment replaces “Form 1” with “Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
 District of _____
 File Number _____

A.B., Plaintiff
v.
C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (~~from an order (describing it)~~) entered in this action on the _____ day of _____, 20__.

(s) _____
 Attorney for _____
 Address: _____

[Note to inmate filers: *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]*

* See Rule 3(c) for permissible ways of identifying appellants.

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Form 1B

Notice of Appeal to a Court of Appeals From a Judgment or an Appealable Order of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff
v.
C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (from an the order ___ (describing the order it) _____) entered in this action on the _____ day of _____, 20__.

(s) _____
Attorney for _____
Address: _____

[Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]

* See Rule 3(c) for permissible ways of identifying appellants.

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Form 2

**Notice of Appeal to a Court of Appeals From a Decision
of
the United States Tax Court**

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent
--

Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal*) _____ hereby appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address: _____

* See Rule 3(c) for permissible ways of identifying appellants.

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1 **Rule 42. Voluntary Dismissal**

2 * * * * *

3 **(b) Dismissal in the Court of Appeals.**

4 **(1) Stipulated Dismissal.** The circuit clerk ~~may~~
5 must dismiss a docketed appeal if the parties file
6 a signed dismissal agreement specifying how
7 costs are to be paid and pay any court fees that
8 are due. ~~But no mandate or other process may~~
9 ~~issue without a court order.~~

10 **(2) Appellant’s Motion to Dismiss.** An appeal may
11 be dismissed on the appellant’s motion on terms
12 agreed to by the parties or fixed by the court.

13 **(3) Other Relief. A court order is required for any**
14 relief beyond the mere dismissal of an appeal—
15 including approving a settlement, vacating an
16 action of the district court or an administrative
17 agency, or remanding the case to either of them.

18 (c) Court Approval. This Rule 42 does not alter the legal
19 requirements governing court approval of a settlement,
20 payment, or other consideration.

21 * * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney’s fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, “appeal” should be understood to include a petition for review or application to enforce an agency order.

TAB 3B

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Minutes of the Fall 2019 Meeting of the
Advisory Committee on the Appellate Rules

October 30, 2019

Washington, DC

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 30, 2019, at 9:00 a.m., at the Thurgood Marshall Federal Judiciary Building in Washington, DC.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Lisa B. Wright. Solicitor General Noel Francisco was represented by Thomas Byron, Assistant Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Bernice Donald, Member, Advisory Committee on the Bankruptcy Rules, and Liaison Member, Advisory Committee on the Appellate Rules; Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Alison Bruff, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Lisa Wright of the Federal Defenders Office in DC, a new member of the Committee, and Circuit Judge Bernice Donald of the Sixth Circuit, the new Bankruptcy liaison. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the dinner the night before. He congratulated Chris Landau on his appointment as ambassador to Mexico, and noted his excellent work for the Committee during his time as a member.

II. Report on Status of Proposed Amendments and Legislation

Judge Chagares reported that the proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 are on track to take effect on December 1, 2019, barring Congressional action. These proposed amendments mostly reflect the move to electronic filing and the resulting reduced need for proof of service. In addition, the proposed amendment to Rule 26.1 changes the disclosure requirements of that Rule.

He also reported that the proposed amendments to Rules 35 and 40 are on track to take effect on December 1, 2020. They have been approved by the Judicial Conference and sent to the Supreme Court for its consideration. These proposed amendments impose length limits on responses to petitions for rehearing and unify terminology.

Judge Chagares then called attention to the proposed AMICUS Act, S. 1441, mentioned in the agenda book on page 36. That legislation would require disclosures from certain amici. Rebecca Womeldorf reported that it did not seem to have much traction at the moment, but appeared to be the kind of legislation that could move quickly after the next election. The Committee discussed how this differed from current Appellate Rule 29 and Supreme Court Rule 37. The current rules focus on disclosure of funding the brief itself. The proposed legislation, on the other hand, would generally require that those who submit three or more amicus briefs in a year disclose information about their own sources of funding. In particular, disclosure would be required of the name of any person who contributed 3 percent or more of the filer's revenue or more than \$100,000. Committee members wondered how many organizations this would affect, and how it might apply to trade associations and churches, and suggested the formation of a subcommittee. Professor Coquillet agreed that this was the kind of bill that once it moved, could move fast, and agreed with the suggestion that a subcommittee be formed. Judge Chagares appointed a subcommittee to deal with amicus disclosures, consisting of Professor Sachs, Ms. Spinelli, and Ms. Wright. He noted that, as usual, he and the Reporter would serve on the subcommittee ex officio.

III. Approval of the Minutes

The draft minutes of the April 5, 2019, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment (16-AP-D and 17-AP-G)

Judge Chagares noted that proposed amendments to Rules 3, 6, 42, and Forms 1 and 2 were published for public comment. The Standing Committee made no substantive change to this Committee's proposals regarding Rules 3, 6, and Forms 1 and 2. As for Rule 42, the Standing Committee moved to the text something that this Committee had left to the Note: a statement that the Rule does not alter legal requirements governing court approval of settlements and the like.

No one requested to be heard at a hearing on these amendments that would have been held in conjunction with this meeting. There will be another opportunity to request to be heard at a hearing in January in Phoenix.

No comments were received regarding Rule 42. Two were received regarding Rule 3, one favorable, one critical. Judge Chagares asked the Reporter to discuss the critical response.

The Reporter first noted for the Committee the stylistic change that the Standing Committee had made to Rule 3—changing romanettes to a dash—so the Committee members would be clear about how the proposal published for public comment differed from the version approved by this Committee. He also noted that a third comment had been received since the publication of the agenda book, but that it was addressed to transparency in bankruptcy proceedings and had nothing to do with these proposals.

Turning to the critical comment submitted by Michael Rosman, the Reporter explained that the critique was based on Mr. Rosman’s interpretation of Civil Rule 54(b). Under his reading of that Rule, a district court is obligated to enter a separate document that lists all of the claims in the action and what has become of them. That is, if a district court disposes of part of a case under Rule 12(b)(6), and then some years later disposes of the rest of the case, the district court has to enter a document that recites not just the disposition of those remaining claims, but that recites the disposition of the earlier part of the case as well. Until that is done, in Mr. Rosman’s view, there is no final appealable judgment because there is no decision that adjudicates “all the claims and all the parties’ rights and liabilities.” He emphasizes that Civil Rule 54 does not say “all the remaining claims,” but “all the claims.” By contrast, the proposed amendment to Rule 3 does refer to “all remaining claims and the rights and liabilities of all remaining parties.”

The Reporter noted that Mr. Rosman’s interpretation is not how Rule 54 is generally understood, including by major treatise writers. Instead, it is generally understood that when a decision disposes of all remaining claims of all remaining parties to a case, that is a final judgment. The Reporter emphasized that if Mr. Rosman is right, we would have a real problem with the proposed Rule and need to rethink it. No member of the Committee expressed agreement with Mr. Rosman’s interpretation, and no member of the Committee suggested any changes to the proposed amendments as published.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rules 35 and 40 (18-AP-A)

Thomas Byron presented the subcommittee’s report regarding its ongoing review of Rules 35 and 40. (Agenda Book page 177). He explained that the consideration of Rules 35 and 40 had begun with making provision for the length of responses, and that review uncovered the small difference between one rule calling that document a “response,” and the other calling it an “answer.” That review also uncovered lots of other differences between the two rules, traceable to the historic treatment that permitted parties to petition for panel rehearing, but only suggest rehearing en banc.

The subcommittee undertook a comprehensive review, and considered aligning Rules 35 and 40 with each other, or both with Rule 21. It also considered revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing. But based on the guidance of this Committee, the subcommittee is not proposing any of these changes.

Instead, there are four ideas still on the table:

- (1) any panel member may request a poll of the full court
- (2) a panel may treat a petition for rehearing en banc as a petition for panel rehearing
- (3) if the panel changes its decision, ensure that it can't block access to the full court
- (4) encourage the readers of Rule 35 to look to Rule 40 as a reminder that panel rehearing may be available when the standards for rehearing en banc are not met.

The subcommittee looked to local rules, internal operating procedures, and the like to see how the various circuits handle these matters.

(1) Although many circuits allow all panel members to request a poll, not all circuits allow visiting and senior judges to do so. The subcommittee abandoned this idea, leaving it to local rules.

(2) Petitions for panel rehearing are generally considered lesser-included requests when rehearing en banc is sought. Most circuits say that, and panel rehearing is available sua sponte, so this is essentially codifying existing practice. The subcommittee considered and rejected expressly stating that this is limited to relief that the panel has the authority to grant, reasoning that the members of the panel know that they cannot grant relief that only the full court can grant.

(3) Ensuring that a panel cannot block access to the full court was a major concern expressed at the last meeting.

(4) A provision reminding readers that panel rehearing might be available if the criteria for rehearing en banc is not met fits well with the explicit statement that a petition for rehearing en banc may be treated as a petition for panel rehearing.

At the last meeting, members of the Committee were concerned with ensuring that a panel cannot block access to the full court. Sometimes a panel will make changes to its decision and state that no further petitions for rehearing en banc will be permitted. The subcommittee thinks that most likely these statements are based on an accurate assessment, obtained from a formal or informal poll of their colleagues, that a petition for rehearing en banc would be futile. But the subcommittee proposed making clear that if the panel makes a substantive change, a party can petition for rehearing.

Judge Chagares stated that it was unfair to box in the parties. If they are still not satisfied, they should have a right to complain to the full court.

An academic member thanked the subcommittee for its great work, while noting continuing support for a more extensive reshuffling of Rules 35 and 40. But he had a visceral negative reaction to the language “changes the substance of its decision.” Why not allow a new petition whenever the panel amends its decision? Perhaps a rule similar to the omnibus motion provision in the civil rules [Civil Rule 12(g)] should be added so that parties cannot file a new petition on grounds omitted from the first petition. Perhaps the amendment would be better placed in Rule 40.

Ms. Dodszeit stated that sometimes there are orders amending opinions that make minor changes, such as fixing typos. Those can be distinguished from grants of panel rehearing with subsequent opinion. Judge Chagares noted that an order amending an opinion might change one case name, or add the name of an associate who worked on the case.

Mr. Byron observed that there isn’t a uniform practice across the circuits regarding whether the petition is “granted” when changes are made, or regarding the distinction between an order amending an opinion and issuing a new opinion.

An academic member contended that a minor change to an opinion should not bar access to the full court. The party may be complaining that the panel did not go far enough in making changes.

The Reporter agreed with Mr. Byron about the disuniformity in practice, and stated that he probably agreed with the academic member’s point that it would be wrong to limit the ability to file a new petition to situations where the panel made a substantive change. The subcommittee didn’t want to invite new petitions when the names of cited cases were fixed, but if the petition argued that the panel’s decision was inconsistent with a new Supreme Court decision, and the panel simply fixed the name of a cited case, that shouldn’t block access to the full court. An academic member built an example: what if the change the panel made was simply to add a citation to the new Supreme Court decision?

A judge member stated that there shouldn’t be repeated petitions for panel rehearing. Professor Coquillette stated that the rule should explicitly state that it is limited to a new petition for rehearing en banc. An academic member questioned why a subsequent petition for panel rehearing should be barred if the panel changes its decision. Professor Coquillette emphasized that the rule should be explicit: if a new petition for panel rehearing is permitted, the rule should say so. An academic member suggested placement in Rule 40(a).

Mr. Byron expressed concern about dragging out the issuance of the mandate, and creating uncertainty with the possibility of repeated petitions for panel rehearing. Judge Chagares worried about finality.

A judge member suggested that the term “substance” would invite second order disputes about whether a particular change was substantive. One way a court of appeals can deal with this is for the panel to decide, when it makes a change, whether the change is sufficiently minor (e.g., correcting typos) and, if so, state that no further petitions are permitted.

Professor Struve pointed out that, in regard to whether further chances to petition are permitted we are talking about establishing the default rule. Rule 2 allows suspension of the Rules in particular cases.

An academic member suggested that other language could be added to deal with the mandate issue.

The Reporter suggested that it might be best to limit the Rule to new petitions for rehearing en banc, leaving the rare case in which a second petition for panel rehearing might be appropriate to Rule 2, such as where a party files a motion for leave to file a second petition for panel rehearing.

The subcommittee will continue to work on the proposal, taking this discussion into account. Professor Sachs was added to the subcommittee.

B. Proposed Amendment to Rule 25 in Railroad Retirement Act Cases (18-AP-E, 18-CV-EE)

Judge Chagares presented the subcommittee's report regarding privacy in Railroad Retirement Act cases. (Agenda Book page 197). He explained that this project began with a request from the General Counsel of the Railroad Retirement Board to treat Railroad Retirement Act benefit cases the same way the Social Security Act cases are treated in terms of electronic access. Civil Rule 5.2 limits remote electronic access (but not at the courthouse access) in Social Security cases. Appellate Rule 25 follows Civil Rule 5.2 in such cases.

While Social Security appeals go to the district courts, Railroad Retirement Act appeals go directly to the courts of appeals. For that reason, this Committee is dealing with the issue. The Committee on Court Administration and Case Management has no objection to this Committee going forward.

Research identified two other statutory schemes that might warrant similar treatment, the Black Lung Act and the Longshore and Harbor Workers' Compensation Act. The subcommittee considered including those as well.

Mr. Byron explained that he has reached out to people in the Department of Labor about including the Longshore Act and Black Lung Act, and found hesitation to include proceedings under those statutes because of differences in the administrative processes under those Acts compared to the Railroad Retirement Act. For that reason, the subcommittee did not include them.

The Reporter added that he had spoken to an attorney at the Railroad Retirement Board and confirmed that most of the time that a Railroad Retirement Act case is filed in the district court it is because a pro se litigant filed in the wrong court. Occasionally, someone will claim entitlement to benefits under both the Railroad Retirement Act and

Social Security Act, and argue that the district court has jurisdiction to hear them together. The Railroad Retirement Board argues against that position. Sometimes, there may be a class action type claim filed in the district court; these would typically not involve review of an administrative record. Disability cases involve lots of medical records. But even retirement cases have sensitive information: the file identifier is a Social Security number, and it can be difficult to redact Social Security numbers from wage records and still have those records be meaningful. The Board also administers unemployment insurance, but does not seek to have such cases covered by the proposed rule.

The Reporter also noted that he consulted with Ed Cooper, the Reporter for the Civil Rules, who suggested that instead of referring to the “limitations on” electronic access, it might be better to refer to something like “provisions for.” The Reporter suggested “provisions governing,” and a judge member suggested simply “provisions on.”

At Judge Chagares’ request, Ms. Dodszeit had sought out lawyers who practice in this area. She found five, and none objected to this proposal.

Professor Coquillette asked if there would be any administrative difficulties implementing this proposal. Ms. Dodszeit said that there wouldn’t be; the technology is in place and all that would be necessary would be an additional CM/ECF coding so that it happened automatically. And there are so few such cases, it wouldn’t be a problem for clerks. Ms. Womeldorf stated that she would provide specific notice to the people who implement CM/ECF.

Mr. Byron asked if the hybrid Social Security / Railroad Retirement Act cases would be covered. The Reporter said that they would, explaining that his reason for mentioning those cases was not because they needed special coverage, but because the premise of our action here is that Railroad Retirement Act cases do not go to the districts courts, so he wanted to alert the Committee to rare instances where such a case might be filed in a district court.

Professor Struve asked why the proposal referred to Civil Rule 5.2(c)(1) and (c)(2) rather than simply 5.2(c)—which would include the opening phrase “Unless the court orders otherwise”—and suggested referring to “proceedings” for review rather than “a petition” for review. The Reporter responded that referring to 5.2(c) as a whole could be read to bring with it the limitation to Social Security and immigration cases, and that the word “petition” was used to be parallel to other Federal Rules of Appellate Procedure. Professor Struve added that Rule 2 makes unnecessary the provision specifically mentioning the power of the court to order otherwise.

The subcommittee will continue its work, taking into account this discussion.

VI. Discussion of Matters Before Joint Subcommittees

A. Study of Earlier Deadline for Electronic Filing (19-AP-E)

Judge Chagares described his proposal to study the possibility of rolling back electronic filing deadlines from midnight to some earlier time, such as the time of closing of the clerk’s office.

He recounted his memories of the old days of rushing to get a filing to the court before the clerk's office closed. Reasons to roll back the time include: the negative effect of midnight deadlines on the quality of life of lawyers and staff; increasing the usefulness to district judges of daily filing reports, fairness to pro se litigants who might not be able to electronically file, and avoidance of sandbagging by those who wait until midnight even when the filings are ready to go well before then. On the other hand, with lawyers working in multiple time zones, an earlier filing deadline might create problems, and some lawyers might prefer the flexibility (for example), of being able to finish documents and file them after getting their kids to bed.

A cross-committee subcommittee has been formed to study the issue. Diversity in multiple dimensions was sought on the committee, including geographic and style of practice. The FJC is looking at deadlines across the country, including Delaware, which has adopted an earlier deadline. Information being sought includes when clerks' offices actually close, what opportunity there is for after-hours filings, who actually files at late hours, and the extent to which pro se litigants may file electronically. The ABA and other membership organizations have been asked to comment.

A judge member stated that the Ohio Supreme Court is looking at this issue from the other end. Currently, electronically filing must be done by 5:00 p.m., a deadline originally imposed so that staff was available to deal with problems. Now, some lawyers are caught unaware, thinking that they have until midnight. Time zone differences complicate matters.

A lawyer member noted that his memory of the old days included going to the after hours drop box late at night, and that pro se litigants still do. Mr. Byron had a similar recollection of routinely going to a drop box at night. He added that we would have to be careful about interaction with the mailbox rule, recalling routinely taking taxis to a mailbox with a midnight pick up.

Another lawyer member similarly recalled using late night drop boxes, and stated that a 5:00 p.m. filing deadline would be much more stressful and make life much more difficult for associates. Clients drive things, and it is good to have time to deal with finishing a filing after the client goes home.

Ms. Womeldorf stated that she had received a comment by email (sent at 1:48 a.m.) strongly supporting the proposal, noting that it would improve quality of life, and pointing to litigants who play chicken with simultaneous filings by waiting until the last minute to file.

Ms. Dodszeit reported that the idea was floated at a clerk's meeting and was uniformly opposed.

A judge member suggested closing the filing window from 8:00 p.m. on a weekday until 6:00 a.m. the next day, so that lawyers who are on trial can come to court refreshed the next day.

Professor Coquilletre recalled that he thought his career was over years ago when he missed the 5:00 p.m. filing deadline, until he learned from the clerk that the time stamp wasn't changed until 9:00 a.m. the next day, so that he would be okay if he got it there at 8:50 a.m.

Judge Chagares noted that individual judges can set particular times in orders. A lawyer member said litigants comply with such orders issued in particular situations, but that a general rule that applied in ordinary situations and established an electronic filing deadline tied to the closing time of each clerk's office would be a problem because litigants would have to check the closing time of various clerk's offices.

Mr. Byron observed that when time is of the essence, as in stay motions, a schedule is worked out that gets materials to the judges in time.

An academic member noted that sometimes the day might be filled with meetings, so that the night is the only time to focus on getting the filing done. He also recalled making filings at the last FedEx drop off box, and urged care regarding the interaction with the mailbox rule in order to avoid opening up discrepancies that would create incentives as to whether to seek to file electronically or not.

A lawyer member pointed out that one can file electronically from home, so that it is not necessary to keep staff members working late.

Judge Chagares reiterated that all that is happening now is a study of the issue.

B. Finality in Consolidated Cases (no number assigned)

Judge Bybee presented a report regarding the work of the joint Civil / Appellate Committee considering the issue of finality in consolidated cases. When cases are consolidated, and all of the issues in one such case are resolved, can (and must) an immediate appeal be taken? This question produced a four-way split among the circuits prior to the Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the Supreme Court decided that the consolidated actions retain their separate identity so that an immediate appeal is available. The Supreme Court noted that if this is problematic, it could be changed by rule, and almost invited rulemaking.

In addition to the problem of possible lost appellate rights if litigants do not realize that they need to appeal, there is also a potential for inefficiency in the courts of appeals dealing with related issues in multiple appeals. Moreover, there is an issue involving litigants who relied on circuit precedent rejected by *Hall*.

Emery Lee of the FJC is undertaking a study of how large a problem there might be. So far, he has found that the number of consolidated cases were underestimated, and that

approximately 3% of civil cases are consolidated—not including MDL cases. That suggests there might be 8,500 to 25,000 non-MDL cases consolidated each year.

The joint subcommittee is also looking at academic literature in the area, and may propose a rule that would allow for delayed appealability, with a district judge empowered to dispatch cases for appeal.

The Reporter added that even if the statistics do not reveal a large problem, there may nevertheless be a large problem. He suspects that cases in which one consolidated case has reached a final judgment (and is therefore appealable under *Hall*) are frequently overlooked by both litigants and courts, that it is problematic to have a jurisdictional rule (to be enforced sua sponte) that is difficult to detect, and that the problem is compounded if additional claims or parties are added after consolidation. Moreover, there may well be cases that are consolidated in the district of filing prior to being transferred to an MDL district.

Judge Bybee added that he believes that most of the members of the joint subcommittee are convinced that some rule fix is needed.

VII. Discussion of Recent Suggestions

A. Specifying “Good Cause” For an Extension of Time to File a Brief (19-AP-A)

The Reporter explained that a lawyer who was quite sure that the government did not have good cause for an extension it received had submitted a suggestion to specify criteria for good cause. The Reporter noted that “good cause” is a common term in the Federal Rules, and seemed to be designed for case-specific determinations.

A judge member stated that if a request for an extension fails to state a reason, it should be denied, but if it states a legally sufficient reason, one shouldn’t try to get behind the lawyer’s statement to test its veracity.

Judge Campbell added that there are some instances where case law has developed careful definitions of “good cause” under particular rules, notably Civil Rule 16 and its valuable Committee Note. He would hate to see some generic definition of “good cause” that would upset this case law.

The Committee, without dissent, agreed to remove this item from its agenda.

B. Decision on Grounds Not Argued (19-AP-B)

Judge Chagares stated that the American Academy of Appellate Lawyers (AAAL) had submitted a suggestion that if a court of appeals is contemplating a decision based on grounds not argued it allow briefing on that ground. They noted that at their Fall 2017

meeting most of their members reported having received decisions on unargued grounds. Judge Chagares was at this meeting, and saw the polling. He also recalled it happening to him when in practice, and noted it drives people crazy. The AAAL has been working on this for a while, and put effort into it. The concern is real, although it is unclear whether it is appropriate for a rule, or perhaps just a letter to the circuits.

A subcommittee was appointed, consisting of Mr. Byron, Judge Murphy, Justice French, and Judge Donald.

An academic member suggested that the matter might be dealt with in the rehearing rules, as a potential ground for rehearing.

A judge member wondered whether it was appropriate for rulemaking, and whether there was any doubt that judges shouldn't do it? A liaison judge noted that there are times when such issues arise, and the parties are asked to brief the issue. Judge Chagares noted that he had been criticized merely for citing an out-of-circuit decision that the parties had not cited.

A judge member stated that if the panel confers after argument and the parties just missed it, the court still has to get the law right. Judge Campbell added that district judges have to decide matters that have not been briefed well and never will be briefed well. He'd hate to see a rule that would require matters to be revisited. An academic member suggested that supplemental briefing might be encouraged, without creating a new ground for error.

C. IFP Standards (19-AP-C)

The Reporter stated that Sai had submitted a suggestion for rulemaking to deal with various problems in the granting of in forma pauperis status. A recent Yale Law Journal article shows that there are wide disparities across the various districts. One major question is whether the matter is appropriate for rulemaking under the Rules Enabling Act. Administrative agencies commonly promulgate regulations that interpret and implement statutory provisions, but that isn't the way the Rules Enabling Act is generally thought to work.

The Supreme Court decision in *Adkins v. E.I. Dupont de Nemours & Co.*, 335 U.S. 331 (1948), interpreted the IFP statute, 28 U.S.C. § 1915, and explained that a person who would wind up on public assistance if denied IFP status is sufficiently poor to be granted IFP status. Based on that decision, it might appear reasonable to provide that a person who is on public assistance is thereby entitled to IFP status. But the statute as amended requires a "prisoner" to submit an affidavit listing all assets, and the word "prisoner" is broadly understood to be a scrivener's error that should be read as "person."

Judge Campbell stated that this proposal was also considered by other Committees, particularly Civil. It appeared unanimous that IFP status is appropriately granted based on case-specific decisions, considering that the cost of living varies drastically from place to place. In addition, prisons handle prisoner accounts in various ways. Civil decided not to pursue this matter, thinking it best addressed by the Committee on Court Administration and Case Management. Civil

is not asking CACM to do anything, but is sending its minutes and the Yale Law Journal article to CACM for its consideration.

Ms. Womeldorf added that the discussion at the Criminal Rules Committee was similar.

Professor Coquillette stated that there is a real problem, particularly with the growing number of pro se litigants, but that this is not for the Rules Committees. Various members noted that 40 percent or more of their courts' caseload now involves pro se litigants.

The Reporter added that there may be an aspect unique to the Appellate Rules here. The official forms have been largely eliminated in the Civil Rules, with the exception of the forms for waiver of service in Civil Rule 4. The IFP forms available for use in district court proceedings are AO forms.

By contrast, the Appellate Rules still have official forms as part of the Appellate Rules. When someone seeks leave to pursue an appeal IFP, Appellate Rule 24 requires the use of Appellate Form 4. Moreover, Supreme Court Rule 39 requires that a party seeking IFP status in the Supreme Court must use Appellate Form 4. If the AO changes the forms used in the district court, this Committee might want to reconsider whether to continue to have its own form. It is not clear why it is necessary to have a different form for appeals, especially considering that IFP status on appeal is first sought in the district court.

Ms. Dodszeit pointed out that there are also original proceedings in the courts of appeals for which IFP status can be sought.

An academic member stated that this is incredibly important, and suggested a joint committee to consult with CACM. He recalled how little guidance there was regarding IFP status, including whether statements should be accepted as true. Uniformity is needed, perhaps a default rule, or a few easy to apply rules such as those suggested in the Yale article. He suggested that there was room for rulemaking, given that the statute says that a court "may" grant IFP status. He urged that the matter remain on the agenda in some form.

A lawyer member was struck by how complex Appellate Form 4 is compared to the form used for appointing counsel under the Criminal Justice Act. A lot of judicial resources seem to go into fighting over rather small amounts of money.

Judge Chagares noted that any decision regarding the creation of a joint committee would be up to the Standing Committee. The matter will stay on the Committee's agenda, the Reporters will remain in touch with each other, and we will send our comments to CACM.

D. Court Calculated Deadlines (19-AP-D)

Sai also submitted a suggestion that courts calculate deadlines and provide the information to the parties so the parties can rely on them.

Ms. Dodszeit stated that this would be extremely labor intensive and difficult, and incomprehensible in cases with more than two parties. Some software applications in the future will have some capacity to generate case-by-case deadlines, but at least until then, there simply isn't the budget or personnel.

Judge Campbell stated that the Bankruptcy, Civil, and Criminal Committees all had the same reaction. Sai has pointed to a real problem for pro se litigants, but there isn't an easy fix. It would be an enormous burden on the clerks' offices or the judges' staffs. Plus, there is a risk of being misleading because there are some deadlines that are fixed as a matter of jurisdiction even if a court provides a litigant with incorrect information.

There was some discussion of whether deadlines that CM/ECF generates automatically could be made available, but even this is impractical because there are case to case variables and these deadlines are sometimes wrong.

An academic member added that what Sai has proposed would be immensely valuable, but would require funding commensurate with that value.

The Committee agreed, without dissent, to remove this matter from its agenda.

VIII. New Business and Updates on Other Matters

Judge Campbell noted major projects in other Advisory Committees:

The Bankruptcy Committee is continuing to work on restyling.

The Criminal Rules Committee is considering requiring greater disclosure of expert reports, similar to what is required in civil cases.

The Evidence Rules Committee is working on forensic expert evidence and Evidence Rule 702, in an effort to make *Daubert* more effective and better describe the court's gatekeeping function. One concern is not having experts overstate the level of confidence. The Committee is also looking at extending the rule of completeness to oral statements, and the interaction of this rule with the hearsay rule. It is also looking at the exclusion of witnesses, and whether that rule should apply outside the courtroom.

The Civil Rules Committee is primarily focused on two issues. The first is whether to create MDL-specific rules. MDL cases comprise some 40% of the entire civil docket. There may be an impact on the Appellate Rules Committee, because one important issue is whether to make interlocutory appeals more widely available. On the one hand, there are some rulings that, if decided one way, would end the case, but if decided the other way, would impose tremendous settlement pressure. On the other hand, if interlocutory appeals were allowed more broadly, and

not decided promptly, and the district court proceedings paused pending appeal, MDLs would become unmanageable. The second is whether to create special rules governing appeals in Social Security cases. Over 17,000 such appeals are filed every year. The matter should not affect the Appellate Rules Committee.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. None were immediately forthcoming, although one judge member stated that the new civil rules in Ohio were modeled on the federal rules, particularly the proportionality requirement for discovery.

IX. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team, including Shelly Cox, for organizing the dinner and the meeting, and the members of the Committee for their participation. He announced that the next meeting would be held on April 3, 2020, in Palm Beach, Florida.

The Committee adjourned at approximately 11:45 a.m.

TAB 4

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TAB 4A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

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

DATE: December 23, 2019

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 26, 2019. The draft minutes of that meeting are attached at Tab B.

At the meeting, the Advisory Committee voted to seek publication of an amendment to Rule 8023 (Voluntary Dismissal) to conform to proposed changes to Appellate Rule 42(b). That amendment will be presented at the Standing Committee's June 2020 meeting.

The major topics of discussion at the September meeting concerned necessary amendments to the Bankruptcy Rules and Official Forms in response to amendments to the Bankruptcy Code enacted by Congress in August 2019. This legislation included the "Honoring American Veterans in Extreme Need Act of 2019" ("HAVEN Act") and the Small Business Reorganization Act of

2019 (“SBRA”). Part II of the report discusses amendments to Official Forms 122A-1, 122B, and 122C-1 that the Advisory Committee approved to implement the HAVEN Act. Because that act took effect immediately upon enactment, the Advisory Committee exercised its delegated authority to make technical and conforming changes to Official Forms, subject to subsequent approval by the Standing Committee—which it now seeks—and notice to the Judicial Conference.

Part III of this report presents two information items. The first concerns the Advisory Committee’s preparation of interim Bankruptcy Rules, to be adopted as local rules by the bankruptcy courts, to implement the procedural and substantive changes to the Bankruptcy Code made by the SBRA, and Official Form amendments promulgated by the Advisory Committee for the same purpose. The Standing Committee has approved these interim rules and forms by an email vote, and the Judicial Conference’s Executive Committee has approved the distribution of the interim rules to the courts. This discussion is included as an information item in this report in order to provide a public record of the actions that have been taken on an expedited basis to implement the SBRA, which goes into effect on February 19, 2020.

The second information item is a status report on the ongoing project of restyling the Bankruptcy Rules.

II. Action Item

Official Form Amendments Made to Implement the HAVEN Act

The Advisory Committee recommends that the Standing Committee retroactively approve and provide notice to the Judicial Conference of the amendments to Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period), which are discussed below. The forms as amended are in Bankruptcy Appendix A.

The HAVEN Act was signed by the President on August 23 and was effective on that date. This new law amends the definition of “current monthly income” in Title 11 § 101(10A) of the U.S. Code to exclude:

any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

This exclusion is added to the current exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of international terrorism or domestic terrorism. It also limits the current inclusion of pensions and retirement income.

The inclusion of pension income and exclusions for social security benefits and other payments are recognized in lines 9 and 10 of Form 122A-1, Form 122B, and Form 122C-1 in the statement of current monthly income under chapter 7, 11, and 13, respectively. The Advisory Committee has approved amendments to those lines of the forms as follows:

1 **9. Pension or retirement income.** Do not include any amount received that was a
2 benefit under the Social Security Act. Also, except as stated in the next sentence,
3 do not include any compensation, pension, pay, annuity, or allowance paid by the
4 United States Government in connection with a disability, combat-related injury or
5 disability, or death of a member of the uniformed services. If you received any
6 retired pay paid under chapter 61 of title 10, then include that pay only to the extent
7 that it does not exceed the amount of retired pay to which you would otherwise be
8 entitled if retired under any provision of title 10 other than chapter 61 of that title.

9 **10. Income from all other sources not listed above.** Specify the source and
10 amount. Do not include any benefits received under the Social Security Act; ~~or~~
11 payments received as a victim of a war crime, a crime against humanity, or
12 international or domestic terrorism; or compensation, pension, pay, annuity, or
13 allowance paid by the United States Government in connection with a disability,
14 combat-related injury or disability, or death of a member of the uniformed services.
15 If necessary, list other sources on a separate page and put the total below.

Committee Note

Official Forms 122A-1, 122B, and 122C-1 are amended in response to the enactment of the Honoring American Veterans in Extreme Need Act of 2019 (the “HAVEN Act”), Pub. L. No. 116-52, 133 Stat. 1076. That law modifies the definition of “current monthly income” in § 101(10A) to exclude certain amounts payable “in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services.” The exclusion for servicemember retired pay is limited, however, and the debtor should exclude from current monthly income only that amount of retired pay that exceeds the amount that the recipient would otherwise be entitled to receive had the recipient retired for a reason other than disability. Each form is modified to expressly exclude these amounts from lines 9 and 10.

Additional language has also been added to the Instructions – Bankruptcy Forms for Individuals with respect to each of these forms. As an example, the instructions for Official Forms 122C-1 have been amended as follows:

1 **Information for completing the forms**

2 To fill out several lines of the forms, you must look up information provided on
3 websites or from other sources. For information:

4 (1) to complete line 16c of Form 122C-1 and lines 6-15, 30, and 36 of Form
5 122C-2; or

6 (2) if you are a servicemember, veteran, or the family member of a veteran,
7 and are looking for a list of the types of benefits that the United States Department
8 of Justice confirms need not be reported on lines 9 or 10 of Form 122C-1 on account
9 of the veteran’s death or disability under the “Helping American Veterans in
10 Extreme Need Act of 2019” (HAVEN Act);

11 go to:

12 <https://www.justice.gov/ust/means-testing>.

III. Information Items

A. Interim Rules and Official Forms to Implement the SBRA

On August 1 Congress passed the SBRA, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors. The President signed the legislation on August 23. It will go into effect 180 days after that date, which will be February 19, 2020.

The enactment of the SBRA requires amendments to be made to a number of bankruptcy rules and forms, in some cases excepting subchapter V cases from provisions that apply generally to chapter 11 and in other cases making provisions expressly applicable to subchapter V cases. Because the SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee voted to have amended rules issued initially as interim rules for adoption by each judicial district. In addition, the Advisory Committee approved amended and new forms pursuant to its delegated authority to make conforming and technical amendments to Official Forms.

By email vote in October, the Standing Committee approved for publication proposed interim rules and forms to implement the SBRA. The package for publication consisted of eight rules and nine Official Forms, and it was published from October 16 to November 13. Twelve comments were submitted in response to the publication, five of which did not address the rules and forms in question. The other seven provided helpful suggestions regarding the published rules and forms, as well as suggestions for amendments to additional rules. With respect to the latter category, it was pointed out that several existing rules use the disclosure-statement hearing date as the trigger for taking certain actions or the setting of dates by the court. Because there will generally be no disclosure statement in subchapter V cases, a different triggering event is needed for those cases. These comments persuaded the Advisory Committee to recommend changes to four additional rules that were not published, and to recommend a new rule.

The Advisory Committee reviewed the rules and forms with revisions proposed in response to the comments. By email vote that concluded on December 4, the Advisory Committee voted

unanimously to seek the issuance of thirteen rules as interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, subject to later approval by the Standing Committee and notice to the Judicial Conference.

By email vote concluding on December 13, the Standing Committee unanimously approved the following recommendations of the Advisory Committee:

The Advisory Committee recommends that the following rule and form amendments and new rules and forms be approved as set out in Appendices A and B to this [December 5, 2019] report; that the Standing Committee request approval from the Executive Committee of the Judicial Conference to distribute the interim rules to the district and bankruptcy courts for adoption; and that the Standing Committee inform the Judicial Conference at its next meeting of the promulgation of the Official Forms:

- Rule 1007,
- Rule 1020,
- Rule 2009,
- Rule 2012,
- Rule 2015,
- Rule 3010,
- Rule 3011,
- Rule 3014,
- Rule 3016,
- Rule 3017.1,
- new Rule 3017.2,
- Rule 3018,
- Rule 3019,
- Official Form 101,
- Official Form 201,
- Official Form 309E,
- Official Form 309F,
- new Official Form 309E2,
- new Official Form 309F2,
- Official Form 314,
- Official Form 315, and
- Official Form 425A.

Following the Standing Committee's approval, the chairs of the Standing and Advisory Committees requested the Executive Committee of the Judicial Conference to "act on an expedited basis on behalf of the Judicial Conference to authorize distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they can be adopted locally to facilitate uniformity in practice until the Bankruptcy

Rules can be revised in accordance with the Rules Enabling Act.”¹ On December 16, we were informed that the Executive Committee had unanimously approved the requests of the Committees as submitted.

A memorandum from the chairs of the Standing Committee and the Advisory Committee was sent to all chief judges of the district and bankruptcy courts on December 19. The memorandum included a copy of the interim rules and requested that they be adopted locally to implement the SBRA until rulemaking under the Rules Enabling Act can take place. A copy of the December 19 memorandum, the Advisory Committee’s December 5 Report to the Standing Committee, and the interim rules and amended forms are attached as Appendix B. The interim rules and amended forms have also been posted on the federal courts’ website.

At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules, and it anticipates seeking the Standing Committee’s approval at the June meeting for publication of the rules and forms in August 2020.²

B. Bankruptcy Rules Restyling

The style consultants provided an initial restyled draft of Part I of the Bankruptcy Rules in May 2019. The reporters provided comments on that draft, and the style consultants produced a new draft in early July. The Restyling Subcommittee of the Advisory Committee held three telephonic meetings to review that draft and has produced a revised draft, which it has provided to the style consultants and intends to present to the Advisory Committee at its spring meeting.

The style consultants sent an initial draft of the restyled Part II rules in September. Again, the reporters provided comments on this draft, and the style consultants provided a new draft in mid-November, together with a memorandum explaining the position of the style consultants on some of the comments made by the reporters on the draft. The Restyling Subcommittee discussed the concerns of the style consultants at its last telephonic meeting and began commenting on the Part II rules. More telephonic meetings are scheduled for early 2020, with a view to producing a draft of the Part II rules that can be presented to the Advisory Committee at its spring meeting.

The process has been productive on all sides, and the Restyling Subcommittee believes that the Advisory Committee – and bankruptcy professionals – will be very pleased with the restyled rules.

¹ See Memorandum of December 13, 2019, from the Chairs of the Standing Committee and the Advisory Committee to the Executive Committee of the Judicial Conference.

² Although the Official Forms have been officially promulgated pursuant to the Advisory Committee’s delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish them again under the regular procedure to ensure full opportunity for public comment.

APPENDIX A

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

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

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

Case number _____
 (If known)

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

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

Check if this is an amended filing

Official Form 122A-1

Chapter 7 Statement of Your Current Monthly Income

10/19

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

Part 1: Calculate Your Current Monthly Income

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

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

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

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

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

8. Unemployment compensation

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

For you \$ For your spouse \$

\$ \$

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services.

\$ \$

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services.

\$ \$

Total amounts from separate pages, if any.

\$ \$

+ \$ + \$

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

\$ + \$ = \$

Total current monthly income

Part 2: Determine Whether the Means Test Applies to You

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

12a. Copy your total current monthly income from line 11. Copy line 11 here Multiply by 12 (the number of months in a year).

\$ x 12 \$

12b. The result is your annual income for this part of the form.

12b.

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

Fill in the state in which you live.

Fill in the number of people in your household.

Fill in the median family income for your state and size of household.

\$

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. How do the lines compare?

14a. Line 12b is less than or equal to line 13. On the top of page 1, check box 1, There is no presumption of abuse. Go to Part 3.

14b. Line 12b is more than line 13. On the top of page 1, check box 2, The presumption of abuse is determined by Form 122A-2. Go to Part 3 and fill out Form 122A-2.

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

Part 3: Sign Below

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

x _____
Signature of Debtor 1

x _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A-2.

If you checked line 14b, fill out Form 122A-2 and file it with this form.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

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

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

Case number _____
 (if known)

Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

10/19

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

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

- Not married.** Fill out Column A, lines 2-11.
- Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
- Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

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

	Column A Debtor 1	Column B Debtor 2		
2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____		
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____		
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____		
5. Net income from operating a business, profession, or farm	<table border="0" style="margin: auto;"> <tr> <td style="padding: 0 10px;">Debtor 1</td> <td style="padding: 0 10px;">Debtor 2</td> </tr> </table>		Debtor 1	Debtor 2
Debtor 1	Debtor 2			
Gross receipts (before all deductions)	\$ _____	\$ _____		
Ordinary and necessary operating expenses	- \$ _____	- \$ _____		
Net monthly income from a business, profession, or farm	\$ _____	\$ _____		
	Copy here →	\$ _____		
6. Net income from rental and other real property	<table border="0" style="margin: auto;"> <tr> <td style="padding: 0 10px;">Debtor 1</td> <td style="padding: 0 10px;">Debtor 2</td> </tr> </table>		Debtor 1	Debtor 2
Debtor 1	Debtor 2			
Gross receipts (before all deductions)	\$ _____	\$ _____		
Ordinary and necessary operating expenses	- \$ _____	- \$ _____		
Net monthly income from rental or other real property	\$ _____	\$ _____		
	Copy here →	\$ _____		

Column A Debtor 1

Column B Debtor 2

7. Interest, dividends, and royalties

\$ _____ \$ _____

8. Unemployment compensation

\$ _____ \$ _____

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

For you \$ _____

For your spouse..... \$ _____

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

\$ _____ \$ _____

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

Total amounts from separate pages, if any. + \$ _____ + \$ _____

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

Boxed calculation: \$ _____ + \$ _____ = \$ _____

Total current monthly income

Part 2: Sign Below

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

X Signature of Debtor 1

X Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).

2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).

3. The commitment period is 3 years.

4. The commitment period is 5 years.

Check if this is an amended filing

Official Form 122C-1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

10/19

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
- Not married.** Fill out Column A, lines 2-11.
- Married.** Fill out both Columns A and B, lines 2-11.

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

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

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

7. Interest, dividends, and royalties

\$ _____	\$ _____
----------	----------

8. Unemployment compensation

\$ _____	\$ _____
----------	----------

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

For you \$ _____

For your spouse \$ _____

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

\$ _____	\$ _____
----------	----------

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.

_____ \$ _____

_____ \$ _____

Total amounts from separate pages, if any.

+ \$ _____	+ \$ _____
------------	------------

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

\$ _____	+	\$ _____	=	\$ _____
----------	---	----------	---	----------

Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. Copy your total average monthly income from line 11. \$ _____

13. Calculate the marital adjustment. Check one:

- You are not married. Fill in 0 below.
- You are married and your spouse is filing with you. Fill in 0 below.
- You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

_____ \$ _____

_____ \$ _____

_____ + \$ _____

Total \$ _____ Copy here → _____

14. Your current monthly income. Subtract the total in line 13 from line 12. \$ _____

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

15a. Copy line 14 here → \$ _____
Multiply line 15a by 12 (the number of months in a year). **x 12**

15b. The result is your current monthly income for the year for this part of the form. \$ _____

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

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. \$ _____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. How do the lines compare?

17a. Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Your Disposable Income* (Official Form 122C-2).

17b. Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C-2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. Copy your total average monthly income from line 11. \$ _____

19. Deduct the marital adjustment if it applies. If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13.

19a. If the marital adjustment does not apply, fill in 0 on line 19a. - \$ _____

19b. Subtract line 19a from line 18. \$ _____

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

20a. Copy line 19b..... \$ _____
Multiply by 12 (the number of months in a year). **x 12**

20b. The result is your current monthly income for the year for this part of the form. \$ _____

20c. Copy the median family income for your state and size of household from line 16c..... \$ _____

21. How do the lines compare?

Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Part 4: Sign Below

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

X _____
Signature of Debtor 1

X _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C-2.

If you checked 17b, fill out Form 122C-2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

COMMITTEE NOTE

Official Forms 122A-1, 122B, and 122C-1 are amended in response to the enactment of the Honoring American Veterans in Extreme Need Act of 2019 (the “HAVEN Act”), Pub. L. No. 116-52, 133 Stat. 1076. That law modifies the definition of “current monthly income” in § 101(10A) to exclude certain amounts payable “in connection with a disability, combat-related injury or disability or death of a member of the uniformed services.” The exclusion for servicemember retired pay is limited, however, and the debtor should exclude from current monthly income only that amount of retired pay that exceeds the amount that the recipient would otherwise be entitled to receive had the recipient retired for a reason other than disability. Each form is modified to expressly exclude these amounts from lines 9 and 10.

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APPENDIX B

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**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544**

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

December 19, 2019

MEMORANDUM

TO: Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts

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

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

RE: ADOPTION OF INTERIM BANKRUPTCY RULES TO IMPLEMENT THE SMALL BUSINESS
REORGANIZATION ACT OF 2019 (**IMPORTANT INFORMATION**)

On August 23, 2019, the Small Business Reorganization Act of 2019 (the SBRA) was enacted into law. The SBRA creates a new subchapter V of chapter 11 for the reorganization of small business debtors. It does not repeal existing chapter 11 provisions regarding small business debtors, but instead creates an alternative procedure that small business debtors may elect to use. The effective date of the SBRA is February 19, 2020, long before the three-year approval process needed to amend the Bankruptcy Rules under the Rules Enabling Act, 28 U.S.C. §§ 2071-77.

On October 16, 2019, we notified you that the Advisory Committee on Bankruptcy Rules (the Advisory Committee) drafted interim bankruptcy rules (the Interim Rules) to be adopted by courts as local rules to implement the SBRA until the Bankruptcy Rules can be amended. We published the Interim Rules, as well as SBRA-related amendments to the Official Forms, and invited public comment. The comments helped the Advisory Committee revise the proposals and persuaded it to recommend changes to four additional rules that were not published, and to recommend a new rule.

The Advisory Committee and Committee on Rules of Practice and Procedure (the Standing Committee) approved the following Interim Rules and recommended that they be distributed to the courts so they can be adopted locally to facilitate uniformity in the implementation of the changes mandated the SBRA.

Interim Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019.

The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules have been drafted so they are integrated into, and are consistent with, the Federal Rules of Bankruptcy Procedure. Changes to the existing rules are shown by underlining and strikeouts. The Committee Notes that follow each rule explain the purpose of that rule. The Interim Rules and the Federal Rules of Bankruptcy Procedure apply as one set of rules for cases and proceedings governed by the SBRA. Attached is a memorandum prepared by the Advisory Committee summarizing the Interim Rules. Copies of the Interim Rules showing changes, and a clean version of the Interim Rules can also be found on the [pending rules page](#) of the courts' public website (uscourts.gov).¹ A proposed court order adopting the Interim Rules is also attached.

In addition to the Interim Rules, the Advisory Committee and Standing Committee also approved SBRA-related amendments to the following forms:

Official Forms 101, 201, 309E1, 309E2 (new), 309F1, 309F2 (new), 314, 315, and 425A.

The Committee Notes to the Official Forms explain the significant changes to these forms. The Official Forms are posted on the [pending forms page](#) of the public website and will be relocated to the [table](#) of Official Bankruptcy Forms when they become effective on February 19, 2020.

¹ On the effective date of the SBRA, February 19, 2020, the Interim Rules will be relocated to the [current rules](#) page of the courts' public website and will remain on that page until superseded. The Interim Rules may also be located on the website by typing that term into the search box at the top right of any page on the site.

The Advisory Committee intends to continue to carefully study the SBRA and will move forward with promulgation of permanent SBRA rules under the Rules Enabling Act. The first step of that process will be the republication of the Interim Rules as well as the SBRA-related Official Form amendments in August 2020, with any further amendments that appear necessary as a result of using the Interim Rules after the SBRA goes into effect.² Those rules, when finally approved, will replace the Interim Rules. In the meantime, local adoption of the Interim Rules and nationwide promulgation of the form changes needed to conform to the SBRA will help to maintain national uniformity in the administration of the Bankruptcy Code. Thank you for your cooperation.

Attachments

cc: District Court Executives
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators
Circuit Librarians

² Although SBRA-related changes to the Official Forms will be officially promulgated on February 19, 2020, pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish the changes again under the Rules Enabling Act procedure to ensure that the public has a thorough opportunity to review the changes.

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

DAVID G. CAMPBELL
CHAIR

CHAIR OF ADVISORY COMMITTEE

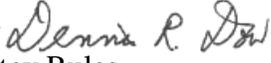
REBECCA A. WOMELDORF
SECRETARY

DENNIS DOW
BANKRUPTCY RULES

December 5, 2019

MEMORANDUM

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

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

RE: REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

I. Introduction

On August 1, Congress passed the Small Business Reorganization Act of 2019 (“SBRA”), which creates a new subchapter V of chapter 11 for the reorganization of small business debtors. The President signed the legislation on August 23. It will go into effect 180 days after that date, which will be February 19, 2020.

The enactment of SBRA requires amendments to be made to a number of bankruptcy rules and forms, in some cases excepting subchapter V cases from provisions that apply generally to chapter 11 and in other cases making provisions expressly applicable to subchapter V cases. Because SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee seeks to have amended rules issued initially as interim rules for adoption by each judicial district. In addition, the Advisory Committee has approved amended and new forms pursuant to its delegated authority to make conforming and technical amendments to Official Forms.

By email vote in October, the Standing Committee approved for publication proposed interim rules and forms to implement SBRA. The package for publication consisted of eight rules and nine Official Forms, and it was published from October 16 to November 13. Twelve comments were submitted in response to the publication, five of which did not address the rules and forms in question. The other seven, which are discussed in this report, provided helpful

suggestions regarding the published rules and forms, as well as suggestions for amendments to additional rules. With respect to the latter category, it was pointed out that several existing rules use the disclosure-statement hearing date as the trigger for taking certain actions or the setting of dates by the court. Because there will generally be no disclosure statement in subchapter V cases, a different triggering event is needed for those cases.

Following the publication period, the Advisory Committee reviewed the rules and forms with revisions proposed in response to the comments. By email vote concluded on December 4, the Advisory Committee voted unanimously to seek the issuance of thirteen rules as interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, subject to later approval by the Standing Committee and notice to the Judicial Conference.

At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules, and it anticipates seeking the Standing Committee's approval at the June meeting for publication of the rules and forms in August 2020.¹

Action Item. The Advisory Committee recommends that the following rule and form amendments and new rules and forms be approved as set out in Appendices A and B to this report; that the Standing Committee request approval from the Executive Committee of the Judicial Conference to distribute the interim rules to the district and bankruptcy courts for adoption; and that the Standing Committee inform the Judicial Conference at its next meeting of the promulgation of the Official Forms:

- Rule 1007,
- Rule 1020,
- Rule 2009,
- Rule 2012,
- Rule 2015,
- Rule 3010,
- Rule 3011,
- Rule 3014,
- Rule 3016,
- Rule 3017.1,
- new Rule 3017.2,
- Rule 3018,
- Rule 3019,
- Official Form 101,
- Official Form 201,
- Official Form 309E,
- Official Form 309F,
- new Official Form 309E2,

¹ Although the Official Forms will have been officially promulgated, it intends to seek publication of them under the regular procedure in order to ensure that the public has a thorough opportunity to review them.

- new Official Form 309F2
- Official Form 314,
- Official Form 315, and
- Official Form 425A.

II. Comments on the Published Rules and Forms

No comments were received on proposed Interim Rules 1007, 2009, 2015, 3010, 3011, and 3016 or on proposed amendments to Official Forms 309E, 309F, and 315. The Advisory Committee voted to approve them as published

Comments on the remaining published rules and forms are discussed below.

A. Rule 1020 (Small Business Chapter 11 Reorganization Case).

Judge Benjamin Kahn (Bankr. M.D.N.C.) and the National Conference of Bankruptcy Judges (“NCBJ”) addressed an issue that the Advisory Committee had considered in September—whether a delayed decision to elect to proceed under subchapter V should be allowed and, if so, under what circumstances. The Advisory Committee decided then to make no change to the rule to address the issue, with some members expressing the view that delayed elections could be handled through motion practice. The commenters had two different suggestions for how the issue might be addressed: by including a time limit in the rule for a delayed decision to proceed under subchapter V (subject to the court’s authority to allow an election after that date under specified circumstances) or to add language to the Committee Note indicating that the court has discretion to allow delayed elections on a case-by-case basis.

The Advisory Committee preferred the NCBJ’s suggestion of a Committee Note addition, although it concluded that it would be better for the addition to adopt a neutral stance rather than take a position on an issue left open by SBRA. Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to make a delayed election would be the time restrictions imposed by subchapter V to which Judge Kahn referred, so his concerns would largely be addressed.

The following sentence was added to the end of the first paragraph of the Committee Note: “The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”

B. Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting).

The NCBJ made a stylistic suggestion, which was accepted by the Advisory Committee.

C. Official Forms 101 (Voluntary Petition for Individuals Filing for Bankruptcy) and **201** (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

The International Council of Shopping Centers commented that Line 14 of Official Form 101 and Line 12 of Official Form 201 should be modified to include instructions, in a case where the debtor has elected to proceed under Subchapter V, to make rental payments directly to a lessor of non-residential real property after the filing of a petition. The Advisory Committee made no change in response to this comment for two reasons. First, the issue of how payments to landlords will be made is not one that is appropriate for the petition to address. And second, because a requirement that rental payments be made directly by the debtor in all subchapter V cases would be controversial, especially in certain districts that follow a different practice in chapter 13 cases, it should not be added to the petition without prior publication of the proposed requirement.

D. Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case—For Individuals or Joint Debtors under Subchapter V).

Walter Oney, a software developer, made a number of stylistic and technical suggestions, most of which were accepted.

NCBJ raised concern about the sentence in Section 11 of the form that read, “However, in some cases the debts will not be discharged until all or a substantial portion of payments under the plan are made. See 11 U.S.C. § 1192.” It commented that the sentence should be deleted because it is both unnecessary and legally inaccurate. Although the Advisory Committee did not fully agree that the sentence was inaccurate, it agreed with NCBJ that there is no need to address the timing of the entry of the discharge itself in the notice. The Advisory Committee therefore voted to delete the sentence.

E. Official Form 309F2 (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships under Subchapter V).

Mr. Oney made stylistic and technical suggestions about this form that were similar to his suggestions about Official Form 309E2, and most were accepted.

F. Official Form 314 (Class [] Ballot for Accepting or Rejecting Plan of Reorganization).

NCBJ suggested some technical corrections, which were accepted.

G. Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

The greatest number of comments received following publication addressed this form. In addition to some stylistic suggestions that were accepted, three commenters—Judge Robert Drain (Bankr. S.D.N.Y.), David Mawhinney, and NCBJ—correctly pointed out that the proposed amendments to the form failed to take account of the “special rule” in Code § 1191(e) for the treatment of administrative expense claims in subchapter V plans that are confirmed non-

consensually. The Advisory Committee voted to revise Article 3.02 of the model plan to include an alternative provision appropriate for those plans.

Judge Drain also commented that the model plan should recognize the possibility of more than one class of (a) secured claims and (b) unsecured claims by enabling the addition of such classes to the form. Article 2—Classification of Claims and Interest—already has instructions to add more classes as needed, and Article 4 does so for priority and secured claims. Because this comment did not relate to the proposed amendments specific to SBRA, the Advisory Committee made no change in response to it.

The International Council of Shopping Centers made a comment that paralleled the group's comments about the petition forms. It sought the addition of an instruction to a subchapter V debtor to make rental payment directly to a lessor. The Advisory Committee voted to make no change. First, because the use of Official Form 425A is not mandatory, the proposed instruction would not necessarily achieve the commenter's desired goal. And second, § 1194(b) of the Code, added by SBRA, provides that "the trustee shall make payments to creditors under the plan." This provision is limited to plans confirmed non-consensually and is subject to alteration by the plan or the order of confirmation. Nevertheless, it is inconsistent with a rule or form instructing all subchapter V debtors to make rental payments directly. At least in cases in which the plan is confirmed under § 1191(b), Congress seems to have preferred having the trustee make payments unless a different determination is made on an individual case basis.

Judge Kahn suggested that Official Form 425A should contain a box to check if a debtor designates the plan as intended to contain adequate information under Rule 3016(b). This comment is not specific to subchapter V plans. Indeed, because a disclosure statement is generally not required under subchapter V, in most such cases there will be no need to designate that the plan provides adequate information. The Advisory Committee voted to take no action in response to this comment.

NCBJ commented that the existing "Article I: Summary" should be left on the first page of the form because it is the most important information for creditors. The Advisory Committee voted to make no change. The proposed Background section for subchapter V plans is required by § 1190 of the Code. The discussion of the debtor's business and history, the liquidation analysis, and the discussion of the debtor's ability to make plan payments and operate are required to be included in the plan because there will generally be no disclosure statement in subchapter V cases. These sections provide background information useful in assessing the plan. As such, it does not make sense to put them at the end of the plan or to break up the plan by putting them somewhere in the middle.

II. Comments Suggesting Additional Rules for Amendment

A. Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case).

Judge Hannah L. Blumenstiel (Bankr. N.D. Cal.) commented that Rule 3014 should be amended, and the Advisory Committee agreed. The rule requires a creditor to make any § 1111(b) election prior to the conclusion of the hearing on the disclosure statement or, if the

disclosure statement is conditionally approved and a final hearing on it is not held, not later than the date fixed by the court under Rule 3017.1(a)(2) for filing objections to the disclosure statement. Because § 1181(b) renders § 1125 inapplicable to cases under subchapter V and thereby makes disclosure statements unnecessary (unless the court orders otherwise), there will not be a hearing on a disclosure statement in such cases. Rule 3014 therefore needs to provide a different triggering event or a deadline for the 1111(b) election in such cases.

The amendment approved by the Advisory Committees leaves the timing of such a deadline up to the court. It adds the following sentence to Rule 3014: “In a case under subchapter V of chapter 11 in which § 1125 of the Code does not apply, the election may be made not later than a date the court may fix.”

B. Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case).

Judge Kahn and NCBJ pointed out that, although there will generally not be a disclosure statement in subchapter V cases, the court can order that § 1125 does apply in a particular case. An option provided by § 1125(f)(3) in small business cases is conditional approval of the disclosure statement by the court prior to the solicitation of votes on the plan, with final approval to be considered at the confirmation hearing. Rule 3017.1 prescribes the procedure for the conditional and final approvals. Rule 3017.1, however, now only applies to “small business cases,” a term that does not include subchapter V cases. The Advisory Committee, agreeing with the need to amend Rule 3017.1, voted to add “or in a case under subchapter V of chapter 11” to the title and subdivision (a) of the rule to expand its coverage.

C. Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement).

NCBJ commented that because disclosure statements are not required in subchapter V cases, the Rules currently provide no mechanism to trigger the setting of various dates by the court. Rule 3017(c) provides that “[o]n or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.” In a subchapter V case, however, if there is no disclosure statement to approve, there needs to be another authorization for the court to set dates for voting on the plan and for the confirmation hearing that does not refer to approval of the disclosure statement. The same is true for the other date-setting provisions in Rules 3017 and 3018 that refer to approval of the disclosure statement.

In order to provide for such date setting by the court in subchapter V cases, the Advisory Committee approved a new rule—Rule 3017.2—that authorizes courts in subchapter V cases in which there is no disclosure statement to (a) fix a time within which the holders of claims and interests may accept or reject the plan; (b) fix a date on which an equity security holder or creditor whose claim is based on a security must be the holder of record of the security in order to be eligible to accept or reject the plan; (c) fix a date for the hearing on confirmation; and (d) fix a date for transmission of the plan, notice of the time within which the holders of claims and interests may accept or reject the plan, and notice of the date for the hearing on confirmation.

D. Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The amendment of Rule 3017.1 and the addition of Rule 3017.2 necessitate changes to Rule 3018(a) to take account of the new authorizations for the setting of dates. The Advisory Committee approved amendments to Rule 3018(a) that add references to date setting under Rules 3017.1 and 3017.2.

E. Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case)

Judge Benjamin Kahn noted that Rule 3019 governs the modification of a chapter 11 plan in an individual case, but that subdivision (b) is limited to requests “under § 1127(e)” to modify the plan after confirmation. He commented that the rule should similarly apply to a request for modification under § 1193(b) or (c), the Code provisions applicable in subchapter V cases.

The Advisory Committee agreed. Rather than just adding the additional Code sections to subdivision (b), however, the Advisory Committee approved a new subdivision (c) that makes the provisions of (b) applicable to subchapter V cases. Subdivision (b) is currently limited to individual debtor cases because § 1127(e) only allows a chapter 11 plan to be modified after confirmation if the debtor is an individual. New § 1193(b) and (c), however, allow post-confirmation modification in any subchapter V case, regardless of the identity of the debtor.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF

In re

ADOPTION OF INTERIM
BANKRUPTCY RULES

GENERAL ORDER NO. ____

On August 23, 2019, the Small Business Reorganization Act of 2019 (the SBRA) was enacted into law. The SBRA makes many substantive and procedural changes to the Bankruptcy Code and requires changes to the Federal Rules of Bankruptcy Procedure to implement those changes. However, the February 19, 2020 effective date of the SBRA occurs long before the Bankruptcy Rules can be amended under the three-year process required by the Rules Enabling Act. Accordingly, the Advisory Committee on Bankruptcy Rules (the Advisory Committee) drafted, published for comment, and subsequently approved interim bankruptcy rules (the Interim Rules) for distribution to the courts. The Committee on Rules of Practice and Procedure approved the Interim Rules, and the Judicial Conference authorized distribution of the Interim Rules to courts for adoption locally to facilitate uniform implementation of the changes mandated by the SBRA.

NOW THEREFORE, pursuant to 28 U.S.C. § 2071, Rule 83 of the Federal Rules of Civil Procedure, and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the attached Interim Rules are adopted in their entirety without change by the judges of this Court to be effective February 19, 2020. For cases and proceedings not governed by the

SBRA, the Federal Rules of Bankruptcy Procedure and the Local Rules of this Court, other than the Interim Rules, shall apply.

The Interim Rules shall remain in effect until further order of the Court.

IT IS SO ORDERED.

DATED: _____

FOR THE COURT:

Honorable
Chief Judge

Appendix A

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

1 **Rule 1007. Lists, Schedules, Statements, and Other**
2 **Documents; Time Limits**

3 * * * * *

4 (b) SCHEDULES, STATEMENTS, AND OTHER
5 DOCUMENTS REQUIRED.

6 * * * * *

7 (5) An individual debtor in a chapter 11 case
8 (unless under subchapter V) shall file a statement of
9 current monthly income, prepared as prescribed by
10 the appropriate Official Form.

11 * * * * *

12 (h) INTERESTS ACQUIRED OR ARISING
13 AFTER PETITION. If, as provided by § 541(a)(5) of the
14 Code, the debtor acquires or becomes entitled to acquire any

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

15 interest in property, the debtor shall within 14 days after the
16 information comes to the debtor's knowledge or within such
17 further time the court may allow, file a supplemental
18 schedule in the chapter 7 liquidation case, chapter 11
19 reorganization case, chapter 12 family farmer's debt
20 adjustment case, or chapter 13 individual debt adjustment
21 case. If any of the property required to be reported under
22 this subdivision is claimed by the debtor as exempt, the
23 debtor shall claim the exemptions in the supplemental
24 schedule. ~~The~~ This duty to file a supplemental schedule ~~in~~
25 ~~accordance with this subdivision~~ continues even after the
26 case is closed, except for property acquired after an order is
27 entered: notwithstanding the closing of the case, except that
28 ~~the schedule need not be filed in a chapter 11, chapter 12, or~~
29 ~~chapter 13 case with respect to property acquired after entry~~
30 ~~of the order~~

31 (1) confirming a chapter 11 plan (other than one
32 confirmed under § 1191(b)); or

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1 **Rule 1020. ~~Small Business~~ Chapter 11 Reorganization**

2 **Case for Small Business Debtors**

3 (a) SMALL BUSINESS DEBTOR

4 DESIGNATION. In a voluntary chapter 11 case, the debtor

5 shall state in the petition whether the debtor is a small

6 business debtor and, if so, whether the debtor elects to have

7 subchapter V of chapter 11 apply. In an involuntary chapter

8 11 case, the debtor shall file within 14 days after entry of the

9 order for relief a statement as to whether the debtor is a small

10 business debtor and, if so, whether the debtor elects to have

11 subchapter V of chapter 11 apply. ~~Except as provided in~~

12 ~~subdivision (c), the~~ The status of the case as a small business

13 case or a case under subchapter V of chapter 11 shall be in

14 accordance with the debtor's statement under this

15 subdivision, unless and until the court enters an order finding

16 that the debtor's statement is incorrect.

17 (b) OBJECTING TO DESIGNATION. ~~Except as~~

18 ~~provided in subdivision (c), the~~ The United States trustee or

19 a party in interest may file an objection to the debtor's
20 statement under subdivision (a) no later than 30 days after
21 the conclusion of the meeting of creditors held under
22 § 341(a) of the Code, or within 30 days after any amendment
23 to the statement, whichever is later.

24 ~~(e) — APPOINTMENT OF COMMITTEE OF~~
25 ~~UNSECURED CREDITORS. If a committee of unsecured~~
26 ~~creditors has been appointed under § 1102(a)(1), the case~~
27 ~~shall proceed as a small business case only if, and from the~~
28 ~~time when, the court enters an order determining that the~~
29 ~~committee has not been sufficiently active and~~
30 ~~representative to provide effective oversight of the debtor~~
31 ~~and that the debtor satisfies all the other requirements for~~
32 ~~being a small business. A request for a determination under~~
33 ~~this subdivision may be filed by the United States trustee or~~
34 ~~a party in interest only within a reasonable time after the~~
35 ~~failure of the committee to be sufficiently active and~~
36 ~~representative. The debtor may file a request for a~~

37 ~~determination at any time as to whether the committee has~~
38 ~~been sufficiently active and representative.~~

39 (d~~c~~) PROCEDURE FOR OBJECTION OR
40 DETERMINATION. Any objection or request for a
41 determination under this rule shall be governed by Rule 9014
42 and served on: the debtor; the debtor’s attorney; the United
43 States trustee; the trustee; the creditors included on the list
44 filed under Rule 1007(d) or, if any a committee has been
45 appointed under § 1102(a)(3), the committee or its
46 authorized agent, ~~or, if no committee of unsecured creditors~~
47 ~~has been appointed under § 1102, the creditors included on~~
48 ~~the list filed under Rule 1007(d);~~ and any other entity as the
49 court directs.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019 (“SBRA”), Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to include that option and to require a small business debtor to state in its voluntary petition, or in a statement filed within 14 days after the order for relief is

entered in an involuntary case, whether it elects to proceed under subchapter V. The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.

Former subdivision (c) of the rule is deleted because the existence or level of activity of a creditors' committee is no longer a criterion for small-business-debtor status. The SBRA eliminated that portion of the definition of "small business debtor" in § 101(51D) of the Code.

Former subdivision (d) is redesignated as subdivision (c), and the list of entities to be served is revised to reflect that in most small business and subchapter V cases there will not be a committee of creditors.

Changes Made After Publication and Comment

- No changes were made to the rule. A sentence was added to the end of the first paragraph of the Committee Note.

Summary of Public Comment

Comment BK-2019-0004-0013 (Judge Benjamin Kahn) (Bankr. M.D.N.C.). Rule 1020(a) should provide that a debtor who did not initially opt to proceed under subchapter V may not amend its statement to effectuate an election for subchapter V more than 30 days after the order for relief unless the court approves the amendment and finds that the debtor's failure to make the election within the 30-day period is attributable to circumstances for which the debtor should not justly be held accountable. To allow otherwise

would make it impossible for the court and the debtor to comply with the time limits of §§ 1188 and 1189.

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). The NCBJ does not suggest any changes to the text of the proposed rule. However, it observes that the proposed rule does not address the subject of a subsequent change in the debtor's position regarding the subchapter V election. The NCBJ assumes that the Advisory Committee does not intend the rule to prohibit a subsequent election to proceed under subchapter V, giving the bankruptcy court the discretion to make that determination on a case-by-case basis. If so, it suggests that the Advisory Committee might consider expanding the Advisory Committee Note to address the issue.

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1 **Rule 2009. Trustees for Estates When Joint**
 2 **Administration Ordered**

3 (a) ELECTION OF SINGLE TRUSTEE FOR
 4 ESTATES BEING JOINTLY ADMINISTERED. If the
 5 court orders a joint administration of two or more estates
 6 under Rule 1015(b), creditors may elect a single trustee for
 7 the estates being jointly administered, unless the case is
 8 under subchapter V of chapter 7 or subchapter V of chapter
 9 11 of the Code.

10 (b) RIGHT OF CREDITORS TO ELECT
 11 SEPARATE TRUSTEE. Notwithstanding entry of an order
 12 for joint administration under Rule 1015(b), the creditors of
 13 any debtor may elect a separate trustee for the estate of the
 14 debtor as provided in § 702 of the Code, unless the case is
 15 under subchapter V of chapter 7 or subchapter V of chapter
 16 11.

17 (c) APPOINTMENT OF TRUSTEES FOR
 18 ESTATES BEING JOINTLY ADMINISTERED.

19 * * * * *

20 (2) *Chapter 11 Reorganization Cases.* If the
21 appointment of a trustee is ordered or is required by
22 the Code, the United States trustee may appoint one
23 or more trustees for estates being jointly
24 administered in chapter 11 cases.

25 * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. In a case under that subchapter, § 1183 of the Code requires the United States trustee to appoint a trustee, so there will be no election. Accordingly, subdivisions (a) and (b) of the rule are amended to except cases under subchapter V from their coverage. Subdivision (c)(2), which addresses the appointment of trustees in jointly administered chapter 11 cases, is amended to make it applicable to cases under subchapter V.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

1 **Rule 2012. Substitution of Trustee or Successor**

2 **Trustee; Accounting**

3 (a) TRUSTEE. If a trustee is appointed in a chapter
4 11 case (other than under subchapter V), or the debtor is
5 removed as debtor in possession in a chapter 12 case or in a
6 case under subchapter V of chapter 11, the trustee is
7 substituted automatically for the debtor in possession as a
8 party in any pending action, proceeding, or matter.

9 * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (a) of the rule is amended to include any case under that subchapter in which the debtor is removed as debtor in possession under § 1185 of the Code.

Changes Made After Publication and Comment

- A stylistic change was made.

Summary of Public Comment

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). Because the proposed rule addresses two different scenarios (appointment of a trustee and removal of a debtor in possession) under three separate bankruptcy chapters, the NCBJ finds the present draft awkward and perhaps slightly ambiguous. It suggests that the Advisory Committee add the word “in” after “or” and before “a case under subchapter V.”

1 **Rule 2015. Duty to Keep Records, Make Reports, and**
2 **Give Notice of Case or Change of Status**

3 (a) TRUSTEE OR DEBTOR IN POSSESSION. A
4 trustee or debtor in possession shall:

5 (1) in a chapter 7 liquidation case and, if the
6 court directs, in a chapter 11 reorganization case
7 (other than under subchapter V), file and transmit to
8 the United States trustee a complete inventory of the
9 property of the debtor within 30 days after qualifying
10 as a trustee or debtor in possession, unless such an
11 inventory has already been filed;

12 (2) keep a record of receipts and the
13 disposition of money and property received;

14 (3) file the reports and summaries required by
15 § 704(a)(8) of the Code, which shall include a
16 statement, if payments are made to employees, of the
17 amounts of deductions for all taxes required to be

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18 withheld or paid for and in behalf of employees and
19 the place where these amounts are deposited;

20 (4) as soon as possible after the
21 commencement of the case, give notice of the case to
22 every entity known to be holding money or property
23 subject to withdrawal or order of the debtor,
24 including every bank, savings or building and loan
25 association, public utility company, and landlord
26 with whom the debtor has a deposit, and to every
27 insurance company which has issued a policy having
28 a cash surrender value payable to the debtor, except
29 that notice need not be given to any entity who has
30 knowledge or has previously been notified of the
31 case;

32 (5) in a chapter 11 reorganization case (other
33 than under subchapter V), on or before the last day
34 of the month after each calendar quarter during
35 which there is a duty to pay fees under 28 U.S.C.

36 § 1930(a)(6), file and transmit to the United States
37 trustee a statement of any disbursements made
38 during that quarter and of any fees payable under 28
39 U.S.C. § 1930(a)(6) for that quarter; and

40 (6) in a chapter 11 small business case, unless
41 the court, for cause, sets another reporting interval,
42 file and transmit to the United States trustee for each
43 calendar month after the order for relief, on the
44 appropriate Official Form, the report required by
45 § 308. If the order for relief is within the first 15 days
46 of a calendar month, a report shall be filed for the
47 portion of the month that follows the order for relief.
48 If the order for relief is after the 15th day of a
49 calendar month, the period for the remainder of the
50 month shall be included in the report for the next
51 calendar month. Each report shall be filed no later
52 than 21 days after the last day of the calendar month
53 following the month covered by the report. The

54 obligation to file reports under this subparagraph
55 terminates on the effective date of the plan, or
56 conversion or dismissal of the case.

57 (b) TRUSTEE, DEBTOR IN POSSESSION, AND
58 DEBTOR IN A CASE UNDER SUBCHAPTER V OF
59 CHAPTER 11. In a case under subchapter V of chapter 11,
60 the debtor in possession shall perform the duties prescribed
61 in (a)(2)–(4) and, if the court directs, shall file and transmit
62 to the United States trustee a complete inventory of the
63 debtor’s property within the time fixed by the court. If the
64 debtor is removed as debtor in possession, the trustee shall
65 perform the duties of the debtor in possession prescribed in
66 this subdivision (b). The debtor shall perform the duties
67 prescribed in (a)(6).

68 (b~~c~~) CHAPTER 12 TRUSTEE AND DEBTOR IN
69 POSSESSION. In a chapter 12 family farmer’s debt
70 adjustment case, the debtor in possession shall perform the
71 duties prescribed in clauses (2)–(4) of subdivision (a) of this

72 rule and, if the court directs, shall file and transmit to the
73 United States trustee a complete inventory of the property of
74 the debtor within the time fixed by the court. If the debtor is
75 removed as debtor in possession, the trustee shall perform
76 the duties of the debtor in possession prescribed in this
77 ~~paragraph~~ subdivision (c).

78 (e) CHAPTER 13 TRUSTEE AND
79 DEBTOR.

80 (1) *Business Cases*. In a chapter 13
81 individual's debt adjustment case, when the debtor is
82 engaged in business, the debtor shall perform the
83 duties prescribed by clauses (2)–(4) of subdivision
84 (a) of this rule and, if the court directs, shall file and
85 transmit to the United States trustee a complete
86 inventory of the property of the debtor within the
87 time fixed by the court.

88 (2) *Nonbusiness Cases*. In a chapter 13
89 individual's debt adjustment case, when the debtor is

90 not engaged in business, the trustee shall perform the
91 duties prescribed by clause (2) of subdivision (a) of
92 this rule.

93 ~~(d)~~ FOREIGN REPRESENTATIVE. In a case in
94 which the court has granted recognition of a foreign
95 proceeding under chapter 15, the foreign representative shall
96 file any notice required under § 1518 of the Code within 14
97 days after the date when the representative becomes aware
98 of the subsequent information.

99 ~~(e)~~ TRANSMISSION OF REPORTS. In a chapter
100 11 case the court may direct that copies or summaries of
101 annual reports and copies or summaries of other reports shall
102 be mailed to the creditors, equity security holders, and
103 indenture trustees. The court may also direct the publication
104 of summaries of any such reports. A copy of every report or
105 summary mailed or published pursuant to this subdivision
106 shall be transmitted to the United States trustee.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) is amended to prescribe the duties of a debtor in possession, trustee, and debtor in a subchapter V case. Those cases are excepted from subdivision (a) because, unlike other chapter 11 cases, there will generally be both a trustee and a debtor in possession. Subdivision (b) also reflects that § 1187 of the Code prescribes reporting duties for the debtor in a subchapter V case.

Former subdivisions (b), (c), (d), and (e) are redesignated (c), (d), (e), and (f) respectively.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

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1 **Rule 3010. Small Dividends and Payments in Cases**
2 **Under Chapter 7 Liquidation, Subchapter V of Chapter**
3 **11, Chapter 12 Family Farmer’s Debt Adjustment, and**
4 **Chapter 13 Individual’s Debt Adjustment Cases**

5 * * * * *

6 (b) CASES UNDER SUBCHAPTER V OF
7 CHAPTER 11, CHAPTER 12, AND CHAPTER 13
8 CASES. In a case under subchapter V of chapter 11, chapter
9 12, or chapter 13, ease no payment in an amount less than
10 \$15 shall be distributed by the trustee to any creditor unless
11 authorized by local rule or order of the court. Funds not
12 distributed because of this subdivision shall accumulate and
13 shall be paid whenever the accumulation aggregates \$15.
14 Any funds remaining shall be distributed with the final
15 payment.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter

V of chapter 11. To avoid the undue cost and inconvenience of distributing small payments, the title and subdivision (b) are amended to include subchapter V cases.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

1 **Rule 3011. Unclaimed Funds in Cases Under Chapter 7**
2 **~~Liquidation,~~ Subchapter V of Chapter 11, Chapter 12**
3 **~~Family Farmer's Debt Adjustment,~~ and Chapter 13**
4 **~~Individual's Debt Adjustment Cases~~**

5 The trustee shall file a list of all known names and
6 addresses of the entities and the amounts which they are
7 entitled to be paid from remaining property of the estate that
8 is paid into court pursuant to § 347(a) of the Code.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The rule is amended to include such cases because § 347(a) of the Code applies to them.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

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1 **Rule 3014. Election Under § 1111(b) by Secured**
2 **Creditor in Chapter 9 Municipality or Chapter 11**
3 **Reorganization Case**

4 An election of application of § 1111(b)(2) of the
5 Code by a class of secured creditors in a chapter 9 or 11 case
6 may be made at any time prior to the conclusion of the
7 hearing on the disclosure statement or within such later time
8 as the court may fix. If the disclosure statement is
9 conditionally approved pursuant to Rule 3017.1, and a final
10 hearing on the disclosure statement is not held, the election
11 of application of § 1111(b)(2) may be made not later than the
12 date fixed pursuant to Rule 3017.1(a)(2) or another date the
13 court may fix. In a case under subchapter V of chapter 11 in
14 which § 1125 of the Code does not apply, the election may
15 be made not later than a date the court may fix. The election
16 shall be in writing and signed unless made at the hearing on
17 the disclosure statement. The election, if made by the

- 18 majorities required by § 1111(b)(1)(A)(i), shall be binding
19 on all members of the class with respect to the plan.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is amended to provide a deadline for making an election under § 1111(b) in such cases that is set by the court.

Changes Made After Publication and Comment

- The Advisory Committee voted to propose an amendment to this rule in response to a comment it received.

Summary of Public Comment

Comment of Judge Hannah L. Blumenstiel (Bankr. N.D. Cal.) (made directly to Judge Dow). Rule 3014 requires a creditor to make any § 1111(b) election prior to the conclusion of the hearing on the disclosure statement or, if the disclosure statement is conditionally approved and a final hearing thereon not held, not later than the date fixed by the court under Rule 3017.1(a)(2) for filing objections to the disclosure statement. Since § 1181(b) renders § 1125 inapplicable to cases under subchapter V and thereby makes disclosure statements unnecessary (unless the court orders otherwise), there won't be a hearing on a disclosure statement in such cases. Rule 3014 should be amended to

provide a different triggering event or a deadline for the 1111(b) election in such cases.

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1 **Rule 3016. Filing of Plan and Disclosure Statement in a**
2 **Chapter 9 Municipality or Chapter 11 Reorganization**
3 **Case**

4 (a) IDENTIFICATION OF PLAN. Every proposed
5 plan and any modification thereof shall be dated and, in a
6 chapter 11 case, identified with the name of the entity or
7 entities submitting or filing it.

8 (b) DISCLOSURE STATEMENT. In a chapter 9 or
9 11 case, a disclosure statement, if required under § 1125 of
10 the Code, or evidence showing compliance with § 1126(b)
11 shall be filed with the plan or within a time fixed by the
12 court, unless the plan is intended to provide adequate
13 information under § 1125(f)(1). If the plan is intended to
14 provide adequate information under § 1125(f)(1), it shall be
15 so designated, and Rule 3017.1 shall apply as if the plan is a
16 disclosure statement.

17 * * * * *

18 (d) STANDARD FORM SMALL BUSINESS
19 DISCLOSURE STATEMENT AND PLAN. In a small
20 business case or a case under subchapter V of chapter 11, the
21 court may approve a disclosure statement and may confirm
22 a plan that conform substantially to the appropriate Official
23 Forms or other standard forms approved by the court.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) of the rule is amended to reflect that under § 1181(b) of the Code, § 1125 does not apply to subchapter V cases (and thus a disclosure statement is not required) unless the court for cause orders otherwise. Subdivision (d) is amended to include subchapter V cases as ones in which Official Forms are available for a reorganization plan and, when required, a disclosure statement.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

1 **Rule 3017.1. Court Consideration of Disclosure**
2 **Statement in a Small Business Case or in a Case Under**
3 **Subchapter V of Chapter 11**

4 (a) CONDITIONAL APPROVAL OF
5 DISCLOSURE STATEMENT. In a small business case or
6 in a case under subchapter V of chapter 11 in which the court
7 has ordered that § 1125 applies, the court may, on
8 application of the plan proponent or on its own initiative,
9 conditionally approve a disclosure statement filed in
10 accordance with Rule 3016. On or before conditional
11 approval of the disclosure statement, the court shall:

- 12 (1) fix a time within which the holders of claims and
13 interests may accept or reject the plan;
14 (2) fix a time for filing objections to the disclosure
15 statement;
16 (3) fix a date for the hearing on final approval of the
17 disclosure statement to be held if a timely objection
18 is filed; and

19 (4) fix a date for the hearing on confirmation.

20 * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to cover such cases when the court orders that § 1125 of the Code applies.

Changes Made After Publication and Comment

- The Advisory Committee voted to propose an amendment to this rule in response to comments it received.

Summary of Public Comment

Comment BK-2019-0004-0013 (Judge Benjamin Kahn) (Bankr. M.D.N.C.). Section 1187(c), enacted by SBRA, provides that “[i]f the court orders under section 1181(b) . . . that section 1125 . . . applies, section 1125(f) . . . shall apply.” Section 1125(f)(3) contemplates that if a separate disclosure statement is required in a small business case, it can be conditionally approved. Under the proposed amendment of Rule 3016, the procedures for conditional approval of a disclosure statement under Rule 3017.1 will apply in a subchapter V case only if the debtor designates the plan as intended to contain adequate information. It does not provide for the circumstances in which the court requires a separate disclosure statement to be conditionally approved under 1125(f)(3) or in which the debtor does not designate

the plan as intended to contain adequate information. In these circumstances, there will be no procedural rule governing conditional approval because Rule 3017.1 applies only to “a small business case.” Therefore, Rule 3017.1 should be amended to provide in (a): “In a small business case, or in a case under subchapter V in which the court has ordered that § 1125 applies...”

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). The NCBJ notes generally that the Rules as drafted fail to provide in subchapter V the deadlines currently in Rule 3017.1 for small business cases.

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1 **Rule 3017.2. Fixing of Dates by the Court in Subchapter**
2 **V Cases in Which There Is No Disclosure Statement**

3 In a case under subchapter V of chapter 11 in which
4 § 1125 does not apply, the court shall:

5 (a) fix a time within which the holders of claims
6 and interests may accept or reject the plan;

7 (b) fix a date on which an equity security holder
8 or creditor whose claim is based on a security must
9 be the holder of record of the security in order to be
10 eligible to accept or reject the plan;

11 (c) fix a date for the hearing on confirmation; and

12 (d) fix a date for transmission of the plan, notice
13 of the time within which the holders of claims and
14 interests may accept or reject the plan, and notice of
15 the date for the hearing on confirmation.

Committee Note

The rule is added in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter

V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is added to authorize the court in such a case to act at a time other than when a disclosure statement is approved to set certain times and dates.

Changes Made After Publication and Comment

- The Advisory Committee voted to propose the addition of this new rule in response to a comment it received.

Summary of Public Comment

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). Because disclosure statements are not required in subchapter V cases, the Rules currently provide no mechanism to trigger plan solicitation, filing a ballot report, or setting a bar date for proofs of claim.

1 **Rule 3018. Acceptance or Rejection of Plan in a Chapter**
2 **9 Municipality or a Chapter 11 Reorganization Case**

3 (a) ENTITIES ENTITLED TO ACCEPT OR
4 REJECT PLAN; TIME FOR ACCEPTANCE OR
5 REJECTION. A plan may be accepted or rejected in
6 accordance with § 1126 of the Code within the time fixed by
7 the court pursuant to Rule 3017, 3017.1, or 3017.2. Subject
8 to subdivision (b) of this rule, an equity security holder or
9 creditor whose claim is based on a security of record shall
10 not be entitled to accept or reject a plan unless the equity
11 security holder or creditor is the holder of record of the
12 security on the date the order approving the disclosure
13 statement is entered or on another date fixed by the court
14 under Rule 3017.2, or fixed for cause, after notice and a
15 hearing. For cause shown, the court after notice and hearing
16 may permit a creditor or equity security holder to change or
17 withdraw an acceptance or rejection. Notwithstanding
18 objection to a claim or interest, the court after notice and

19 hearing may temporarily allow the claim or interest in an
20 amount which the court deems proper for the purpose of
21 accepting or rejecting a plan.

22 * * * * *

Committee Note

Subdivision (a) of the rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and cases under subchapter V of chapter 11.

Changes Made After Publication and Comment

- The Advisory Committee voted to propose amendments to this rule in response to a comment it received and amendments made to other rules.

Summary of Public Comments

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). Because disclosure statements are not required in subchapter V cases, the Rules currently provide no mechanism to trigger plan solicitation, filing a ballot report, or setting a bar date for proofs of claim.

1 **Rule 3019. Modification of Accepted Plan in a Chapter**
2 **9 Municipality or a Chapter 11 Reorganization Case**

3 * * * * *

4 (b) MODIFICATION OF PLAN AFTER
5 CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If
6 the debtor is an individual, a request to modify the plan under
7 § 1127(e) of the Code is governed by Rule 9014. The request
8 shall identify the proponent and shall be filed together with
9 the proposed modification. The clerk, or some other person
10 as the court may direct, shall give the debtor, the trustee, and
11 all creditors not less than 21 days' notice by mail of the time
12 fixed to file objections and, if an objection is filed, the
13 hearing to consider the proposed modification, unless the
14 court orders otherwise with respect to creditors who are not
15 affected by the proposed modification. A copy of the notice
16 shall be transmitted to the United States trustee, together
17 with a copy of the proposed modification. Any objection to
18 the proposed modification shall be filed and served on the

19 debtor, the proponent of the modification, the trustee, and
20 any other entity designated by the court, and shall be
21 transmitted to the United States trustee.

22 (c) MODIFICATION OF PLAN AFTER
23 CONFIRMATION IN A SUBCHAPTER V CASE. In a
24 case under subchapter V of chapter 11, a request to modify
25 the plan under § 1193(b) or (c) of the Code is governed by
26 Rule 9014, and the provisions of this Rule 3019(b) apply.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in such cases under § 1193(b) or (c) of the Code.

Changes Made After Publication and Comment

- The Advisory Committee voted to propose amendments to the rule in response to a comment it received.

Summary of Public Comment

Comment BK-2019-0004-0013 (Judge Benjamin Kahn) (Bankr. M.D.N.C.). Rule 3019 governs the modification of a chapter 11 plan in an individual case. Subdivision (b) says that a request to modify the plan after confirmation “under § 1127(e)” is governed by Rule 9014. Rule 9014 similarly should apply to a request for modification under § 1193(b) or (c). The rest of Rule 3019(b) then generally discusses the procedure for modification after confirmation. These general provisions should apply to an individual case under subchapter V. If the committee does not intend for them to so apply, subchapter V should be expressly excluded.

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Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:
 Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

02/20

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver’s license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years

Include trade names and doing business as names

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

5. Where you live

Number Street

City State ZIP Code

County

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

Number Street

P.O. Box

City State ZIP Code

If Debtor 2 lives at a different address:

Number Street

City State ZIP Code

County

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street

P.O. Box

City State ZIP Code

6. Why you are choosing this district to file for bankruptcy

Check one:

I have lived in this district longer than in any other district.

I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explanation.

Check one:

I have lived in this district longer than in any other district.

I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explanation.

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
Chapter 11
Chapter 12
Chapter 13

8. How you will pay the fee

- I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
I need to pay the fee in installments. If you choose this option, sign and attach the Application for Individuals to Pay The Filing Fee in Installments (Official Form 103A).
I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
Yes. District When Case number
MM / DD / YYYY
District When Case number
MM / DD / YYYY
District When Case number
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
Yes. Debtor Relationship to you
District When Case number, if known
MM / DD / YYYY
Debtor Relationship to you
District When Case number, if known
MM / DD / YYYY

11. Do you rent your residence?

- No. Go to line 12.
Yes. Has your landlord obtained an eviction judgment against you?
No. Go to line 12.
Yes. Fill out Initial Statement About an Eviction Judgment Against You (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

- No. Go to Part 4.
Yes. Name and location of business

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

Name of business, if any
Number Street
City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
Stockbroker (as defined in 11 U.S.C. § 101(53A))
Commodity Broker (as defined in 11 U.S.C. § 101(6))
None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

For a definition of small business debtor, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- No. I am not filing under Chapter 11.
No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

- No
Yes. What is the hazard?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

If immediate attention is needed, why is it needed?

Where is the property?

Number Street
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. Are your debts primarily consumer debts? Consumer debts are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- No. Go to line 16b.
Yes. Go to line 17.

16b. Are your debts primarily business debts? Business debts are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- No. Go to line 16c.
Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7?

No. I am not filing under Chapter 7. Go to line 18.

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
No
Yes

18. How many creditors do you estimate that you owe?

- 1-49, 50-99, 100-199, 200-999, 1,000-5,000, 5,001-10,000, 10,001-25,000, 25,001-50,000, 50,001-100,000, More than 100,000

19. How much do you estimate your assets to be worth?

- \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

20. How much do you estimate your liabilities to be?

- \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

X

Signature of Debtor 1

Executed on MM / DD / YYYY

X

Signature of Debtor 2

Executed on MM / DD / YYYY

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X

Signature of Attorney for Debtor Date
MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone Email address

Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

x

Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

x

Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

Committee Note

Line 13 is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 13 is amended to add a check box for a small business debtor to indicate that it is making that choice, and the existing check box for small business debtors is amended to allow the debtor to indicate that it is not electing to proceed under subchapter V.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

Comment BK-2019-0004-0011 (International Council of Shopping Centers). Line 14 of Official Form 101 should be modified to include instructions, in a case where the debtor has elected to proceed under subchapter V, to make rental payments directly to a lessor/property owner of non-residential real property after the filing of a petition.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter _____

Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

02/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. Debtor's name

2. All other names debtor used in the last 8 years

Include any assumed names, trade names, and *doing business* as names

3. Debtor's federal Employer Identification Number (EIN)

4. Debtor's address

Principal place of business

Mailing address, if different from principal place of business

Number Street

Number Street

P.O. Box

City State ZIP Code

City State ZIP Code

Location of principal assets, if different from principal place of business

County

Number Street

City State ZIP Code

5. Debtor's website (URL)

6. Type of debtor

- Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- Partnership (excluding LLP)
- Other. Specify: _____

7. Describe debtor's business

A. Check one:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Railroad (as defined in 11 U.S.C. § 101(44))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- Clearing Bank (as defined in 11 U.S.C. § 781(3))
- None of the above

B. Check all that apply:

- Tax-exempt entity (as described in 26 U.S.C. § 501)
- Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See <http://www.uscourts.gov/four-digit-national-association-naics-codes> .

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- Chapter 7
- Chapter 9
- Chapter 11.

Check all that apply:

- Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,725,625 (amount subject to adjustment on 4/01/22 and every 3 years after that).
- The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and it chooses to proceed under Subchapter V of Chapter 11.
- A plan is being filed with this petition.
- Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
- The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
- The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.

- Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

No

Yes. District _____ When _____ Case number _____
MM / DD / YYYY

If more than 2 cases, attach a separate list.

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

No

Yes. Debtor _____ Relationship _____

District _____ When _____
MM / DD / YYYY

List all cases. If more than 1, attach a separate list.

Case number, if known _____

11. Why is the case filed in this district?

Check all that apply:

Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

No

Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (Check all that apply.)

It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.

What is the hazard? _____

It needs to be physically secured or protected from the weather.

It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

Other _____

Where is the property?

Number _____ Street _____

City _____ State ZIP Code _____

Is the property insured?

No

Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

Funds will be available for distribution to unsecured creditors.

After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

1-49

1,000-5,000

25,001-50,000

50-99

5,001-10,000

50,001-100,000

100-199

10,001-25,000

More than 100,000

200-999

15. Estimated assets

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

16. Estimated liabilities

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

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

Executed on _____
MM / DD / YYYY

X

Signature of authorized representative of debtor

Printed name

Title

18. Signature of attorney

X

Signature of attorney for debtor

Date _____
MM / DD / YYYY

Printed name

Firm name

Number Street

City

State

ZIP Code

Contact phone

Email address

Bar number

State

Committee Note

Line 8 of the form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 8 is amended to provide a check box for a small business debtor to indicate that it is making that choice.

Changes Made After Notice and Comment

- No changes were made.

Summary of Public Comment

Comment BK-2019-0004-0011 (International Council of Shopping Centers). Line 12 of Official Form 201 should be modified to include instructions, in a case where the debtor has elected to proceed under Subchapter V, to make rental payments directly to a lessor/property owner of non-residential real property after the filing of a petition.

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Information to identify the case:

Debtor 1	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____
Debtor 2 (Spouse, if filing)	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____
United States Bankruptcy Court for the: _____	District of _____			[Date case filed for chapter 11 _____]
	(State)			MM / DD / YYYY] OR
Case number: _____				[Date case filed in chapter _____]
				MM / DD / YYYY
				Date case converted to chapter 11 _____]
				MM / DD / YYYY

Official Form 309E1 (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

02/20

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name		
2. All other names used in the last 8 years		
3. Address		If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address		Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov .		Hours open _____ Contact phone _____

For more information, see page 2 ►

6. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.
Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location:

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

7. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or
[date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed, contingent, or unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed, contingent, or unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the conclusion of the meeting of creditors

8. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

9. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.

10. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

11. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.

Information to identify the case:

Debtor 1	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____ - _____
Debtor 2 (Spouse, if filing)	_____	_____	_____	Last 4 digits of Social Security number or ITIN _____
	First Name	Middle Name	Last Name	EIN _____ - _____
United States Bankruptcy Court for the: _____	District of _____			[Date case filed for chapter 11 _____]
	(State)			MM / DD / YYYY] OR
Case number: _____				[Date case filed in chapter _____]
				MM / DD / YYYY
				Date case converted to chapter 11 _____]
				MM / DD / YYYY

Official Form 309E2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

02/20

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read all pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

6. Bankruptcy clerk's office

Documents in this case may be filed at this address.
You may inspect all records filed in this case at this office or online at www.pacer.gov.

Hours open _____
Contact phone _____

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.
Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location:

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed, contingent, or unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed, contingent, or unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. **The debtor will generally remain in possession of the property and may continue to operate the debtor's business.**

For more information, see page 3 ►

11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line **8**.

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Information to identify the case:

Debtor _____ Name	EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 11 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 11 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309F1 (For Corporations or Partnerships)**Notice of Chapter 11 Bankruptcy Case****02/20**

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**

2. **All other names used in the last 8 years**

3. **Address**

4. **Debtor's attorney**

Name and address

Contact phone _____

Email _____

5. **Bankruptcy clerk's office**

Documents in this case may be filed at this address.

You may inspect all records filed in this case at this office or online at www.pacer.gov.

Hours open _____

Contact phone _____

6. **Meeting of creditors**

The debtor's representative must attend the meeting to be questioned under oath.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location:

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

For more information, see page 2 ►

7. Proof of claim deadline**Deadline for filing proof of claim:**

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below.

Deadline for filing the complaint: _____**9. Creditors with a foreign address**

If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.

11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Information to identify the case:

Debtor _____ Name	EIN _____
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 11 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 11 _____ MM / DD / YYYY]
Case number: _____	

Official Form 309F2 (For Corporations or Partnerships under Subchapter V)**Notice of Chapter 11 Bankruptcy Case****02/20**

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 12 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____
6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov .	Hours open _____ Contact phone _____

For more information, see page 2 ►

7. Meeting of creditors

The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.

_____ at _____

Location:

Date _____ Time _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Proof of claim deadline

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court)]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

9. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below.

Deadline for filing the complaint:

10. Creditors with a foreign address

If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

11. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. **The debtor will generally remain in possession of the property and may continue to operate the debtor's business.**

12. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Committee Note

Official Forms 309E2 and 309F2 are new. They are promulgated in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11.

Because a trustee is always appointed in a subchapter V case, both forms require the name and contact information of the trustee to be provided.

Previously existing Official Forms 309E and 309F have been renumbered 309E1 and 309F1, respectively. Other changes are stylistic.

Changes Made After Publication and Comment

- The second sentence of line 11 of Official Form 309E2 and the same sentence in line 12 of Official Form 309F2 were deleted. Stylistic and technical changes were made to the forms.

Summary of Public Comment

Comment BK-2019-0004-0005 (Walter Oney). The line number cross-reference in the introduction to Official Form 309E2 should be to line 11, not 10. The cross-reference in line 12 of the form should be to line 8. The line number cross-reference in the introduction to Official Form 309F2 should be to line 12, not 11. The forms will be 3 pages in length. Therefore “both” in the second sentence of the form introduction should be replaced with “all.” The line reading, “For more information, see page x,” should be eliminated from the forms to accommodate variations in pagination between different software packages. Lines 3, 4, and 5 can easily be longer than the draft form if additional address lines

are needed, so that the “for more information” text will fall at an unpredictable location in the finished forms.

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). The sentence in Section 11 of Official Form 309E2 that reads, “However, in some cases the debts will not be discharged until all or a substantial portion of payments under the plan are made. See 11 U.S.C. § 1192,” should be deleted because it is both unnecessary and legally inaccurate. Section 1192 addresses the discharge only if the plan is non-consensual. For a consensual plan confirmed under § 1191(a), § 1141(d)(1)(A) applies, and the discharge is granted upon confirmation. For the non-consensual plan referenced in § 1192, the discharge is granted only after completion of all payments due. Nothing in § 1191 or § 1192 conditions the grant of the discharge upon payment of a “substantial portion” of the payments. Further, the main purpose of Section 11 of the Notice is to describe the consequence of the discharge and to give notice of the deadline for requesting a determination of dischargeability of a debt. The NCBJ sees no need to address the timing of the entry of the discharge itself in the notice.

[Caption as in 416A]

Class [] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the Plan) for the Debtor in this case. {The Court has [conditionally] approved a disclosure statement with respect to the Plan (the Disclosure Statement). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]}

{Court approval of the Disclosure Statement does not indicate approval of the Plan by the Court.}

You should review {the Disclosure Statement and} the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives:]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [] claim against the Debtor in the unpaid amount of Dollars (\$)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [] claim against the Debtor, consisting of Dollars (\$) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor

[In each case, the following language should be included:]

Check one box only

Accepts the plan

Rejects the plan

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The first three paragraphs of the form are amended to place braces around all references to a disclosure statement. Section 1125 of the Code does not apply to subchapter V cases unless the court for cause orders otherwise. See Code § 1181(b). Thus, in most subchapter V cases there will not be a disclosure statement, and the language in braces on the form should not be included on the ballot.

Changes Made After Publication and Comment

- Technical and stylistic changes were made.

Summary of Public Comment

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). The NCBJ suggests, for consistency, that “disclosure statement” in the sentence beginning “Court approval of the disclosure statement” should be capitalized to match the defined term in paragraph one and the capitalization in the first and third paragraphs. In addition, there is a typographical error in the final sentence of the Committee Note; “chapter V” should be “subchapter V.”

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[Caption as in 416A]

Order Confirming Plan

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [if applicable, as modified by a modification filed on _____], or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [or, if appropriate, 11 U.S.C. § 1129(b), 1191(a), or 1191(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____, [If appropriate, include dates and any other pertinent details of modifications to the plan] is confirmed. [If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020.]

A copy of the confirmed plan is attached.

MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Citations to the statutory provisions governing confirmation in such cases are added to the form for the court to include as appropriate.

Changes After Publication and Comment

- No changes were made.

Summary of Public Comment

- No comments were submitted.

Fill in this information to identify the case:

Debtor Name _____

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

Case number: _____

Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11

02/20

[Name of Proponent]’s Plan of Reorganization, Dated [Insert Date]

[If this plan is for a small business debtor under Subchapter V, 11 U.S.C. § 1190 requires that it include “(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.” The Background section below may be used for that purpose. Otherwise, the Background section can be deleted from the form, and the Plan can start with “Article 1: Summary”]

Background for Cases Filed Under Subchapter V

A. Description and History of the Debtor’s Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor’s business].

B. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to the Plan as Exhibit ____.

C. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor’s business.

The Plan Proponent has provided projected financial information as Exhibit ____.

The Plan Proponent’s financial projections show that the Debtor will have projected disposable income (as defined by § 1191(d) of the Bankruptcy Code) for the period described in § 1191(c)(2) of \$ _____.

The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for: classes of priority claims; classes of secured claims; classes of non-priority unsecured claims; and classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately cents on the dollar. This Plan also provides for the payment of administrative and priority claims. All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

- 2.01 Class 1 All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)). [Add classes of priority claims, if applicable]
2.02 Class 2 The claim of [], to the extent allowed as a secured claim under § 506 of the Code. [Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]
2.03 Class 3 All non-priority unsecured claims allowed under § 502 of the Code. [Add other classes of unsecured claims, if any.]
2.04 Class 4 Equity interests of the Debtor. [If the Debtor is an individual, change this heading to The interests of the individual Debtor in property of the estate.]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

- 3.01 Unclassified claims Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02 Administrative expense claims Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor. Or Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid [specify terms of treatment, including the form, amount, and timing of distribution, consistent with section 1191(e) of the

Code].

[Note: the second provision is appropriate only in a subchapter V plan that is confirmed non-consensually under section 1191(b).]

- 3.03 **Priority tax claims** Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
- 3.04 **Statutory fees** All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
- 3.05 **Prospective quarterly fees** All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - Priority claims excluding those in Article 3	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 – Secured claim of [Insert name of secured creditor.]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – Non-priority unsecured creditors	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity security holders of the Debtor	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

- 5.01 **Disputed claim** A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either:
 - (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or
 - (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
- 5.02 **Delay of distribution on a disputed claim** No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].
- 5.03 **Settlement of disputed claims** The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01 Assumed executory contracts and unexpired leases

(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date:

[List assumed, or if applicable assigned, executory contracts and unexpired leases.]

(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date.

A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than [] days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01 Definitions and rules of construction

The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions:

[Insert additional definitions if necessary].

8.02 Effective date

The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.

8.03 Severability

If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 Binding effect

The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 Captions

The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 Controlling effect

Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[8.07 Corporate governance

[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

[8.08 Retention of Jurisdiction

Language addressing the extent and the scope of the bankruptcy court's jurisdiction after the effective date of the plan.]

Article 9: Discharge

[Include the appropriate provision in the Plan]

[No Discharge -- Section 1141(d)(3) IS applicable.]

In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

[Discharge -- Section 1141(d)(3) IS NOT applicable; use one of the alternatives below]

[The following 3 alternatives apply to cases in which a discharge is applicable and the Debtor DID NOT elect to proceed under Subchapter V of Chapter 11.]

[Discharge if the Debtor is an individual and did not proceed under Subchapter V]

Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Discharge if the Debtor is a corporation and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

[The following 3 alternatives apply to cases in which the Debtor DID elect to proceed under Subchapter V of Chapter 11.]

[Discharge if the Debtor is an individual under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt:

- (i) imposed by this Plan; or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;
- or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;
- or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a corporation under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

If the Debtor's Plan is confirmed under § 1191(b), confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;
- or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

Debtor Name _____

Case number _____

x

[Signature of the Plan Proponent]

[Printed Name]

x

[Signature of the Attorney for the Plan Proponent]

[Printed Name]

Committee Note

The form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there will generally not be a disclosure statement in subchapter V cases, § 1190 of the Code provides that plans in those cases must include a brief history of the debtor's business operations, a liquidation analysis, and projections of the debtor's ability to make payments under the plan. Those provisions are added to a new Background section of the form with an indication that they are to be included in plans only in subchapter V cases.

Article 3.02 is amended to reflect a special rule for the treatment of administrative expense claims in subchapter V plans that are confirmed non-consensually. See § 1191(e).

Article 9 of the form is amended to include descriptions of the effect of a discharge in a case under subchapter V. The plan proponent is directed to include in the plan the particular provision that is appropriate for the case.

Changes Made After Publication and Comment

- Article 3.02 was revised to reflect a special rule under § 1191(e) of the Code for the treatment of administrative expense claims in subchapter V plans that are confirmed non-consensually. Technical and stylistic changes to the form were also made.

Summary of Public Comment

Comment BK-2019-0004-0003 (Ben Stowell). On the top of page 1, insert the word that is underlined: “The Background section below may be used for that purpose.” Near the top of page 5, change the code citation from “11(41(d)(3)” to “1141(d)(3).” Finally, a formatting suggestion: In the middle of page 5, there is line spacing between “(i) imposed by this Plan; or” and “(ii) to the extent provided in ... 1141(d)(6).” From that point on through page 6, however, that spacing does not exist between (i) and (ii). And you have the exact same wording in the middle of page 6, again, with no spacing.

Comment BK-2019-0004-0004 (Judge Robert Drain) (Bankr. S.D.N.Y.). Section 3.02 of the proposed model plan tracks § 1129(a)(9) of the Bankruptcy Code with respect to payment of allowed administrative expenses, including under § 507(a)(2). This appears to be inconsistent with § 1191(e) of subchapter V, which states, “SPECIAL RULE – Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this title.”

The proposed model plan should recognize the possibility of more than one class of (a) secured claims and (b) unsecured claims by enabling the addition of such classes to the form.

Comment BK-2019-0004-0008 (David Mawhinney). The proposed model Plan of Reorganization for Small Business Under Chapter 11 does not appear to address § 1191(e)’s Special Rule for § 507(a)(2) and (a)(3) claims. Instead, section 3.02 of the proposed model plan tracks § 1129(a)(9)(A) without addressing § 1191(e). The proposed

model plan should reflect section 1191(e) by providing two sections for administrative expense claims (3.02.1 and 3.02.2). Section 3.02.1 would apply to small business debtor plans that are not under subchapter V and subchapter V plans where the debtor wants to provide treatment consistent with section 1129(a)(9)(A). It could remain as drafted. Section 3.02.2 could say, “If the Debtor is proceeding under subchapter V, each holder of a claim described in § 507(a)(2) and (3) of the Code shall receive [specify terms of treatment consistent with section 1191(e) of the Code].”

Comment BK-2019-0004-0011 (International Council of Shopping Centers). Article 6 of Proposed Official Form 425A should be modified to include instructions, in a case where the debtor has elected to proceed under Subchapter V, to make rental payments directly to a lessor/property owner of non-residential real property after the filing of a petition.

Comment BK-2019-0004-0013 (Judge Benjamin Kahn (Bankr. M.D.N.C.)). Since Rule 3016 provides that the debtor may designate the plan as intended to contain adequate information, Official Form 425A should contain a box to check if debtor designates the plan as intended to contain adequate information under Rule 3016(b).

Comment BK-2019-0004-0014 (National Conference of Bankruptcy Judges). The existing “Article I: Summary” should be left on the first page of the form. Because it is the most important information for creditors, it is preferable that it maintain its primacy in the document, particularly because the new information required by § 1190 is designed to explain and justify the terms of the proposed plan.

Second, Article 3.02 of the Form provides that “[e]ach holder of an administrative expense claim allowed under § 503 of the Code . . . will be paid in full on the

effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.” In light of the “Special Rule” of § 1191(e), which provides for confirmation of a plan under § 1191(b) “[n]otwithstanding section 1129(a)(9)(A),” this provision in the form plan is contrary to the statute, which permits administrative expenses to be paid over time through the plan.

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TAB 4B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26, 2019
Washington, D.C.

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Debra Miller, Chapter 13 trustee
Jeremy L. Retherford, Esq.
Professor David A. Skeel
Circuit Judge Amul R. Thapar
District Judge George Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
(the Standing Committee)
Professor Daniel Coquillette, consultant to the Standing Committee (called in)
Professor Catherine Struve, reporter to the Standing Committee (called in)
Bankruptcy Judge Mary Gorman, liaison from the Bankruptcy Committee
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee (called in)
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Allison R. Bruff, Esq., Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Whaley, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group. He introduced Judge David Campbell, the chair of the Standing Committee, and Professor Daniel Coquille, and Professor Catherine Struve, the consultant and reporter for the Standing Committee, who were participating by phone. He also introduced others attending the meeting. He acknowledged Judges Pepper and Thapar, whose terms expire this fall, for their service to the Advisory Committee. He pointed out that the first Consent Agenda item has been moved to the Discussion Agenda and that there are handouts in connection with two items on the agenda.

2. Approval of minutes of San Antonio, Texas April 4, 2019 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 25, 2019 Standing Committee meeting

Judge Dow gave the report. The Standing Committee approved the proposed amendments to Bankruptcy Rules 2002, 2004, and 8012 after publication and consideration of comments. The Standing Committee also approved without publication proposed amendments to Bankruptcy Rules 8013, 8015, and 8021 to conform to amended Federal Rule of Appellate Procedure 25(d) in eliminating the requirement of proof of service for documents served through the court's electronic-filing system. The Standing Committee agreed to transmit all amended Rules to the Judicial Conference of the United States for consideration with a recommendation that they be approved and sent to the Supreme Court.

The Standing Committee also approved the recommendation of the Advisory Committee that it approve effective December 1, 2019, amended Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date. The amendment, proposed by an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California, adds a duplicated instruction emphasizing that a debtor should not complete Official Form 122A-2 if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income.

The Standing Committee also approved the request by the Advisory Committee for publication in August 2019 of proposed amendments to Rules 3007, 7007.1, and 9036. With respect to Rule 2005, the Standing Committee recommended that the rule be published for comment rather than adopted as a technical amendment, and made a small amendment to the Advisory Committee draft, inserting the word “relevant.”

Judge Dow also provided the Standing Committee information on additional work of the Advisory Committee, in particular on restyling and unclaimed funds.

(B) April 5, 2019 Meeting of the Advisory Committee on Appellate Rules

There was no report at the meeting. The following report was submitted by Judge Pamela Pepper after the meeting:

The Advisory Committee on Appellate Rules met in San Antonio on April 5, 2019.

The Advisory Committee continued discussion of an amended Fed. R. App. P. 3, “Appeal Taken As of Right—How Taken” to address the problem created by a case in the Tenth Circuit in which the court found that if the appellant did not specify every single order being appealed, the appellant had waived the right to appeal any order not mentioned. FRAP 3(c)(1)(B) says that the notice of appeal has to “designate the judgment, order, or part thereof being appealed;” it was this language that led the Tenth Circuit to conclude that if the appellant didn’t specify exactly the order or orders—or parts of orders—being appealed, the appellant had waived appeal of any unspecified orders.

The proposed amendment to Rule 3(c)(1)(B) would replace the phrase “being appealed” with the phrase “from which the appeal is taken.” A new (c)(4) would refer to the merger rule and clarify that there is no need to include in the notice of appeal orders that merge into the designated judgment or order. A new (c)(6) would repudiate the *expressio unius* rationale. A new (c)(5)(A) would clarify that a notice of appeal that designates an order that disposes of all remaining claims in a case includes the final judgment.

At the April 5 meeting, the appellate rules committee word-smithed the proposed rule. At the end of the discussion, the chair of the standing committee, Judge David Campbell, asked the reporter (Professor Catherine Struve) to check with the bankruptcy and tax committees, and to run the proposed rule by those committees before taking the proposed rule on to the standing committee for publication.

The Advisory Committee also considered a proposed amendment to Rule 42, “Voluntary Dismissal.” Rule 42(b) currently says that the clerk of the circuit court “may” dismiss a docketed

appeal if the parties filed a stipulation to dismissal. The proposal would change the word “may” to “must.” It would also put the last sentence of that section—“An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court”—into a separate section, to make clear that there’s a difference between a *stipulated* dismissal (which, under the new rule, must be dismissed) and a *motion* to dismiss, which the court would need to rule on. There’s a third proposed change, about trying to explain what the rule means when it says “no mandate or other process may issue without a court order.” This proposed rule change was approved (as revised) to send to the Standing Committee to publish for public comment.

A subcommittee is working on Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing), considering how and when to allow the court to convert a panel rehearing into an *en banc* rehearing and vice versa. There are differences among the circuits. There was discussion about a range of issues, but the subcommittee will continue its work.

The committee had been waiting on the Supreme Court’s decision in Nutraceutical v. Lambert, 139 S. Ct. 710 (2019) to see whether there were equitable tolling issues that might require a fix to FRAP 4(a)(5)(C) (motions for extension of time can’t exceed 30 days after “the prescribed time,” or 14 days after the date when the order granting the motion is entered). Everyone concluded no fix was necessary. The committee also had been thinking about whether it was necessary to create a rule governing how the court of appeals should deal with the vote of a judge who has left the bench, but everyone agreed that the Supreme Court’s decision in Yovino v. Rizo, 139 S. Ct. 706 (2019) had resolved that issue. (C) April 3, 2019 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report.

The MDL Subcommittee continues to consider proposals to formulate rules for multi-district litigation cases.

The Civil Rules Committee approved for transmission to the Standing Committee Rule 30(b)(6) on depositions of an organization as amended after publication and comments. The Standing Committee gave final approval to the amended rule.

The Standing Committee, at the request of the Civil Rules Committee, approved for publication and comment an amendment to Rule 7.1(a) that parallels amendments to Bankruptcy Rule 8012 and Appellate Rule 26.

The joint task force created by the Civil Rules Committee and the Appellate Rules Committee is still considering the Supreme Court decision in *Hall v. Hall*, 138 S.Ct. 1118

(2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. Judge Goldgar is participating in that consideration, because Rule 42 applies in bankruptcy cases. It is too soon to know whether the joint task force will find the problem is one that needs to be addressed.

The mandatory disclosure pilot program is ongoing in two districts and is being assessed.

- (D) June 13-14, 2019 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report.

Longtime chair of the Bankruptcy Committee, Judge Karen E. Schreier, has retired and Judge Sara Darrow of the C.D. Ill. is assuming the chair.

One of the major projects the committee is working on is the diversity project. The bankruptcy courts lag other federal courts on diversity, and the Committee has undertaken programs in many major cities to encourage students to think about bankruptcy work and start the process towards diversity in practice and eventually on the bench.

Subcommittee Reports and Other Action Items

- 4. Report by Appeals, Privacy, and Public Access Subcommittee

- (A) Recommendation to conform Bankruptcy Rule 8023 to proposed changes to Federal Rules of Appellate Procedure 42(b)

Judge Ambro and Professor Bartell provided the report. At the meeting of the Standing Committee on June 25, 2019, the Advisory Committee on Appellate Rules presented proposed amendments to Rule 42(b) dealing with voluntary dismissals. The amended version is intended to make dismissal mandatory upon agreement by the parties, as the rule stated prior to its restyling. It also intends to clarify that a court order is required for any action other than a simple dismissal. The rule does not change applicable law requiring court approval of settlements, payments, or other consideration. The revised Rule 42(b) was approved for publication.

Bankruptcy Rule 8023 was modeled on Rule 42(b), and in order to maintain the parallel structure of the rules, the Subcommittee recommended that the Advisory Committee recommend

to the Standing Committee the publication of the conforming changes to Rule 8023 and related committee note. The Advisory Committee approved the recommendation.

- (B) Consider Suggestion 19-BK-G from Sai to amend Rule 9006 with a new subsection (h) requiring court calculation and notice of deadlines

Professor Gibson provided the report. The Advisory Committee has received a suggestion (19-BK-G) submitted by Sai (an advocate for pro se litigants) that seeks to shift from parties to the courts the obligation of determining when actions must be taken and documents filed under the various sets of federal rules. The identical suggestion was also submitted to the Civil, Criminal, and Appellate Advisory Committees. Sai noted that the calculation of deadlines under the federal rules can be difficult, even for attorneys and even more so for pro se litigants, and that the consequences of a calculation error can be severe. Sai noted that clerk's offices already calculate these deadlines for court purposes and suggested that they should issue the results of their calculations as "a simple clerk's order" that parties would be permitted to rely on.

In his suggestion to the Advisory Committee, he provided proposed language amending Rule 9006 by adding a new subsection (h) requiring the court to calculate deadlines and give notice of those deadlines to all filers.

The Subcommittee discussed the suggestion and little support was expressed for it. Members feared that the burden it would place on clerk's offices would be excessive and were also concerned that it would impermissibly require those offices to provide legal advice to parties. Some questioned whether, in the case of jurisdictional deadlines, a rule could allow parties to rely on what turns out to be an erroneous calculation by the court.

The Subcommittee referred the matter to the full Advisory Committee for discussion of whether it should be pursued as proposed or in any narrower respect, such as having the clerk's office specify deadlines for only a limited set of actions and filings. The views of the Committee will then be shared with the other advisory committees.

Ken Gardner characterized the suggestion as "problematic" and expressed his view that the suggestion was not a good one. No other member of the Advisory Committee expressed enthusiasm for the suggestion. The consensus was to not take any action with respect to this suggestion. Judge Krieger suggested tabling the suggestion to await views of other committees. Judge Campbell said that the Standing Committee wished to hear the views of the various advisory committees, and the Advisory Committee for the Criminal Rules had already discussed the matter at its fall meeting and was not willing to pursue it. Judge Goldgar proposed a table of deadlines be distributed instead of individualized notice of deadlines. Judge Campbell said that

there are resources on timelines available without creating new ones. Concern was expressed about creating something that litigants rely upon and that could mislead them.

The Advisory Committee voted to table the suggestion, on the understanding that it might be reconsidered if other Advisory Committees find merit in it.

5. Report by the Business Subcommittee

(A) Recommended amendments to Rule 5005 concerning notices sent to the United States trustee

Professor Bartell provided the report. Currently pending before Congress are amendments to Rule 9036 that would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. The rule would also allow service or noticing on any entity by any electronic means consented to in writing by that person. We anticipate that these amendments will go into effect in December.

Transmittal of papers to the U.S. Trustee is governed by Rule 5005, which requires that such papers be "mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee" and that the entity transmitting the paper file as proof of transmittal a verified statement.

For the last year, the EOUST has been considering whether any changes should be made to Rule 5005 in light of the pending changes to Rule 9036. The EOUST would like to suggest proposed amendments to Rule 5005 to conform this USTP-specific rule to both amended Rule 9036 and current bankruptcy practice under Rule 5005(b). The proposed changes would allow papers to be transmitted to the U.S. Trustee by electronic means, and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Because the Department of Justice has not provided final approval to the proposed amendments, the Advisory Committee voted to table the proposal until the spring meeting.

(B) Recommended Rule and Form amendments needed to implement the Small Business Reorganization Act of 2019

Professor Gibson provided the report. On August 23 the President signed into law the Small Business Reorganization Act of 2019 ("SBRA"), which creates a new subchapter of chapter 11 for the reorganization of small business debtors. It will go into effect 180 days after

that date, which will be February 19, 2020. It does not repeal existing chapter 11 provisions regarding small business debtors, but instead it creates an alternative procedure that small business debtors may elect to use. Proceedings using the current chapter 11 provisions will continue to be called “small business cases,” while cases for which the new procedure is elected will be called “cases under subchapter V of chapter 11.” Debtors using either procedure are called “small business debtors.”

The enactment of SBRA requires amendments to a number of bankruptcy rules and forms, often to exclude subchapter V cases from provisions referring generally to chapter 11 or to add new provisions applying to subchapter V cases.

The Subcommittee examined proposed amendments to nine bankruptcy rules – Rules 1007, 1020, 2003, 2009, 2012, 2015, 3010, 3011, and 3016, and amendments to seven Official Forms – 101, 201, 309E, 309F, 314, 315, and 425A. Professor Gibson summarized each of the amendments and the comments made on the amendments by retired bankruptcy judge Tom Small.

With respect to Rule 1007(h), Judge Hoffman noted that the proposed revisions did not work with respect to a liquidating chapter 11 case when there is no discharge. The language will be amended to keep the current language but carve out subchapter V cases and add a new clause for Subchapter V.

With respect to Rule 1020(b), which specifies when the US Trustee or a party in interest may file an objection to debtor’s statement that debtor is a small business debtor, Ramona Elliot raised the issue of whether there could be an election of subchapter V status after the initial petition is filed, and when the US trustee could object in that situation. The same issue arises under the current rule with respect to potential elections made after the initial filing. She does not suggest any change to the rule in this regard.

In Rule 3016(d), “title 11” should be “chapter 11”. There was discussion about whether subchapter V cases should be included in this provision, and it was decided that the standard form plan was not required so there was no harm to the inclusion.

On the various versions of Form 309, there was some discussion about how the information about the trustee would be provided prior to the trustee’s appointment, and the conclusion was that the line would read “not yet appointed” and disclosed in connection with the notice of the 341 meeting.

Ken Gardner relayed the views of the bankruptcy clerks' advisory group that having separate 309 forms for subchapter V, rather than including the changes in the current forms, was preferable. The Advisory Committee agreed with that approach.

In new form 309E2, the reference to section 1141(d)(5) will be eliminated in line 11.

In the discussion of Form 425, Deb Miller raised the issue about where the computation of projected disposable income would appear. In the third statement on the first page, the form will be modified to replace the disclosure related to "aggregate average cash flow" with one of "projected disposable income" in conformity with Bankruptcy Code § 1191(c)(2). Judge Bernstein suggested a separate box for a subchapter V discharge in Article 9. This language will be circulated for approval after the meeting.

Ramona Elliot suggested that the Advisory Committee recommend no change to Rule 2003, because there is no reason to shorten the time period for holding 341 meetings in subchapter V cases. The Advisory Committee agreed. Judge Gorman spoke in favor of the amendment to Rule 3010 and Rule 3011 to allow for the trustee to dispose of small amounts, and the Advisory Committee agreed.

Deb Miller suggested that Rule 3002 should be amended to include subchapter V cases, and Rule 3003 should be amended to exclude subchapter V cases. The Advisory Committee was not prepared to consider all the implications of those suggestions at the meeting, and recognized that courts can set their own bar dates. If the trustees wish these suggestions to be pursued, the Advisory Committee will consider them at a future meeting.

Finally, there was a discussion of Judge Small's question about whether a subchapter V election can be made with respect to a case pending on the effective date of SBRA, and whether debtors can change their minds in the future. Professor Gibson recommended handling this by motion in individual cases, without any procedural rule changes. The Advisory Committee agreed.

The Advisory Committee approved all amended rules (other than Rule 2003) and forms with the changes and subject to the conditions noted above.

Because SBRA will take effect long before the rulemaking process can run its course, the amended rules will need to be issued initially as interim rules for adoption by each judicial district as local rules or by general order, and amended forms will need to be issued by the Advisory Committee subject to later approval by the Standing Committee and notice to the Judicial Conference.

Professor Gibson asked Scott Myers to explain the process by which the rules and forms might be added. The Advisory Committee would recommend to the Standing Committee a short public comment period, no longer than 30 days. The Advisory Committee and Standing Committee could consider final recommendations in November by email vote, and the Advisory Committee would then ask the Executive Committee of the Judicial Conference to allow the Standing Committee and the Advisory Committee to post and distribute to the courts the interim rules. With that approval, chief judges of the district courts and bankruptcy courts would be asked to adopt the interim rules as local rules or by general order to take effect on February 19, 2020.

The Advisory Committee would then start the process for approval of permanent rules, seeking publication of the interim rules, with any needed revisions, for public comment next August. Following the normal process would lead to an effective date of the rules of December 1, 2022.

Although the rule changes would be presented as interim rules, any form changes could be adopted by the Advisory Committee with later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee decided to seek comments on the proposed form amendments when it publishes the proposed rule amendments for comment in October. The Advisory Committee will then adopt the form changes, subject to later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee will seek comment on the form changes again in August 2020 when the proposed permanent rule changes are published, and it could revise the forms after that if appropriate.

The Advisory Committee will ask for authority from the Standing Committee to publish the changes for comment in October. The Advisory Committee will then make a final recommendation to the Standing Committee for the approval of interim rules in November.

6. Report by the Consumer Subcommittee

(A) Consideration of suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1

Professor Gibson provided the report. As was discussed at the spring 2019 meeting, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The working group met telephonically several times during the summer and presented a discussion draft of a revised Rule 3002.1 to the Subcommittee. The Subcommittee began its review and discussion of the draft during its August 20, 2019, conference call and will continue its work on the draft this fall.

In addition to considering the content of the suggestions and the language and organization of the draft, the Subcommittee is considering several overarching issues presented by the suggested amendments to Rule 3002.1. They include (1) whether requiring the delay of the effective date of a payment change due to an untimely notice is consistent with the Rules Enabling Act and the Bankruptcy Code; (2) whether Official Forms should be created to implement any new provisions; (3) which, if any, additional enforcement provisions should be proposed; and (4) whether the rule should be divided into two rules to make it easier to read.

The Subcommittee anticipates making a recommendation to the Advisory Committee at the spring 2020 meeting. There was some discussion about whether additional sanctions are needed under the circumstances described in the rule.

- (B) Consideration of suggestion 19-BK-F to amend Rule 3002(c)(6)(A) to expand the situations in which a creditor who doesn't get actual or constructive notice in reasonable time to file a proof of claim can seek an extension of the time to file

Professor Bartell provided the report. The Advisory Committee received a suggestion from George Weiss of Potomac, MD, 19-BK-F, with respect to Fed. R. Bankr. P. 3002(c)(6)(A). Rule 3002 requires creditors to file proofs of claim for their claims to be allowed, and specifies, in Rule 3002(c), the deadline for filing those proofs of claim in cases filed under chapter 7, 12 and 13. Rule 3002(c) then provides certain exceptions, including for domestic creditors, in clause (1), when "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)." Mr. Weiss noted that this would not permit an extension of the deadline for creditors who actually did not get notice either because they were omitted from the matrix or were listed with an improper address.

Professor Bartell noted that the most recent amendments to Rule 3002(c) were made in connection with the adoption of the national chapter 13 plan, and were published twice, in 2013 and 2014. There were extensive comments on the amendments, many of which made the same point that Mr. Weiss is making now. There is no indication that these comments were

considered at the time, probably because of the volume of comments on the national chapter 13 plan.

If the Rule was intended to extend the bar date for domestic creditors only if no list of creditors was filed at all, it will never have any practical impact. There are no reported cases in which the debtor failed to file a list of creditors under Rule 1007(a) and, as a result, the creditor obtained an extension for filing a proof of claim. The prior comments on proposed Rule 3002(c)(6), as well as the current suggestion of Mr. Weiss, suggest that the Advisory Committee should consider expanding the Rule.

There are two possible approaches. The first would be to allow an extension if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.” That is the standard now applicable to foreign creditors under Rule 3002(c)(2). The second would be to allow an extension only if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to include the creditor’s correct name or its proper address on the list of creditors’ names and addresses required by Rule 1007(a).” The Subcommittee made no recommendation as between the two approaches, but referred the matter to the Advisory Committee.

The Advisory Committee recommitted the matter to the Subcommittee to make a recommendation at the next meeting of the Advisory Committee.

7. Report by the Forms Subcommittee

- (A) Recommend amendments to Official Forms 122A-1, 122B, and 122C-1 lines 9 & 10 to implement the recently enacted Haven Act of 2019

Professor Bartell provided the report. The “Honoring American Veterans in Extreme Need Act of 2019” or the “HAVEN Act” was signed by the President on August 23. This new law amends the definition of “current monthly income” in Section 101(10) of the Code to exclude certain income in connection with a disability, combat-related injury or disability or death of a member of the uniformed services. It also limits retired pay excluded under the new provision.

This exclusion is added to the current exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of international terrorism or domestic terrorism. The current inclusion of pension income and exclusions for social security benefits and other payments are recognized in lines 9 and 10 of each of Form 122A-1, Form 122B and Form 122C-1 in the statement of current monthly income under chapter

7, 11 and 13, respectively. The Subcommittee originally approved the proposed versions of those forms with the amended language that appears in the agenda book, but Professor Catherine Struve proposed revisions to some of the language to make it more comprehensible. After discussions with the reporters, the version of the language contained in the version of Form 122A-1 distributed at the meeting was agreed to with one exception. Judge Goldgar suggested replacing the words “the recipient” with the word “you” in two places in line 9. The Advisory Committee agreed.

The Advisory Committee, upon motion and vote, agreed to approve the amendments to the forms and committee note without publication as conforming changes, pursuant to the authority that the Judicial Conference granted to the Advisory Committee in March 2016, subject to later approval by the Standing Committee and notice to the Judicial Conference.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger thanked the AO staff and reporters for their work which made the work of the Subcommittee easier. The Subcommittee members also came to the conference call prepared and ready to comment. The Subcommittee has had two lengthy meetings by conference call and Skype to look at the restyled bankruptcy rules in Part I after the style consultants and the reporters worked out many issues between them on prior drafts. The reporters recently received an initial draft of the restyled rules in Part II, and have provided their comments to the style consultants. The reporters await their second draft which will be the basis of further discussion with the Subcommittee.

Our most important goal in this process is attempting to ensure that the changes made to the language of the rules do not alter the substance of the rules. The Subcommittee remains open to new approaches suggested by the style consultants, such as making references to specific forms in the rules where appropriate. The Subcommittee is also trying to be deferential about matters of pure style.

In addition, if the Subcommittee notes a substantive change that should be made in any rule, it is keeping a list for consideration at a later time by the Advisory Committee.

The Subcommittee still needs to discuss how to handle phrases the style consultants wish to modify that are used in the Code or defined in the Code, such as “small business case,” “small business debtor,” “health care business,” and the like. The style consultants feel very strongly that these terms should be restyled in the rules. The Subcommittee is also attempting to reach a consensus on what terms and phrases are words of art or so-called sacred phrases that it believes

should be retained despite the fact that they are stylistically deficient, such as “meeting of creditors.”

Information Items

9. Consideration of conforming amendments to Rule 8003 and Official Form 417A

Professor Gibson provided a report on the status of the Subcommittees’ consideration of possible conforming amendments. The Advisory Committee on Appellate Rules has proposed amendments to FRAP 3(c) (Contents of the Notice of Appeal), which were published for public comment in August. The amendments are a response to a line of cases that treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment. The Committee’s goal in proposing the amendments is to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal. Along with this rule change, the Appellate Rules Committee is also proposing an amendment to Appellate Form 1, which would split the notice-of-appeal form into two forms.

The Subcommittees were asked to recommend to the Advisory Committee whether Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and the bankruptcy notice-of-appeal form—Official Form 417A—should similarly be amended.

Unlike FRAP 3(c), Rule 8003(a)(3) does not specify the contents of a notice of appeal. Instead it requires substantial conformity with Official Form 417A. The reporter’s research revealed only a few bankruptcy cases in which courts held that an appeal was limited to an order designated in the notice of appeal. Members of the Forms Subcommittee expressed concern that creating two notice-of-appeal forms for bankruptcy cases—one for appeals from judgments and the other for appeals from orders and decrees—would lead to confusion. It was pointed out that Rule 9001(7) defines “judgment” to mean “any appealable order,” so there does not seem to be a basis for creating separate notices of appeal. While the wording of existing Official Form 417A might be revised in a manner similar to the proposed amendments to FRAP 3(c)(1)(B), the Subcommittee decided to wait until the spring to consider such changes so that it would have the benefit of the comments submitted in response to the publication of the FRAP 3(c) amendments.

The Appeals Subcommittee agreed with the Forms Subcommittee’s decision to wait until spring – after it has seen the comments submitted on the FRAP amendments and learned the likely action to be taken by the Appellate Rules Advisory Committee -- to make a recommendation on whether to propose conforming amendments. Members of this

Subcommittee were not sure that the proposed amendments to Rule 8003 are needed for bankruptcy appeals.

The two subcommittees will make recommendations regarding any conforming changes to Rule 8003 and Official Form 417A at the spring meeting. Judge Campbell said the Advisory Committee should be careful about not taking action and potentially creating a trap for the unwary appealing in those jurisdictions that do not apply the merger rule.

10. Extension of the National Guard and Reservists Act of 2008

Professor Gibson provided a report.

In 2008 Congress enacted legislation that amended § 707(b)(2)(D) by adding a new subsection (ii) to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces.

In the years since the enactment of the 2008 legislation, Congress has extended the law's applicability on several occasions so that the exclusion has continued to remain in effect. On August 25 of this year, the President signed the National Guard and Reservists Debt Relief Extension Act of 2019, which makes the exclusion applicable to bankruptcy cases filed for four more years (15 years from the effective date of the 2008 act).

As a result, no changes are needed for Official Forms 122A-1 and 122A-1 Supp. The only changes needed for Interim Rule 1007-I are changes to its footnote to reference the most recent legislation and the extension conferred by that act. Those changes have been made.

11. Recommendations regarding suggestion 19-BK-D and 19-BK-J to amend Rule 7004(h)

Professor Bartell provided the report. George Weiss, an attorney in Potomac, MD, proposed in Suggestion 19-BK-D that Bankruptcy Rule 7004(h) should be amended by “importing the language of” Civil Rule 4(h) (permitting service of process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process) to replace the requirement that service be made on “an officer,” but retaining the requirement that such service be made by certified mail.

Several suggestions have been made in recent years requesting amendments to Rule 7004(h), most recently in 2017, 17-BK-E, which requested inclusion of credit unions in the Rule. Bankruptcy Rule 7004(h) was enacted verbatim by Congress in Section 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Because, under the Bankruptcy Rules

Enabling Act, 28 U.S.C. § 2075, bankruptcy rules cannot override statutory provisions, the Advisory Committee on Bankruptcy Rules lacks the authority to modify Rule 7004(h) in a manner that is inconsistent with federal statutes. Because the text of Rule 7004(h) is in fact statutory, an amendment that modifies that language in the manner suggested by Mr. Weiss is beyond the power of the Advisory Committee, whatever its substantive merits.

Mr. Weiss followed up his initial suggestion with two others. Rather than modifying the statutory language of the rule, he suggests first that the Advisory Committee supplement the rule with a new definition of “officer” to include a resident agent appointed to accept service of process. Although any insured depository institution can designate whomever it chooses as an “officer” of that institution, Professor Bartell expressed her view that it is not within the power of the Advisory Committee to interpret the term “officer” to include someone the institution has not so designated. She recommended no action be taken on this suggestion.

Mr. Weiss’s second additional suggestion is that the Advisory Committee add an explanation of what the rule means when it requires certified mail “addressed to an officer of the institution.” In particular, he would like the Advisory Committee to add a new provision in Rule 7004 specifying that any service made on an officer need not name the officer but rather can be addressed to “officer of [name of institution].”

This issue is not confined to Rule 7004(h); the same issue arises under the general service of process rule, Rule 7004(b)(3), with respect to service on corporations. Courts are divided on whether service is adequate if the officer is not named, both under Rule 7004(h) and under Rule 7004(b)(3). (Because Federal Rule of Civil Procedure 4(h)(1)(B) requires personal service, the issue does not arise outside of the bankruptcy context.)

This suggestion has not been considered by any subcommittee. The Advisory Committee saw some merit in pursuing this suggestion, and referred the suggestion to the Business Subcommittee to consider it and report back at the spring meeting.

12. Future meetings

The spring 2020 meeting will be in West Palm Beach, FL on April 2, 2020, and may be a two-day meeting. The fall 2020 meeting will be in Washington, D.C. on September 22, 2020.

13. New Business

There was no new business.

14. Adjournment

The meeting was adjourned at 1:35 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Forms Subcommittee
 - (A) Recommendation of no action regarding suggestion 19-BK-C to amend Official Form 309 to list addresses for the debtor for the prior three years

TAB 5

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TAB 5A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: January 6, 2020

1 **Introduction**

2 The Civil Rules Advisory Committee met at the Administrative Office of the United
3 States Courts on October 29, 2019, and at the same time held a hearing on the proposal to amend
4 Rule 7.1 that was published last August. Draft minutes of the meeting are attached at Tab B.

5 The Committee has no action items to report. The report presents only information items.

6 Part I includes several information items that remain on the Committee agenda for
7 ongoing work. The first two reflect the work of the Social Security Disability Review
8 Subcommittee and the Multidistrict Litigation Subcommittee.

9 Further ongoing subjects include two matters addressed in the Civil Rules report to the
10 Standing Committee last June: (1) service by the U.S. Marshals Service for an *in forma pauperis*
11 plaintiff; and (2) the effect of consolidating originally independent actions on finality for appeal.

12 A new subject that will carry forward on the Civil Rules agenda is reconsideration of the
13 deadline for electronic filing. This subject is being considered by a joint committee representing
14 the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

15 Another new subject added to the agenda is whether to amend Rule 12(a)(2) and possibly
16 (3) to include recognition of statutes that set different filing times. Rule 12(a)(1) includes such an
17 exception.

18 Part II briefly describes other topics that were considered and removed from the agenda.

19 I. Information Items

20 A. Social Security Review Actions

21 *Introduction*

22 The Social Security Review Subcommittee was appointed to consider a proposal that
23 Enabling Act rules should be adopted to govern district court review of Social Security
24 Administration decisions under 28 U.S.C. § 405(g). A brief reminder of the origins of this project
25 is provided below.

26 The subcommittee and committee believe that the time has come to confront, if not to
27 entirely resolve, the question whether this project should be pursued to the point of polishing
28 proposed rule text for publication. The subcommittee has worked diligently for two years,
29 gathering information from many sources. Regular conversations have been had with
30 representatives of the Social Security Administration, the National Organization of Social
31 Security Claimants Representatives, and the American Association for Justice. A meeting with
32 representatives of those groups and of the Administrative Conference of the United States was
33 held at the beginning of the work, and a similar meeting was held last June. The Department of
34 Justice has been consulted and has provided its views. Advice has been gathered from
35 representative magistrate judges, and further advice is likely to be sought from them. Further
36 insight is provided by experience in districts that have local rules similar to the subcommittee
37 drafts.

38 All of this work has led the subcommittee to believe that it has learned about as much as
39 can presently be learned from experts who are closely engaged with social security review
40 actions. Current rules drafts can be refined further and polished, but the core is likely to remain.
41 Before undertaking that work, it is important to engage in a searching discussion of the
42 challenges that confront any proposal to adopt Enabling Act rules that focus on a specific area of
43 substantive law. The one word most often used to express these questions is found in the
44 tradition that the rules must be transsubstantive. The subcommittee and committee have grappled
45 repeatedly with the competing considerations that bear on these questions in the specific context

46 of § 405(g) actions. Without reaching any final determination, the Committee has directed the
47 subcommittee to carry on with its work, looking both at a new rule or rules to be incorporated
48 directly into the body of the Civil Rules and at similar provisions framed as a new set of
49 Supplemental Rules.

50 This report seeks further discussion and advice on the transsubstantivity question. The
51 attached drafts illustrate alternative approaches to framing a new rule. One is framed as a new
52 Civil Rule 71.2. The other is framed as a new set of Supplemental Rules for 42 U.S.C. § 405(g)
53 Review Actions. Discussion of these drafts will be helpful if time allows, but the initial focus
54 should be on transsubstantivity.

55 The next section provides a reminder of the origins of this project. The following section
56 attempts to develop the general issues posed by transsubstantivity through exploring the issues
57 specific to § 405(g) social security review actions.

58 This project serves modest ambitions. The goal is to determine whether uniform national
59 rules can be developed to meet the hopes of the Administrative Conference of the United States
60 and SSA for improved district-court procedures. Improved procedures in individual review
61 actions might, by reducing burdens on SSA’s legal staff, achieve some quite modest
62 opportunities to improve SSA’s administrative procedures. But no one believes that a better
63 judicial review process will have any significant effect on the problems that beset administrative
64 review of individual claims. The volume of claims that reach the administrative law judge stage
65 is staggering. The corps of administrative law judges is designed to handle a far smaller number
66 of claims. One consequence is that the rate of judicial remands for further administrative
67 proceedings, although greatly variable, runs from a bottom range that seems high to a top range
68 that is truly troubling. Amelioration of these problems must be sought elsewhere, not in the Civil
69 Rules. That said, whatever prospect there may be that improved district court procedures could
70 reduce the burden on SSA attorneys, the subcommittee’s work has confirmed that the Civil Rules
71 may not provide the most effective framework for what is essentially appellate review of SSA
72 decisions.

73 *The Background*

74 The background that led to development of draft rules for § 405(g) social security review
75 cases can be summarized as follows:

76 At the end of 2016 the Administrative Conference of the United States recommended that
77 “the Judicial Conference of the United States develop special procedural rules for cases under the
78 Social Security Act in which an individual seeks district court review” under § 405(g). The
79 recommendation grew out of a detailed study of district-court practices, Jonah Gelbach & David
80 Marcus, *A Study of Social Security Litigation in the Federal Courts* (report to the Administrative
81 Conference)(July 28, 2016). The study showed wide variations in practice, and suggested that

82 some local practices may not be as effective as others.

83 SSA has strongly supported the suggestion that uniform national rules should be adopted.

84 The recommendation that the Judicial Conference develop rules was assigned to the Civil
85 Rules Advisory Committee.

86 The draft rule reflects the fact that § 405(g) cases are appeals, not ordinary civil actions.
87 The case is usually decided on the administrative record, as it may be expanded on a remand for
88 further consideration. Although district courts entertain other forms of actions for review of
89 administrative action, often on an administrative record, Social Security cases are distinctive.
90 There are a great many of them, averaging between 17,000 and 18,000 actions a year, and
91 accounting for 7% to 8% of the federal civil docket. These features account for the early decision
92 to work on a rule aimed only at Social Security review, not a more general rule for district court
93 review of administrative actions.

94 The appellate character of Social Security review actions ordinarily displaces most of the
95 Civil Rules and affects the operation of others. The draft rule reflects this belief. Little purpose is
96 served by detailed pleading of the arguments that the record lacks substantial evidence to support
97 the Commissioner's decision, or that the decision is wrong as a matter of law. Those arguments
98 are more efficiently and effectively developed in briefs. So too summary judgment, although
99 often used as a convenient vehicle for framing the arguments, may prove misleading. The
100 administrative record provides the basis for decision, not the procedures of Rule 56(c). If the
101 Commissioner's decision meets the substantial evidence threshold, summary judgment is granted
102 even though the decision could go either way on the administrative record. And discovery is
103 almost never involved.

104 Drafting a potential rule, however, is complicated by the experience that in a small
105 fraction of § 405(g) cases there may be an occasion for discovery. It is even possible that a class
106 action may be framed that rests in part on § 405(g). Beyond those rare cases, a great many of the
107 Civil Rules remain important to govern such matters as filing, notices, docketing, motions, and
108 so on.

109 These competing considerations account for the basic applicability provision that
110 introduces draft Rule 71.2: "These rules govern * * *." The Civil Rules apply, "except that in an
111 action that presents only an individual claim these procedures apply * * *." This scope provision
112 is critical. The simplified, appeal-like procedures that follow will be all that is required for
113 efficient disposition of the vast majority of § 405(g) cases that present only a challenge to the
114 Commissioner's final decision on the administrative record. The small number of cases that go
115 beyond this limit are governed by the general Civil Rules without regard to the special Social
116 Security review provisions. The scope provision in draft Supplemental Rule 1 does the same job,
117 in terms that may be easier to follow.

118 A simplified complaint satisfies Rule 8(a), although a claimant who wishes to plead in
119 greater detail may do so. The administrative record and any Rule 8(c) affirmative defenses
120 constitute the answer. Rule 8(b) does not apply, relieving the Commissioner of the obligation to
121 respond to the allegations in the complaint, although here too the Commissioner is free to do so.
122 Service on the Commissioner is made by the court by transmitting a notice of electronic filing, a
123 practice that has been adopted in some districts with great success. Motion practice is similar to
124 general motion practice; many earlier drafts included separate provisions for motions to remand,
125 particularly “voluntary remands,” but in the end they seemed to accomplish nothing more than to
126 recite the three separate remand provisions found in sentences four and six of § 405(g).

127 In many ways the central feature of the draft rule is the subdivision (d) provision for
128 presenting the case through the briefs. That is how an appeal is effectively presented. Several
129 drafts required the claimant to file a motion for relief along with the opening brief, as a formal
130 way of framing the case and as a useful docket event. The current drafts omit the motion
131 requirement as unnecessary, relying on the brief alone to frame and explain the request for relief.

132 It may be useful to note two proposals that were considered and eventually abandoned.
133 One would have set page limits for the briefs. The other would have ventured into the thicket of
134 motions for attorney fees. Page limits could be set readily enough, but it may be better to leave
135 that matter to local practice. The attorney-fee issues are complex, and there is a risk that rule text
136 might trespass beyond procedure into the realm of substance.

137 *Transsubstantivity Concerns*

138 The subcommittee does not believe that further work will significantly improve draft
139 Rule 71.2, either in overall approach or in detailed implementation. The alternative Supplemental
140 Rules draft will likely benefit from additional style work, but the substance is meant to be the
141 same as Rule 71.2. That assumption sets the foundation for exploring the advantages of
142 establishing a uniform national practice for § 405(g) review cases in one form or the other. The
143 advantages must be weighed against the risks of adopting a rule (or rules) for a single substantive
144 subject.

145 Uniform national procedures are inherently important. Uniformity is the central purpose
146 of the Rules Enabling Act. Uniformity is why local rules must be consistent with national rules.

147 The Administrative Conference and SSA believe that additional practical reasons make it
148 important to establish a nationally uniform core procedure for § 405(g) review actions. At least
149 62 districts have local rules for social security review actions. Standing orders add to the variety,
150 and individual judges may have individual practices. This diversity of practices imposes
151 substantial costs on SSA, which points out that many lawyer years could be freed up by saving
152 even an average of one hour of SSA lawyer time in the 17,000 to 18,000 § 405(g) cases brought
153 to the district courts every year.

154 The costs imposed by local practices are not limited to the need to remain current on a
155 wide range of diverse practices. Added costs arise from local practices that seem unproductive.
156 Nine districts, for example, require the claimant and SSA to produce a joint statement of facts, a
157 practice said to require a great deal of time and to yield little or no benefit for the parties. As
158 noted above, Rule 56 is often used to establish the framework for presenting the case for
159 decision. This practice can be beneficial if it is used to produce competing designations of the
160 parts of the administrative record that support the parties' positions, much as designations of the
161 record are required in an appellate brief. But it can lead to confusion if other parts of Rule 56 are
162 invoked, and would lead to fundamental error if the summary-judgment standard for decision
163 were to displace the § 405(g) substantive evidence standard.

164 The arguments for a uniform national rule advanced by the Administrative Conference
165 and SSA deserve careful attention.

166 The counter arguments begin with a direct challenge to the need for uniformity in the
167 Civil Rules generally. The national rules are supplemented across the country by local rules,
168 standing orders, individual docket practices, and the like. A lawyer practicing across districts
169 must become familiar with the local practices and adhere to them. Wide differences in local
170 practices may reflect significant differences in local conditions. Claimants' representatives make
171 this point specifically for social security review cases, and add a further argument that claimants
172 are better served by adhering to practices that please local judges. A judge who must discard
173 favored practices may be less efficient when forced to operate under a new national practice. And
174 local practices are hardy things — whether viewed as flowers or weeds, a new national rule may
175 trim them but will not eradicate them. Even with a uniform national rule, there will undoubtedly
176 be variations in local practice by rules or standing orders.

177 The entrenched tradition of transsubstantivity presents a more significant challenge to
178 using the Rules Enabling Act to establish a uniform national rule that applies only to social
179 security review actions. Section 2072(a) of Title 28 provides: "The Supreme Court shall have the
180 power to prescribe *general* rules of practice and procedure * * * for cases in the United States
181 district courts * * *." Section 2072(b) admonishes: "Such rules shall not abridge, enlarge or
182 modify any substantive right." Does a social-security-only rule qualify as a "general" rule?
183 Would it create an uncontrollable risk of abridging, enlarging, or modifying substantive rights
184 created by the Social Security Act?

185 Earlier discussions have looked for examples of substance-specific rules. Perhaps the
186 clearest example is Supplemental Rule G, which "governs a forfeiture action in rem arising from
187 a federal statute." Rule 71.1 applies to "proceedings to condemn real and personal property by
188 eminent domain." Rule 5.2 establishes limits on remote access to court files in social security and
189 immigration proceedings. These two Civil Rules, however, are narrow. Rule 5.2 does no more
190 than recognize the particular risks to privacy from electronic access to court records that include
191 intense amounts of personal individual information. Rule 71.1 qualifies the general rules only in

192 specific and limited ways, and applies to condemnation actions under any statute that brings the
193 action to the district court. Supplemental Rules are established for admiralty and maritime cases,
194 § 2254 proceedings, and § 2255 proceedings. Like Supplemental Rule G, these rules govern
195 broadly, but all of them invoke the Civil Rules at least in part.

196 None of these examples conclusively answer concerns about the substance-specific
197 character of a social security review rule. The present draft, and any other draft that seems likely
198 to respond to the proponents' arguments, is more intensely focused on a single substantive statute
199 than any of the analogies, with the possible exception of Supplemental Rule G. That focus
200 intensifies abstract concerns about the limits of a "general" rule of practice and procedure.

201 Practical interests add to doubts about developing a substance-specific rule. Two years of
202 hard work have demonstrated the many twists of social security law that must be reckoned with
203 in framing a rule. A proposal to include a procedure for seeking attorney fees for services in the
204 district court provides an example that has been omitted from the outset. Many misadventures
205 have been identified and set to rights. Many detailed provisions have been pared away, largely for
206 fear of substantive entanglement. What remains is modest. But it is difficult to be confident that
207 the subcommittee has been able to identify and adapt to all of the most important substantive
208 elements and to anticipate the procedures that best accommodate those elements. Expert advice
209 has been offered from many quarters, but risks remain.

210 At least one more concern gives pause. The competing interests affected by a narrow
211 substance-specific rule may be more clearly drawn than the interests affected by transsubstantive
212 rules. Any rule that is adopted may inadvertently favor one set of interests over another, and even
213 if it achieves a scrupulously neutral balance is likely to be perceived as the product of favoritism
214 by at least one, and perhaps all, sides. Many claimants in fact have opposed successive drafts
215 because they perceive that a rule would advance SSA interests. Indeed, at the outset this project
216 was urged in large part to address inefficiencies that impact SSA. And it may be wondered how
217 far it is appropriate to address through rulemaking SSA needs that arise from inadequate staffing
218 that results from inadequate funding.

219 A final concern is that adopting even one purely substance-specific rule will generate
220 increased pressures to adopt others. Arguments will be made that one or another substantive
221 areas presents needs for specific uniform rules as great as social security review, if not greater.
222 One breach makes it impossible to say such rules are never adopted. Resistance can be bolstered
223 by relying on the distinction between private interest groups seeking private advantage and an
224 important governmental institution that seeks better procedures for all parties. And the
225 Committees are constituted to resist such pressures, but informed resistance takes time away
226 from other projects.

227 The tradition of transsubstantivity, bolstered by these concerns, has great force. But the
228 pragmatic concerns supporting a social-security review rule remain. On this view, the general

229 Civil Rules have been continually revised to address problems presented by a small subset of
230 troublesome cases. The general run of federal cases may not be well served by general rules
231 shaped to accommodate the cases with the highest monetary or public policy values, the deepest
232 level of aggressive advocacy, the most sweeping opportunities for weapons of mass discovery,
233 and so on. The pressures that arise from specific categories of litigation might better be addressed
234 by specific sets of rules, if only wisdom enough can be gained.

235 These tensions have been recognized from the beginning of the subcommittee’s mission.
236 A more broadly transsubstantive approach is possible, looking to a new rule that would apply to
237 all administrative review actions in the district courts. That would, however, be a new and very
238 broad undertaking. The subcommittee has not explored this alternative to the point of seeking
239 detailed information on the varieties and total number of all administrative review actions. Many
240 of them are brought under the Administrative Procedure Act, but even those involve a wide range
241 of underlying substantive statutes. Several concerns have counseled hesitation. The sheer variety
242 of agencies, substantive law, and administrative procedure presents far more diverse needs than
243 do single-claimant social security actions for what is in effect appellate review on a completed
244 administrative record. Nor has any other specific substantive area been identified that produces
245 anything that remotely approaches the sheer volume of § 405(g) cases. Concerns about
246 transsubstantivity would not be assuaged by expanding this project to encompass all actions for
247 administrative review in a district court, or even a carefully curated set of these actions. Either
248 form of § 405(g) rules — Civil Rule 71.2 or Supplemental Rules — is modest. Either addresses a
249 category of cases that lie at the extreme end of the spectrum that blends appellate procedure with
250 more general litigation procedure.

251 Concerns about adopting substance-specific rules may bear on the choice between
252 lodging § 405(g) review in the Civil Rules or in a new set of supplemental rules. The earliest
253 drafts were framed as a set of supplemental rules. The subcommittee later chose to locate its draft
254 within the Civil Rules for at least two reasons. First, the general rules continue to govern all but a
255 few of the ways in which § 405(g) cases progress through the district courts. Second, only a few
256 — although significant — departures are made. The special rules displace formal service of
257 summons and complaint on the Commissioner, establish reduced thresholds for pleading, address
258 some details of motion practice, and establish an essentially appellate procedure for submitting
259 the case for decision on the briefs. It was feared that requiring cross-reference from supplemental
260 rules to the main body of Civil Rules might impose unnecessary complications. Rule 71.1
261 provides a reassuring model. These practical advantages initially overcame the uncertain
262 arguments whether supplemental rules or a new Civil Rule are more likely to invite proposals for
263 additional substance-specific rules. But more recent committee and subcommittee deliberations
264 suggested that the Supplemental Rules format could facilitate clearer exposition, particularly for
265 the all-important scope provision. The Committee has not had an opportunity to review the
266 Supplemental Rules draft, which emerged from subcommittee work after the October 2019
267 committee meeting, but the subcommittee draft is a good illustration of the possible advantages
268 of this format.

269 Further discussion of transsubstantivity at the October 2019 meeting is reflected at pages
270 3-11 of the draft minutes [pages 337-345 of this agenda book]. The discussion reflects the
271 elusiveness of the concepts that come into play and compete for judgment. Disagreements remain
272 about the advantages that might be gained by any § 405(g) review rule. The Administrative
273 Conference and SSA continue to be strong advocates. Organizations that speak for claimants'
274 representatives report reservations, partly by doubting the need for national uniformity and partly
275 by expressing comfort in a status quo that enables different judges to adopt congenial particular
276 procedures. Judges that have offered advice recognize that the general Civil Rules do not work
277 well in this setting, and that the rule drafts reflect the approaches that many have crafted to adapt
278 the general rules to the needs of § 405(g) review. The Department of Justice has propounded a
279 model local rule that is closely similar to the rule drafts, but fears that lodging § 405(g) review
280 provisions in national rules will encourage private interest groups to press for other substance-
281 specific rules. Primarily for that reason, DOJ does not support separate rules for social security
282 review cases.

283 The advantages to be gained by nationally uniform § 405(g) review procedures, however
284 certain or uncertain, must be balanced against the reasons for reluctance to adopt any substance-
285 specific rules. The committee was not confident about evaluating either side of this equation at
286 the October 2019 meeting. The difficulty of these evaluations provides the reasons for seeking
287 further guidance now. The subcommittee has debated the same concerns in two conference calls
288 after the October discussion and continues to believe that discussion in the Standing Committee
289 will help in reaching a recommendation whether to pursue this project to the point of
290 recommending rules for publication. The rules drafts have advanced to a point that supports
291 thorough exploration of the concerns that pit the opportunity to improve practice in an important
292 area against the fear that starting to open the field to substance-specific rules will bring pressures
293 to open broader vistas of special-interest rules. This April, the Advisory Committee should be in
294 a position to decide on a recommendation, whether to discontinue work on social-security review
295 rules or to recommend a proposed rule or supplemental rules for publication. It will benefit from
296 further discussion of the transsubstantivity concerns by the Standing Committee.

297 **SUPPLEMENTAL RULES FOR REVIEW ACTIONS UNDER 42 U.S.C. § 405(g)**

298 **RULE 1. REVIEW OF SOCIAL SECURITY DECISIONS UNDER 42 U.S.C. § 405(g)**

299 (a) **APPLICABILITY OF THESE RULES.** These rules govern an action under 42 U.S.C. §
300 405(g) for review on the record of a final decision of the Commissioner of Social Security that
301 presents only an individual claim.

302 (b) **FEDERAL RULES OF CIVIL PROCEDURE.** The Federal Rules of Civil Procedure also
303 apply to a proceeding under these rules, except to the extent that they are inconsistent with these
304 rules.

305 **RULE 2. COMPLAINT**

306 (a) **COMMENCING ACTION.** A civil action for review under these rules is commenced
307 by filing a complaint.

308 (b) **CONTENTS.**

309 (1) The complaint must:

310 (A) state that the action is brought under § 405(g) and
311 identify the final decision to be reviewed;

312 (B) state
313 (i) the name, the county of residence, and the
314 last four digits of the social security number
315 of the person for whom benefits are claimed,
316 and

317 (ii) the name and last four digits of the social
318 security number of the person on whose
319 wage record benefits are claimed; and

320 (C) state the type of benefits claimed.

321 (2) The complaint may include a short and plain statement of the
322 grounds for review.

323 **RULE 3. SERVICE**

324 The court must notify the Commissioner of the commencement of the action by
325 transmitting a Notice of Electronic Filing to the appropriate office within the Social Security
326 Administration's Office of General Counsel and to the United States Attorney for the district [in
327 which the action is filed]. The plaintiff need not serve a summons and complaint under [Federal
328 Rule of] Civil [Procedure] Rule 4.

329

330 **RULE 4. ANSWER; MOTIONS; TIME**

331 (a) An answer must be served on the plaintiff within 60 days after notice of the action
332 is given under Rule 3.

333 (b) An answer may be limited to a certified copy of the administrative record, and any
334 affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

335 (c) A motion under Civil Rule 12 must be made within 60 days after notice of the

336 action is given under Rule 3.
337 (d) Unless the court sets a different time, serving a motion under Rule 4(c) alters the
338 time to answer as provided by Civil Rule 12(a)(4).

339 **RULE 5. PRESENTING THE ACTION FOR DECISION**

340 The action is presented for decision by the parties' briefs.

341 **RULE 6. PLAINTIFF'S BRIEF**

342 The plaintiff must serve on the Commissioner a brief for the requested relief within 30
343 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule
344 4(c), whichever is later. The brief must support arguments of fact by citations to particular parts
345 of the record.

346 **RULE 7. COMMISSIONER'S BRIEF**

347 The Commissioner must serve a brief on the plaintiff within 30 days after service of the
348 plaintiff's brief. The brief must support arguments of fact by citations to particular parts of the
349 record.

350 **RULE 8. REPLY BRIEF**

351 The plaintiff may, within 14 days after service of the Commissioner's brief, serve a reply
352 brief on the Commissioner.

353 **Committee Note**

354 Actions to review a final decision of the Commissioner of Social Security under 42
355 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however,
356 establish a simplified procedure that recognizes the essentially appellate character of actions that
357 seek only review of an individual's claims on a single administrative record. An action is brought
358 under § 405(g) for this purpose if it is brought under another statute that explicitly provides for
359 review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-
360 114(a)(3)(B)(iv)(III). Most actions under § 405(g) are brought by an individual. But the plaintiff
361 may be a representative or someone whose claim derives from a worker.

362 The Civil Rules continue to apply to actions for review under § 405(g) except to the
363 extent that the Civil Rules are inconsistent with these Supplemental Rules.

364
365 Some actions may plead a claim for review under § 405(g) but also join more than one
366 plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such
367 actions fall outside these Supplemental Rules and are governed by the Civil Rules alone.

368 These Supplemental Rules establish a uniform procedure for pleading and serving the
369 complaint; for answering and making motions under Rule 12; and for presenting the action for

370 decision by briefs. These procedures reflect the ways in which a civil action under § 405(g)
371 resembles an appeal or a petition for review of administrative action filed directly in a court of
372 appeals.

373 Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil
374 action be commenced by filing a complaint. In an action that seeks only review on the
375 administrative record, however, the complaint is similar to a notice of appeal. Simplified
376 pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the
377 action as one brought under § 405(g). The elements of the claim for review are adequately
378 pleaded under Rule 2(b)(1). Failure to plead all the matters described in Rule 2(b)(1), moreover,
379 should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff who
380 wishes to plead more than Rule 2(b)(1) requires to do so.

381 Rule 3 provides a means for giving notice of the action that supersedes Civil Rule 4(i)(2).
382 The Notice of Electronic Filing sent by the court suffices, so long as it provides a means of
383 electronic access to the complaint. Notice to the Commissioner is sent to the appropriate regional
384 office. The plaintiff need not serve a summons and complaint under Civil Rule 4.

385 Rule 4's provisions for the answer build from this part of § 405(g): "As part of the
386 Commissioner's answer the Commissioner of Social Security shall file a certified copy of the
387 transcript of the record including the evidence upon which the findings and decision complained
388 of are made." In addition to filing the record, the Commissioner must plead any affirmative
389 defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, but the Commissioner is free to
390 answer any allegations that the Commissioner may wish to address in the pleadings.

391 The time to answer is set at 60 days after notice of the action is given under Rule 3.
392 Likewise, the time to file a motion under Civil Rule 12 is set at 60 days after notice of the action
393 is given under Rule 3. If a timely motion is made under Civil Rule 12, the time to answer is
394 governed by Civil Rule 12(a)(4) unless the court sets a different time.

395 Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review
396 action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action
397 for decision on the merits. This procedure displaces summary judgment or such devices as a joint
398 statement of facts as the means of review on the administrative record.

399 Under Rule 6, the plaintiff's brief is similar to an appellate brief, citing to the parts of the
400 administrative record that support an argument that the final decision is not supported by
401 substantial evidence. Under Rule 7, the Commissioner responds in like form. Rule 8 allows a
402 reply brief.

403 Rules 6, 7, and 8 set the times for serving the briefs: 30 days after the answer is filed or
404 30 days after the court disposes of all motions filed under Rule 4(b) for the plaintiff's brief, 30

405 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service
406 of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.

407

ALTERNATIVE: CIVIL RULE 71.2

408 Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]

409 APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g)
410 for review on the record of a final decision of the Commissioner of Social Security, except that in
411 an action that presents only an individual claim these procedures apply:

412 (a) COMPLAINT. The complaint satisfies Rule 8(a) if it:

413 (1) States that the action is brought under § 405(g) and identifies the
414 final decision to be reviewed;

415 (2) States:

416 (A) the name, the county of residence, and the last four digits of
417 the social security number of the person for whom benefits
418 are claimed, and

419

420 (B) the name and last four digits of the social security number
421 of the person on whose wage record benefits are claimed;
422 and

423 (3) Identifies the type of benefits claimed.

424 (b) SERVICE. The court must notify the Commissioner of the commencement of the
425 action by transmitting a Notice of Electronic Filing to the appropriate office
426 within the Social Security Administration’s Office of General Counsel and to the
427 United States Attorney for the district [in which the action is filed]. The plaintiff
428 need not serve a summons and complaint under Rule 4.

429

430 (c) ANSWER; MOTIONS; TIME.

431 (1) An answer must be served on the plaintiff within 60 days after
432 notice of the action is given under Rule 71.2(b).

433 (2) An answer may be limited to a certified copy of the administrative
434 record, and any affirmative defenses under Rule 8(c). Rule 8(b)
435 does not apply.

436 (3) A motion under Rule 12 must be made within 60 days after notice
437 of the action is given under Rule 71.2(b).

438 (4) Unless the court sets a different time, serving a motion under Rule
439 71.2(c)(3) alters the time to answer as provided by Rule 12(a)(4).

- 440 (d) BRIEFING.
- 441 (1) *Plaintiff's Brief.* The plaintiff must serve on the Commissioner a
442 brief for the requested relief within 30 days after the answer is filed
443 or 30 days after the court disposes of all motions filed under Rule
444 71.2(c)(3), whichever is later. The brief must support arguments of
445 fact by citations to particular parts of the record.
- 446 (2) *Commissioner's Brief.* The Commissioner must serve a brief on the
447 plaintiff within 30 days after service of the plaintiff's brief. The
448 brief must support arguments of fact by citations to particular parts
449 of the record.
- 450 (3) *Reply Brief.* The plaintiff may, within 14 days after service of the
451 Commissioner's brief, serve a reply brief on the Commissioner.

452 **Committee Note**

453 Actions to review a final decision of the Commissioner of Social Security under 42
454 U.S.C. § 405(g) are generally governed by the Civil Rules. This new Rule 71.2, however,
455 establishes a simplified procedure that recognizes the essentially appellate character of actions
456 that seek only review of claims of an individual on a single administrative record. An action is
457 brought under § 405(g) for this purpose if it is brought under another statute that explicitly
458 provides for review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and
459 1395w-114(a)(3)(B)(iv)(III). Most actions under § 405(g) are brought by an individual. But the
460 plaintiff may be a representative or someone whose claim derives from a worker.

461 All actions for review under § 405(g) are governed by all the Civil Rules. Application of
462 the Civil Rules is modified only by applying Rule 71.2 to the matters it covers in an action
463 brought by a single plaintiff for relief on a single administrative record.

464
465 Some actions may plead a claim for review under § 405(g) but also join more than one
466 plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such
467 actions fall outside Rule 71.2 and are governed by the other Civil Rules alone.

468 Rules 71.2(a) through (d) establish a uniform procedure for pleading and serving the
469 complaint in an action to which they apply; for answering and making motions under Rule 12(b);
470 and for presenting the action for decision through briefs. Rule 71.2 supersedes the general Civil
471 Rules in only a few ways. The Rule 71.2(d) procedure for presenting the action for decision
472 displaces summary judgment or such devices as a joint statement of facts as the means of review
473 on the administrative record. But for the most part, there is no conflict between Rule 71.2 and the
474 general rules. Rule 9(a)(1)(B) is an example — a plaintiff suing in a representative capacity need
475 not plead authority to sue in a representative capacity. And a plaintiff remains free to plead more
476 than the elements listed in Rule 71.2 (a), while the Commissioner may choose to respond to the
477 plaintiff's allegations even though Rule 71.2(c)(2) provides that Rule 8(b) does not apply.

478 The relationship between Rule 71.2 and the general Civil Rules rests on Section 405(g),
479 which provides for review of a final decision “by a civil action.” Rule 3 directs that a civil action
480 be commenced by filing a complaint. In an action that seeks only review on the administrative
481 record, however, the complaint is similar to a notice of appeal. The elements specified in Rule
482 71.2(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under §
483 405(g). Failure to plead all the matters described in Rule 71.2(a) should be cured by leave to
484 amend, not dismissal. A plaintiff who wishes to plead more than Rule 71.2(a) provides is free to
485 do so.

486 Rule 71.2(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2).
487 The Notice of Electronic Filing sent by the court suffices, so long as it provides a means of
488 electronic access to the complaint. Notice to the Commissioner is sent to the appropriate regional
489 office. The plaintiff need not serve a summons and complaint under Rule 4.

490 Rule 71.2(c)(2) builds from this part of § 405(g): “As part of the Commissioner’s answer
491 the Commissioner of Social Security shall file a certified copy of the transcript of the record
492 including the evidence upon which the findings and decision complained of are made.” In
493 addition to filing the record, the Commissioner must plead any affirmative defenses under Rule
494 8(c). Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the
495 Commissioner may wish to address in the pleadings.

496 The time to answer is set at 60 days after notice of the action is given under Rule 71.2(b).
497 The time to file a motion under Rule 12 is also set at 60 days after notice of the action is given
498 under Rule 71.2(b). If a timely motion is made under Rule 12, the time to answer is governed by
499 Rule 12(a)(4) unless the court sets a different time.

500 Rule 71.2(d) addresses the procedure for bringing on for decision a § 405(g) review
501 action that is governed by Rule 71.2. The plaintiff serves a brief that is similar to an appellate
502 brief, citing to the parts of the administrative record that support an argument that the final
503 decision is not supported by substantial evidence. The Commissioner responds in like form. A
504 reply brief is allowed.

505 Rule 71.2(d)(1)-(3) sets the times for serving the briefs: 30 days after the answer is filed
506 or 30 days after the court disposes of all motions filed under Rule 71.2(c)(3) for the plaintiff’s
507 brief, 30 days after service of the plaintiff’s brief for the Commissioner’s brief, and 14 days after
508 service of the Commissioner’s brief for a reply brief. The court may revise these times when
509 appropriate.

510 **B. MDL Subcommittee**

511 Since the Standing Committee’s last meeting, the MDL Subcommittee has continued to
512 explore and gather information about the issues it has been considering. Besides subcommittee
513 conference calls, this activity has included attendance by members of the subcommittee at
514 various events focused on these issues.¹ As it has throughout the subcommittee’s work, the
515 Judicial Panel on Multidistrict Litigation has been very supportive and helpful.

516 In addition, the subcommittee has received an extensive research memorandum from the
517 Rules Law Clerk on experience under 28 U.S.C. § 1292(b) in MDL proceedings, as well as some
518 advice from Emery Lee of the FJC on data regarding such appellate review.

519 As before, this work is ongoing. Originally, the subcommittee’s focus included a number
520 of topics that have since been moved off the “front burner.”² At the Advisory Committee’s
521 October 2019 meeting, the subcommittee reported that it had concluded that issues regarding
522 third-party litigation funding (TPLF) did not seem particularly pronounced in relation to MDL
523 litigation. To the contrary, this sort of activity seems at least equally important in a broad range
524 of types of litigation. Accordingly, the subcommittee recommended suspending further work on
525 the possibility of developing an amendment idea directed toward TPLF in MDL litigation. The
526 full Advisory Committee approved that recommendation.

¹ These events have included the following:

American Association for Justice annual convention, San Diego, CA, July 27, 2019 — special session addressing issues under study by subcommittee.

UC Berkeley Law program on Ethics in Litigation Funding, Berkeley, CA, Sept. 10, 2019.

Emory Law Institute for Complex Litigation and Mass Claims conference on interlocutory appeal in MDL proceedings, Washington, D.C., Oct. 1, 2019.

ABA 25th Annual National Institute on Class Actions, Oct. 17-18, Nashville, TN. Subcommittee representatives were on a panel entitled “‘Top of the Charts’: Potential MDL Rule Changes and Their Effect on Your Practice.”

² Examples include adding specific references to “master complaints” in the rules; adopting a rule requiring that each plaintiff pay an individual filing fee; modifying Rule 20 to forbid joinder of multiple plaintiffs in situations where joinder might now be authorized; expanding initial disclosure requirements in certain MDL proceedings; authorizing MDL transferee courts to compel attendance at trial by party witnesses located beyond the subpoena power; and adopting particularized pleading requirements for certain claims asserted in MDL proceedings.

527 At the same time, the subcommittee’s work has shown that TPLF is a phenomenon of
528 growing importance, and also that it is evolving. Therefore, the subcommittee also
529 recommended that TPLF remain on the Advisory Committee’s agenda, and that it monitor
530 developments in TPLF. The question whether a rule change is appropriate to deal with these
531 developments therefore would remain under consideration. The Advisory Committee also
532 approved of this recommendation.

533 This report therefore updates the Standing Committee on the three areas that remain on
534 the MDL Subcommittee’s “front burner.”

535 (1) Early Vetting, PFS and DFS Requirements, and a “Census” of Claims: This topic
536 responds to what might be called the “Field of Dreams” problem — sometimes JPML
537 centralization of litigation is followed by the filing of a large number of new claims. “If you build
538 it, they will come.” It appears to the subcommittee that there has been a significant shift in the
539 positions of attorneys about how best to address these issues as subcommittee discussions have
540 also evolved.

541

542 One response was included in H.R. 985, the Fairness in Class Action Litigation Act,
543 passed by the House of Representatives in March 2017. That proposed legislation would have
544 required all personal injury claimants in MDL proceedings to submit evidentiary support for their
545 claims of exposure and injury within 45 days and require the court to rule on the sufficiency of
546 those submissions within 90 days after that. The Senate did not act on this proposed legislation,
547 and with the arrival of a new Congress in January 2019, it lapsed.

548 This legislation appeared to build on the plaintiff fact sheet (PFS) practice that had
549 emerged in many MDL personal-injury proceedings, calling for plaintiffs to provide certain
550 specifics and materials without formal discovery. FJC Research investigated the use of PFS
551 orders, and found that they were already used very frequently in larger MDL proceedings, and
552 used in virtually all of the “mega” MDL proceedings with more than 1,000 cases. In most of
553 those proceedings, defendant fact sheets (DFS) were also required, often calling for defendants to
554 provide information to the plaintiffs without the need for formal discovery.

555 One view of PFS and DFS practice is that it is an effective way to “jump start” discovery
556 in larger MDLs. Another view of this practice is that it enables early screening out of
557 unsupportable claims. Although to some extent plaintiffs’ counsel and defense counsel agreed
558 that methods of determining whether there were unsupportable claims might be desirable, there
559 was resistance to rules requiring plaintiffs to provide discovery before they were allowed to take
560 discovery. And the point was also made that, even if some proportion of the claims were not
561 supportable, the rest should be allowed to go forward without undue delay.

562 The FJC research also showed that PFS and DFS requirements, while often having
563 similarities from one MDL proceeding to another, were almost always tailored to the specific

564 MDL proceeding before the court. And that tailoring often took considerable time to complete.
565 Beyond that, some viewed the PFS and DFS requirements in some MDL proceedings as
566 excessive and overly demanding. These concerns made the prospect of drafting a rule for all or
567 certain MDL proceedings exceedingly challenging.

568 That challenge was compounded by the recurrent point made by experienced MDL
569 transferee judges that they needed flexibility in designing appropriate procedures for the cases
570 before them. One size would not likely fit all, the subcommittee was repeatedly told.

571 As these discussions proceeded, the views of the participants seemed to evolve. It might
572 even be that the subcommittee's attention served as a small catalyst to this evolution. In any
573 event, eventually the focus shifted somewhat. In place of reliance on PFS/DFS practice, the more
574 promising idea came to be known as a "census," an effort to gain some basic details on the
575 claims presented — *e.g.*, evidence of exposure to the product at issue — so as to permit an initial
576 assessment. This need not be a substitute for a PFS, but rather a beginning for an information
577 exchange that might later include a PFS and a DFS.

578 This census idea has been the focus of work since mid-2019. In October, Judge Orrick
579 (N.D. Cal.) directed counsel involved in the MDL proceeding *In re Juul Labs, Inc., Marketing,*
580 *Sales Practices, and Product Liability Litigation* (MDL 2913) to develop a plan to "generat[e] an
581 initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School,
582 who has organized several events attended by representatives of the MDL Subcommittee. For the
583 present, then, the subcommittee is awaiting further information about how this new method
584 works. Assuming it has promise, it may be that it is not really suitable to inclusion in a rule but
585 rather is a management technique on which the Judicial Panel could offer advice and instruction
586 to transferee judges.

587 (2) Interlocutory Review of Orders in MDL Proceedings: If the positions of the parties
588 have moved closer together in regard to the census idea described above, no similar confluence
589 has occurred with regard to facilitating interlocutory review of rulings by MDL transferee judges.

590 A starting point in the subcommittee's consideration of this issue was the provision in
591 H.R. 985 requiring courts of appeals to accept appeals of any order in an MDL proceeding if
592 review "may materially advance the ultimate termination of one or more of the civil actions in
593 the proceedings." Sometimes proponents of such a provision have urged that it be coupled with
594 some sort of directive for "expedited" appellate treatment.

595 The proponents of rules facilitating interlocutory review in MDL proceedings have urged
596 that orders in those cases may have much greater importance than orders in ordinary civil actions.
597 In particular, when orders effectively apply in a multitude of individual cases the importance of
598 interlocutory review increases appreciably. Moreover, proponents of expanded review cited
599 several recurrent critical issues — preemption and *Daubert* decisions on admissibility of expert

600 testimony, for example — that could resolve most or all cases in the MDL. As to these sorts of
601 “cross-cutting” issues, they contended, there was inequality of treatment: a victory by defendants
602 would often result in a final judgment that would permit plaintiffs to appeal, while a victory by
603 plaintiffs would not permit defendants to take an immediate appeal because the litigation would
604 continue.

605 Opponents of rule-based expansion of interlocutory review in MDL proceedings
606 emphasized that there are already multiple routes to appellate review, particularly under 28
607 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). Expanding review
608 would lead to a broad increase in appeals and produce major delays without any significant
609 benefit, particularly when the order was ultimately affirmed after extended proceedings in the
610 court of appeals. And, of course, the “inequality” of treatment complained of is a feature of our
611 system for all civil cases, not just MDLs.

612 Both proponents and opponents of rule amendments have submitted detailed reports on
613 the actual experience under § 1292(b) in MDL proceedings. The Rules Law Clerk has provided
614 an extensive report to the subcommittee on transferee judges’ decisions whether to certify issues
615 for appeal.

616 One concern the subcommittee had about whether § 1292(b) might not be suited to MDL
617 proceedings was that it authorizes a district court to certify an order for immediate appeal only
618 on finding that (i) there is a “controlling question of law” as to which (ii) “there is substantial
619 ground for difference of opinion” and (iii) that immediate review would “materially advance the
620 ultimate termination of the litigation.” These statutory criteria might not be suited to the sorts of
621 situations raised by the proponents of review. Some issues (*e.g.*, *Daubert* decisions) might not
622 present a “controlling question of law.” Immediate review might not, in sprawling MDL
623 proceedings, “materially advance the ultimate termination of the litigation.”

624 The Rules Law Clerk research did not disclose a significant number of instances in which
625 the issues cited by proponents of rulemaking were advanced under § 1292(b). Instead, a wide
626 variety of orders have prompted § 1292(b) requests in MDL proceedings. Moreover, judges
627 asked to certify orders in those proceedings do not suggest that the statutory standards constrain
628 their ability to grant certification if appropriate, although they scrupulously examine each factor
629 and frequently comment on their circuit’s receptivity to § 1292(b) appeals. No district judge, in
630 denying certification, has done so because of inflexibility of the statutory criteria. And given the
631 wide variety of issues actually presented as grounds for § 1292(b) review in MDL proceedings,
632 there may be at least some basis for worrying that efforts to obtain review might occur more
633 frequently and in regard to many kinds of orders beyond those cited by the proponents of
634 expanded opportunities for interlocutory review.

635 In sum, the research to date seems to support the following conclusions:

636 (1) There are not many § 1292(b) certifications in MDL proceedings.

637 (2) The reversal rate when review is granted is relatively low (about the same as in
638 civil cases generally).

639 (3) A substantial time (nearly two years) on average passes before the court of appeals
640 rules.³

641 (4) The courts of appeals (and district courts) appear to acknowledge that there may
642 be stronger reasons for allowing interlocutory review because MDL proceedings
643 are involved.

644 As reflected in the Advisory Committee report to the Standing Committee for its June
645 2019 meeting, during the May 2019 Emory event in Boston, the case for expanded review was
646 not convincingly made. Subsequently, on October 1, 2019, Emory hosted an all-day event for the
647 subcommittee in Washington, D.C., that provided a very thorough discussion and permitted
648 subcommittee members to get a clear picture of the competing views on this topic. It showed that
649 the proponents and opponents of change continue to disagree fundamentally, but also that the
650 discussion has evolved.

651 The proponents of expanding interlocutory review assert that in MDL mass tort litigation
652 defendants have found it difficult or impossible to obtain review of core legal issues such as
653 preemption until after a bellwether trial, and perhaps not even then if defendants win at trial. In
654 particular, in their view § 1292(b) does not work well because the statutory standard is too
655 confining and because it provides something like a “veto” to the district judge. The argument is
656 that this state of affairs denies defendants access to authoritative resolution of legal issues.

657 The response from the plaintiff side is that the final judgment rule is a key aspect of our
658 judicial system, and that § 1292(b) and Rule 54(b) provide safety valves for instances in which
659 interlocutory review is appropriate. From this perspective, the showing has not been made that

³ Prof. Steven Sachs, a member of the Appellate Rules Advisory Committee, has made an intriguing suggestion that a rule might provide that the district judge could indicate in a § 1292(b) certification that immediate review would only “materially advance the ultimate termination of the litigation” (in the statute’s current words) if the court of appeals handled the case on an “expedited” basis. This might support a rule that either leaves it entirely up to the court of appeals’ discretion whether to expedite review or limits the court of appeals’ discretion to granting review only if there will be expedited review. Such a limitation might unduly intrude into the court of appeals’ management of its own docket. Any such change might be limited to MDL proceedings. The MDL Subcommittee has begun to consider this idea.

660 these existing routes to interlocutory review fail in MDL litigation, or that MDL litigation is so
661 different from other litigation that it justifies a special appealability rule.

662 Although the two sides remain divided on these issues, it does seem that the views have
663 evolved. On at least some points, the participants in the Oct. 1 event appeared largely to agree:
664 (1) the goal is not to provide an appeal of right, but instead to enable the court of appeals (as
665 under Rule 23(f)) to decide in its discretion whether to accept the appeal; (2) the goal is not to
666 preclude the district judge from expressing views on whether an immediate appeal is justified,
667 perhaps in a manner like the certificate of appealability in habeas cases; (3) the focus is not on a
668 limited set of legal issues (*e.g.*, preemption, *Daubert* rulings) so long as the issues are important
669 to resolution of a significant number of cases; and (4) it is not certain whether any rule should be
670 limited only to some MDLs (*e.g.*, “mass tort” MDLs, or “mega” mass tort MDLs), but there is no
671 effort to expand it beyond MDL proceedings. Notwithstanding these areas of agreement, there
672 remains a fundamental disagreement on the need for a rule expanding access to interlocutory
673 appeal.

674 The subcommittee continues to work on these issues. It notes that a joint subcommittee of
675 the Civil and Appellate Advisory Committees is examining the possibility of recommending a
676 rule change in response to the Court’s decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018). In that
677 case, the Court held that when cases are consolidated for trial, judgment in one but not the other
678 is final for purposes of appeal even though there might be prudential reasons for deferring
679 appellate review until entry of a final judgment in the other consolidated case. In *Gelboim v.*
680 *Bank of America*, 135 S.Ct. 897 (2015), the Court earlier applied the same rule in an MDL
681 proceeding in which one of many cases subject to the MDL transfer reached final judgment
682 before any of the cases had been tried. Justice Ginsburg, writing for the Court in that 2015 case,
683 recognized that sometimes a “merger” of the consolidated cases might defer appealability.
684 Absent such a “merger” (which did not occur in the MDL proceeding before the Court), each
685 case in the MDL proceeding was separate for purposes of the final judgment rule.

686 The reason for mentioning the *Hall v. Hall* Subcommittee’s work is that it has been
687 considering whether a rule revision would be appropriate to defer appealability, somewhat the
688 obverse of the issue before the MDL Subcommittee, which has been urged to provide additional
689 avenues for interlocutory review even though final judgment has not been entered in any of the
690 consolidated actions. Judge Rosenberg, a member of the MDL Subcommittee, is Chair of the
691 *Hall v. Hall* Subcommittee.

692 (3) Settlement Review, Attorney’s Fees, and Common Benefit Funds: This may be the
693 toughest question the MDL Subcommittee faces, and it introduces the idea of trying to develop
694 for at least some MDL proceedings some judicial supervision regarding settlement like that
695 provided in Rule 23 for class actions.

696 The class action settlement review procedures were recently revised by amendments that
697 became effective on Dec. 1, 2018, which fortified and clarified the courts' approach to
698 determining whether to approve proposed settlements in class actions. Earlier, in 2003 Rule 23(e)
699 was expanded beyond a simple requirement for court approval of class-action settlements or
700 dismissals, and Rules 23(g) and (h) were also added to guide the court in appointing class
701 counsel and awarding attorney's fees and costs. Together, these additions to Rule 23 provide a
702 framework for courts to follow that was not included in the original 1966 revision of Rule 23.

703 In class actions, a judicial role approving settlements flows from the binding effect Rule
704 23 prescribes for a class-action judgment. Absent a court order certifying the class, there would
705 be no binding effect. After the rule was extensively amended in 1966, settlement became normal
706 for resolution of class actions, and certification solely for purposes of settlement also became
707 common. Courts began to see themselves as having a "fiduciary" role to protect the interests of
708 the unnamed (and otherwise effectively unrepresented) members of the class certified by the
709 court.

710 Part of that responsibility connects with Rule 23(g) on appointment of class counsel,
711 which requires class counsel to pursue the best interests of the class as a whole, even if not
712 favored by the designated class representatives. The court may approve a settlement opposed by
713 class members who have not opted out. The objectors may then appeal to overturn that approval;
714 otherwise they are bound despite their dissent. Now, under amended Rule 23(e), there are
715 specific directions for counsel and the court to follow in the approval process.

716 MDL proceedings are different. Ordinarily all of the claimants have their own lawyers.
717 Section 1407 only authorizes transfer of pending cases, so claimants must first file a case to be
718 included. ("Direct filing" in the transferee court has become fairly widespread, but that still
719 requires a filing, usually by a lawyer.) As a consequence, there is no direct analogue to the
720 appointment of class counsel to represent unnamed class members (who may not be aware they
721 are part of the class, much less that the lawyer selected by the court is "their" lawyer). The
722 transferee court cannot command any claimant to accept a settlement accepted by other
723 claimants, whether or not the court regards the proposed settlement as fair and reasonable. And
724 the transferee court's authority is limited, under the statute, to "pretrial" activities, so it cannot
725 hold a trial unless that authority comes from something beyond a JPML transfer order.

726 Notwithstanding these structural differences between class actions and MDL proceedings,
727 one could also say that the actual evolution of MDL proceedings over recent decades --
728 particularly "mass tort" MDL proceedings — has somewhat paralleled the emergence of
729 settlement as the common outcome of class actions. Almost invariably in MDL proceedings
730 involving a substantial number of individual actions, the transferee court appoints "lead counsel"
731 or "liaison counsel" and directs that other lawyers be supervised by these court-appointed
732 lawyers. The Manual for Complex Litigation (4th ed. 2004) contains extensive directives about
733 this activity:

734	§ 10.22.	Coordination in Multiparty Litigation — Lead/Liaison Counsel and
735		Committees
736	§ 10.221.	Organizational Structures
737	§ 10.222.	Powers and Responsibilities
738	§ 10.223.	Compensation

739 So sometimes — again perhaps particularly in “mass tort” MDLs — the actual evolution
740 and management of the litigation may resemble a class action. Though claimants have their own
741 lawyers (sometimes called IRPAs — individually represented plaintiffs’ attorneys), they may
742 have a limited role in managing the course of the MDL litigation. A court order may forbid them
743 to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed
744 by the court as leadership counsel. In class actions, a court order appointing “interim counsel”
745 under Rule 23(g) even before class certification is decided may have a similar consequence of
746 limiting settlement negotiation (potentially later presented to the court for approval under Rule
747 23(e)), which might be likened to the role of the court in appointing counsel to represent one side
748 or the other in MDL litigation.

749 At the same time, it may appear that at least some IRPAs have gotten something of a
750 “free ride” because leadership counsel have done extensive work and incurred large costs for
751 liability discovery and preparation of expert presentations. The Manual for Complex Litigation
752 (4th) § 14.215 provides: “Early in the litigation, the court should define designated counsel’s
753 functions, determine the method of compensation, specify the records to be kept, and establish
754 the arrangements for their compensation, including setting up a fund to which designated parties
755 should contribute in specified proportions.”

756 One method of doing what the Manual directs is to set up a common benefit fund and
757 direct that in the event of individual settlements a portion of the settlement proceeds (usually
758 from the IRPA’s attorney’s fee share) be deposited into the fund for future disposition by order of
759 the transferee court. And in light of the “free rider” concern, the court may also place limits on
760 the percentage of the recovery that those non-leadership counsel may charge their clients,
761 sometimes reducing what their contracts with their clients provide.

762 The predominance of leadership counsel can carry over into settlement. One possibility is
763 that individual claimants will reach individual settlements with one or more defendants. But
764 sometimes MDL proceedings produce aggregate settlements. Defendants ordinarily are not
765 willing to fund such aggregate settlements unless they offer something like “global peace.” That
766 outcome can be guaranteed by court rule in class actions, but there is no comparable rule for
767 MDL proceedings. Nonetheless, various provisions of proposed settlements may exert
768 considerable pressure on IRPAs to persuade their clients to accept the overall settlement. On
769 occasion, transferee courts may also be involved in the discussions or negotiations that lead to
770 agreement to such overall settlements. For some transferee judges, achieving such settlements
771 may appear to be a significant objective of the centralized proceedings. At the same time, some

772 have wondered whether the growth of “mass” MDL practice is in part due to a desire to avoid the
773 greater judicial authority over and scrutiny of class actions and the settlement process under Rule
774 23.

775 The absence of clear authority and/or constraint for such judicial activity in MDL
776 proceedings has produced much uneasiness among academics. One illustration is Prof. Burch’s
777 recent book *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge U.
778 Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In
779 brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h)
780 applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that
781 “[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23
782 requirements and constraints, represents a paradigm-shifting means for resolving complex
783 litigation.” Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the*
784 *All Writs Act*, 37 Rev. Lit. 129, 135 (2018). Her recommendation: “[B]etter authority for MDL
785 judicial power might be accomplished through amendment of the MDL statute or through
786 authority conferred by a liberal construction of the All Writs Act.” *Id.* at 183.

787 Achieving a similar goal via a rule amendment might be possible by focusing on the
788 court’s authority to appoint and supervise leadership counsel. That could at least invoke criteria
789 like those in Rule 23(g) and (h) on selection and compensation of such attorneys. It might also
790 regard oversight of settlement activities as a feature of such judicial supervision. However, it
791 would not likely include specific requirements for settlement approval like those in Rule 23(e).

792 But it is not clear that judges who have been handling these issues feel a need for either
793 rules-based authority or further direction on how to wield this authority. Research has found that
794 judges do not express a need for greater or clarified authority in this area. And the subcommittee
795 has not, to date, been presented with strong arguments from experienced counsel in favor of
796 proceeding along this line. All participants — transferee judges, plaintiffs’ counsel and
797 defendants’ counsel — seem to prefer avoiding a rule amendment that would require greater
798 judicial involvement in MDL settlements.

799 For the present, then, the subcommittee is not yet prepared to propose to develop rule-
800 amendment drafts dealing with appointment or compensation of leadership counsel or settlement
801 review. But these questions remain open for further study.

802 One more recent development deserves mention, however. On Sept. 11, 2019, Judge
803 Polster granted class certification under Rule 23(b)(3) of a “negotiation class” of local
804 governmental entities in the opioids MDL pending before him in the N.D. Ohio. Paragraph 13 of
805 the certification order explains:

806 The order does not certify the Negotiation Class for any purpose other than to
807 negotiate for the class members with the thirteen sets of national Defendants

808 identified above. Accordingly, this Order is without prejudice to the ability of any
809 Class member to proceed with the prosecution, trial, and/or settlement in this or any
810 court, of an individual claim, or to the ability of any Defendant to assert any defense
811 thereto. This order does not stay or impair any action or proceeding in any court, and
812 Class members may retain their Class membership while proceeding with their own
813 actions, including discovery, pretrial proceedings, and trials. In the event a Class
814 Member receives a settlement or trial verdict, it may proceed with its
815 settlement/verdict in the usual course without hindrance by virtue of the existence of
816 the Negotiation Class.

817 *In re National Prescription Opiate Litigation*, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019)
818 (memorandum opinion, not accompanying order). Paragraph 8 of the order provides:

819 Class Counsel and only Class Counsel are authorized to (a) represent the Class in
820 settlement negotiations with Defendants, (b) sign any filings with this or any other
821 Court made on behalf of the Class, (c) assist the court with functions relevant to the
822 class actions, such as but not limited to maintaining the Class website and executing
823 a satisfactory notice program, and (d) represent the Class in Court.

824 It is not clear what will come of this initiative. But if it provides a vehicle for judicial
825 involvement in settlement of an MDL proceeding under the auspices of Rule 23, it may illustrate
826 the sort of authority and guidance discussed above without the need for a rule amendment. On
827 Nov. 8, 2019, the Sixth Circuit granted a petition under Rule 23(f) to review Judge Polster's
828 order. *See In re National Opiate Litigation*, Sixth Cir. Nos. 19-305 and 19-306.

829 **C. Rule 4(c)(3): Service by the U.S. Marshals Service**

830 At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised
831 questions about the meaning of the Civil Rule 4(c)(3) provisions for service of process by a
832 United States marshal in *in forma pauperis* cases. These questions are being explored with the
833 United States Marshals Service. Initial discussions show that practices vary from one district to
834 another. The Service would welcome greater national uniformity on some practices, but it is not
835 clear whether amending the Civil Rules can usefully do more than remove an apparent ambiguity
836 in the rule text.

837 Rule 4(c)(3):

838 (c) SERVICE. * * *

839 (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request,
840 the court may order that service be made by a United States marshal or
841 deputy marshal or by a person specially appointed by the court. The court
842 must so order if the plaintiff is authorized to proceed in forma pauperis

843 under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

844 “must so order”: The central question arises from an ambiguity in the second sentence.
845 When is it that the court “must so order”? The two sentences could be read together to mean that
846 the court must order service by a marshal only if the plaintiff has requested it. Or the second
847 sentence could be read independently to require the order whether or not the plaintiff has made a
848 request. There is some disarray in the cases that address this ambiguity. Drafting a repair is easy.
849 The question is which way the ambiguity should be fixed. The rule could say clearly that an i.f.p.
850 plaintiff or seaman must move for a court order. It could say clearly that the court must enter the
851 order automatically in every i.f.p. or seaman case. Or a more direct rule could say that the
852 marshal must make service without a court order, changing the present practice that provides for
853 marshal service only if the court so orders. As noted below, the marshals would not be likely to
854 welcome that approach.

855 Rule 4(c)(3) has its roots in 28 U.S.C. § 1915(d), which provides that when a plaintiff is
856 authorized to proceed *in forma pauperis*, “[t]he officers of the court shall issue and serve all
857 process, and perform all duties in such cases.” The statute does not limit the category of officers
858 to marshals. Apparently some clerks’ offices actively facilitate service in i.f.p. cases. Facilitating
859 service by issuing process is consistent with the statute’s direction that the officers of the court
860 shall issue process — that is a clerk job, not the marshal’s. The clerk’s actually making service,
861 for example if state law allows service by mail, is consistent with the statute for the same reason.
862 Section 1915(d) is also consistent with a rule directing service by a marshal without requiring a
863 court order — “[t]he officers of the court shall * * * serve all process * * *.”

864 The ambiguity in Rule 4(c)(3) may be an artifact of the 2007 Style Rules. The immediate
865 predecessor, former Rule 4(c)(2), read:

866 (2) Service may be effected by any person who is not a party and who is at least 18
867 years of age. At the request of the plaintiff, however, the court may direct that
868 service be effected by a United States marshal, deputy United States marshal, or
869 other person or officer specially appointed by the court for that purpose. *Such an*
870 *appointment* must be made when the plaintiff is authorized to proceed in forma
871 *pauperis* [etc.] * * *.

872 Saying that “such an appointment must be made” is more direct than “must so order.” It
873 does not seem to tie to a “request of the plaintiff.” Still, “such an appointment” might refer to an
874 appointment made on a request of the plaintiff, never mind that “appointed” is used in the
875 preceding sentence only to refer to an “other person or officer,” not a marshal.

876 Reading former Rule 4(c)(2) to mean that the court must order service by a marshal in all
877 i.f.p. and seaman cases without waiting for a request by the plaintiff does not fully resolve the
878 question. Reason still might be found to require a request by the plaintiff. The most likely

879 concern might be that the plaintiff prefers to make service, perhaps because the plaintiff expects
880 to do it sooner than the marshal might. A secondary reason might be that the Marshals Service
881 would prefer to be called on to make service only when that is necessary. The alternative
882 approaches remain open.

883 Practical considerations should guide the choice to be made, subject to the statutory
884 direction that the officers of the court shall serve all process. Providing for service by someone
885 appointed by the marshal — or, more conservatively, by the court — could reduce the burden
886 imposed on the marshals.

887 It would be possible to venture further, considering a first-ever authorization for service
888 of the summons and complaint by electronic means. The concerns that have thwarted electronic
889 service as a general matter might be reduced if the marshal, or possibly the court clerk, were
890 making the determination that e-service is likely to work for a particular defendant. But further
891 work would be required before seriously considering this alternative.

892 Other issues might be considered as well. Marshals do invoke Rule 4(d) procedures to
893 request waiver of service on occasion; there seems little point in amending the rule to require
894 resort to waiver at the plaintiff's request. Uncertainties can be found in tracing through the Rule
895 4(b) and (c) obligations that remain on the plaintiff to engage with the court and marshal when
896 the marshal is to make service. No practical reason to address those uncertainties has been found.
897 There might be some concern that a plaintiff may suffer if the marshal fails to make service
898 within the time set by Rule 4(m), but it seems unlikely that a court would fail to grant relief.

899 These questions remain on the agenda. Discussions with the Marshals Service will
900 continue. Other means of gathering practical information about current experience and possible
901 improvements will be sought.

902 **D. Final Judgment Appeals after Rule 42(a) Consolidation**

903 A joint subcommittee of the Appellate and Civil Rules Committees is exploring the
904 questions of appeal finality that arise when a district court consolidates two or more originally
905 independent actions and eventually enters a judgment that disposes of all claims among all
906 parties to what began life as a separate action. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court
907 ruled that consolidation does not merge the originally separate actions for purposes of § 1291
908 final-judgment appeal. An appeal may, and apparently must, be taken or lost upon complete
909 disposition of an originally independent action. At the same time, the Court suggested that the
910 Rules Enabling Act provides the appropriate means to address any problems that might arise
911 from its decision.

912 The subcommittee has begun its work. The immediate focus is on empirical work that Dr.
913 Emery Lee is undertaking at the Federal Judicial Center. The work will seek to gather as much

914 information as possible about actual Rule 42(a) consolidation practices, including distinctions
915 between consolidation “for all purposes” and less complete consolidations. The next step will be
916 to sort out orders that leave continuing proceedings open in other cases caught up in the
917 consolidation while completely disposing of all parts of at least one originally independent
918 action. The *Hall v. Hall* questions will come next: How often are appeals taken at the time
919 designated? How often are appeals delayed until after complete disposition of all parts of the
920 consolidated proceedings? If appeals are delayed, how often is the delay penalized by dismissal,
921 and how often is it rewarded by casual or benign oversight?

922 The FJC study will initially consider actions filed in 2015, 2016, and 2017 that have
923 reached final disposition. That period will enable comparison of appeals under the four different
924 approaches taken in the circuit courts of appeals before *Hall v. Hall* adopted one of those
925 approaches, although many of the cases will have reached final disposition after the Court’s
926 ruling. It may well prove important to expand the period to include actions filed in 2018, 2019,
927 and 2020, although it will take some time to accumulate final dispositions in those actions.

928 The possibility remains that sophisticated docket studies will not yield a satisfactory
929 foundation for considering possible rules amendments to establish a new framework for appeals
930 after consolidation. The subcommittee, however, will await further development of the research
931 before deciding whether to take up the inquiry.

932 **E. E-filing Deadlines: Rule 6(a)(4)**

933 The Time Computation Project adopted an all-rules definition of the “last day” for filing.
934 Civil Rule 6(a)(4) is an example:

935 (4) “*Last Day*” *Defined*. Unless a different time is set by a statute, local rule, or court
936 order, the last day ends:
937 (A) for electronic filing, at midnight in the court’s time zone; * * *

938 Judge Chagares, inspired in part by experience with a local rule in the District of
939 Delaware and the rule in Delaware state courts, has suggested that the last day might be redefined
940 to end “when the clerk’s office is scheduled to close.” The proposal is being studied by a
941 subcommittee constituted of representatives from the Appellate, Bankruptcy, Civil, and Criminal
942 Rules Committees.

943 The proposal contemplates several advantages from moving the deadline back. Work-life
944 balance for attorneys and their staffs is important. Judges too may benefit by being relieved of
945 opportunities — which may tend to be felt as duties — to watch for late filings. Some litigants
946 and firms may be better able than others to seize the opportunity for late filing, and may file late
947 simply as a tactical maneuver.

948 The midnight deadline may have advantages that counter the potential disadvantages.
949 Some filings may benefit from just a few more hours of revision and polishing. A fixed time is
950 clear, and may be substantially uniform unless many courts change it by local rules. And lawyers
951 operating across time zones may encounter de facto mid-day deadlines when bound by clerk's
952 office closing times.

953 The subcommittee is engaged in seeking information about local rules; actual filing time
954 patterns; whether filings after the clerk's office closes are associated with particular types of
955 litigation or law firms; what is the experience with pro se litigants in courts that permit them to
956 file electronically; the hours clerks' offices are open; the use of drop boxes; and still other
957 questions. The Federal Judicial Center has begun a comprehensive study of local rules and filing
958 data: "This is a big data project, and every datum tells a story." The FJC also will survey
959 attorneys.

960 **F. Rule 12(a): Filing Times and Statutes**

961 Rule 12 sets the time to serve a responsive pleading. Rule 12(a)(1) sets the presumptive
962 time at 21 days. Paragraph (2) sets the time at 60 days for "The United States, a United States
963 agency, or a United States officer or employee sued only in an official capacity." Paragraph (3)
964 sets the time at 60 days for "A United States officer or employee sued in an individual capacity
965 for an act or omission occurring in connection with duties performed on the United States'
966 behalf."

967 Rule 12(a)(1) begins with this qualification: "Unless another time is specified by this rule
968 or a federal statute, the time for serving a responsive pleading is as follows * * *." It is possible
969 to read this qualification as applying not only to the times set by paragraph (1), but also to the
970 times set by paragraphs (2) and (3). Many readers, however, will find it more natural to read the
971 exception for a statutory time to apply only within paragraph (1). The exception for another time
972 specified by this rule appeared for the first time in the Style Project, and seems to make explicit
973 what had been only implicit — that the 60-day periods in (2) and (3) supersede the 21-day period
974 in (1). If federal statutes set times different than 60 days for cases covered by (2) and (3), it seems
975 desirable to make the rule clear.

976 Suggestion 19-CV-O points to the 30-day response time set by the Freedom of
977 Information Act. The proponent recounts experience with a clerk's office that initially refused to
978 issue a summons substituting the 30-day period for the Rule 12(a)(2) 60-day period. Further
979 discussion persuaded the clerk to incorporate the 30-day period, but the incident demonstrates the
980 opportunity for confusion.

981 The Department of Justice complies with the 30-day time set by the Freedom of
982 Information Act, but asks for an extension in cases that combine FOIA claims with other claims
983 that are governed by the 60-day period in Rule 12(a)(2).

984 The Freedom of Information Act is, of itself, reason to amend Rule 12(a)(2) to bring it
985 into parallel with (a)(1) by adding: “Unless another time is specified by a federal statute, * * *.”
986 This amendment likely will be proposed.

987 The committee has not yet found any statute that sets another time for actions against a
988 United States officer or employee sued in an individual capacity. If such a statute is found, an
989 amendment of Rule 12(a)(3) will be proposed to make it parallel to (1) and (2). If no statute is
990 found, the amendment might make sense as a precaution to protect against later discovery of a
991 current statute or future enactment of a statute. Yet the amendment might be not only
992 unnecessary but a source of confusion for litigants who go about searching for possible statutory
993 exceptions. This question remains under consideration.

994 **II. Matters Removed from the Agenda**

995 The committee determined to remove several “mailbox” suggestions from its agenda.
996 Brief descriptions follow:

997 **A. Rules 4 and 5**

998 This proposal (19-CV-N) was submitted by a pro se litigant whose suggestions seem to
999 be that Rule 4(c)(3) should be amended to give a cross-reference to statutes governing service by
1000 a marshal; Rule 4(a)(1)(E) should be amended to refer to such local practices as one deferring the
1001 Rule 12(a) time to respond until after an Initial Phone Status Conference; and Rule 5(b) should
1002 be amended to direct that the clerk provide a party who makes a paper filing with a copy of the
1003 filing that shows the number designating it when the clerk enters it in the electronic record.

1004 Discussion centered on the frequency of pro se appearances, the association of pro se
1005 filings with *in forma pauperis* status, and the difficulties encountered by pro se parties. The
1006 committee concluded that these suggestions do not warrant rules amendments.

1007 **B. In Forma Pauperis Standards**

1008 This proposal (19-CV-Q) by Sai, a pro se litigant who has provided thoughtful
1009 suggestions in the past, begins with the observation that standards to qualify for *in forma*
1010 *pauperis* status vary widely from one district to another. Uniform standards are urged, primarily
1011 by way of adopting the standards used by the Legal Services Corporation, supplemented by
1012 automatic qualification for recipients of SSI, SNAP, TNAF, or Medicaid benefits. Sai also urges
1013 provisions describing the duty to update changing information. Sai further finds many
1014 ambiguities in the Administrative Office forms that courts may use to gather information bearing
1015 on i.f.p. status, and then argues that some of the requested information is irrelevant, invades the
1016 privacy of persons other than the litigant, and at times violates constitutional norms.

1017 Committee discussion reflected sympathy for uniform standards, but doubts whether the
1018 wide range of information that may be relevant in making decisions unguided by the i.f.p. statute
1019 can be captured in a workable formula. Delegation of this responsibility to standards created by
1020 others for different purposes is not attractive. But the questions Sai raises about the
1021 Administrative Office forms were commended to the AO for further consideration.

1022 **C. Calculating Filing Deadlines**

1023 In this proposal (19-CV-R), Sai points to the difficulties frequently encountered by pro se
1024 litigants in attempting to calculate filing deadlines, and further observes that lawyers often face
1025 uncertainty and expend much effort and even anguish in attempts to identify clear deadlines. His
1026 proposed solution rests on the assumption that “[t]he court knows what the times are, [and] has
1027 the authority to define them conclusively.”

1028 Building on this premise, Sai proposes an elaborate rule that would require courts to give
1029 all parties immediate notice of a calculated time certain for every applicable date or time
1030 specified by court rules or order. The notice should include whether and how the time may be
1031 modified, and “whether the event is optional or specified.” The obligation is cumulative — the
1032 most recent order must include the full calendar, “listing all available, pending, or issued events,
1033 and their respective deadlines.” And “[a]ll filers shall be entitled to rely on the court’s computed
1034 times.”

1035 One adjustment would be necessary to fit the provision on party reliance into the rule that
1036 some time provisions established by statute are mandatory and jurisdictional.

1037 The committee was sympathetic to the challenges that may be encountered in calculating
1038 filing deadlines. But deadlines are necessary to achieve the goals of Rule 1. All of the deadlines
1039 in all the sets of rules were considered and many were revised during the Time Computation
1040 Project ten years ago. No particular deadline is addressed by this proposal.

1041 The premise that courts know all deadlines, and routinely calculate them with unerring
1042 accuracy, may be open to some doubt. Great burdens would be imposed by an obligation to
1043 continually inform all parties of all deadlines after each event that triggers a new deadline or
1044 affects a current deadline.

1045 An alternative might be found in relaxing the requirement in Rule 6(b) that requires good
1046 cause for extending a time to act. Special sympathy may be felt for pro se parties. But committee
1047 discussion showed agreement that courts take pro se status into account in administering the
1048 good-cause test.

1049 **D. Expert Witness Fees in Discovery: Rule 26(b)(4)(E)**

1050 Suggestion 19-CV-T, submitted by retired Judge Mark Bennett, transmits an article by
1051 Professor Danielle Shelton, *Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit*
1052 *Expert Fee Shifting and Reduce Litigation Abuses*, 49 Seton Hall L. Rev. 475 (2019).

1053 Rule 26(b)(4)(E)(i) provides:

1054 (E) *Payment*. Unless manifest injustice would result, the court must require that the
1055 party seeking discovery:

1056 (i) pay the expert a reasonable fee for the time spent in responding to discovery
1057 under Rule 26(b)(4)(A) * * *.

1058 Professor Shelton identifies a number of detailed issues that have provoked apparently
1059 inconsistent approaches. Complex questions arise from time spent in preparing for a deposition:
1060 can the time be separated from time spent preparing a report or preparing for trial? Should offsets
1061 be recognized if preparation for a deposition reduces the time needed to prepare for trial? What
1062 standards should be used in determining the reasonableness of preparation time? Can the expert
1063 charge a higher rate for time spent in the actual deposition? Should the expert be allowed to
1064 charge a daily fee, even if the deposition is brief or cancelled? Among the more pedestrian issues
1065 are those related to travel to the site of a deposition and expenses for accommodations and food.

1066 Professor Shelton's proposed resolution of these questions is demonstrated by part of the
1067 text of her proposed rule:

1068 (i) "Time spent responding to discovery" includes only: (1) the actual time the expert
1069 spends in a deposition, including any breaks during the day, and does not include
1070 time or fees spent preparing for a deposition, traveling to or from a deposition,
1071 reviewing a deposition transcript, or time otherwise relating to being deposed.

1072 Many other issues are addressed in her proposal, including the time for submitting and paying
1073 claims for reimbursement, and interest after the due date.

1074 Establishing flat rules of the sort proposed may be questioned on the ground that different
1075 answers are appropriate in different circumstances. Finding a good mix of discretion with
1076 specific rules would be a difficult task.

1077 Discussion of the difficulty of preparing a good rule found all of the practicing lawyers
1078 agreeing that these questions are always worked out, not litigated. The judges agreed.

1079 The committee removed this proposal from the agenda.

1080 **E. Rule 26: ESI Production and Cost-Shifting**

1081 This proposal (19-CV-V) includes two topics aimed at elaborating the 2015 proportional
1082 discovery amendments.

1083 The first would add this provision to Rule 26:

1084 The court may require a party to disclose details of its application of these Rules to
1085 its production of electronically stored information relevant to the case.

1086 The purpose is to permit discovery of the choices a responding party made in determining
1087 that its responses to discovery of electronically stored information were proportional to the needs
1088 of the case. It connects to a topic discussed in the committee note to the 2015 amendments. The
1089 committee note observed that it is not meaningful to assign to either party a burden to show
1090 whether a request or response is proportional to the needs of the case as measured by the criteria
1091 in the rule. The requesting party is in the better position to explain why information is relevant,
1092 while the responding party is in the better position to explain the burdens of complying.

1093 Committee discussion suggested that it is too early to attempt to refine the 2015
1094 proportionality amendment. Four or five more years of experience will show whether refinements
1095 are desirable. This proposal was removed from the agenda.

1096 The second proposal is to add this provision:

1097 In order to ensure proportionality, the Court may order the cost of discovery be
1098 shifted from one party to another party.

1099 Discussion centered on the 2015 amendment that added to Rule 26(c)(1)(B) explicit
1100 recognition that a protective order may specify terms for the allocation of expenses for disclosure
1101 or discovery. The committee note observed that this authority had already been recognized, but
1102 urged that cost-shifting should not become a common practice. Again, recent attention to these
1103 issues persuaded the committee that the time has not come for renewed consideration.

1104 **F. Rule 68: Clear Offers**

1105 Retired Judge Mark Bennett submitted this proposal (19-CV-S) by transmitting another
1106 article by his colleague, Professor Danielle M. Shelton: *Rewriting Rule 68: Realizing the Benefits*
1107 *of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev.
1108 864-937 (2007).

1109 The article, now thirteen years old, explores the dangers that unclear terms raise for both
1110 a party receiving a Rule 68 offer of judgment and the party making the offer. The party receiving

1111 the offer may, after accepting, be surprised to discover that a stated sum is interpreted to include
1112 costs and recoverable fees as well as damages. Or a party rejecting the offer may be surprised to
1113 discover that a judgment that seemed to better the offer fell short because the offer did not
1114 include costs and recoverable fees. The party making the offer may encounter similar problems.
1115 The suggested solution is to permit only two forms of offer. One, a “damage only” offer, leaves
1116 any matters of costs or fees for determination by the court and excludes them from any
1117 comparison of offer and judgment. The other is a “lump sum” offer that must be made in the
1118 exact language provided by an amended Rule 68.

1119 Clear offers are desirable. It may be possible to encourage greater clarity by revising Rule
1120 68, perhaps on the terms proposed by Professor Shelton.

1121 The committee chose, however, to remove this proposal from the agenda. Rule 68
1122 proposals have a long history, going back to a proposal published in 1982 that was followed by a
1123 much-revised proposal published in 1983, only to have the 1983 proposal fail without further
1124 action. Another serious study was undertaken in 1994, this time to conclude without publishing
1125 the elaborate draft that had been developed to address a wide variety of perceived difficulties
1126 with Rule 68 as it stands. Since then, Rule 68 has been the subject of many “mail box” proposals.
1127 The most common feature of these proposals is to make Rule 68 more effective by increasing the
1128 consequences of failing to win a judgment better than a rejected offer. But many other questions
1129 are raised, often beginning with the argument that fairness requires that a party making a claim
1130 should be entitled to make an offer. Since a Rule 68 costs sanction would be redundant if the
1131 defendant suffered a judgment greater than a rejected offer, shifting attorney fees is commonly
1132 proposed as the sanction. Another common suggestion is that it can be reasonable to reject an
1133 offer that in fact proved better than the judgment, so that some margin of difference should be
1134 required to support sanctions.

1135 Still more fundamental questions can be raised. One asks why Rule 68 needs to be
1136 revised if the goal is to increase the frequency of settlements. Few cases make it all the way to
1137 trial. The response is that an enhanced Rule 68 might encourage earlier settlements in cases that
1138 now settle later, often after costly discovery. And the reply is that settlements reached after
1139 discovery are more likely to be fair.

1140 Still other questions go to Supreme Court decisions that rely on the “plain meaning” of
1141 Rule 68. One is that the Rule 68 denial of post-rejected-offer costs cuts off the right to statutory
1142 attorney fees if the statute characterizes fees as “costs,” but not otherwise. The other is that a
1143 defendant who makes an offer for a substantial amount and then wins a take-nothing judgment is
1144 not entitled to sanctions because the offeree has not “obtain[ed]” a judgment.

1145
1146 The committee concluded that although there might be something to be gained by a
1147 project that focuses narrowly on encouraging clearer Rule 68 offers, undertaking even that
1148 project could not avoid reexamining Rule 68 as a whole. Some participants might seize the

1149 occasion to argue for outright abrogation.

1150 **G. “Snap Removal”: Rule 4(d)**

1151 This proposal (19-CV-W) advances a novel Civil Rule approach to problems perceived in
1152 judicial interpretations of the provision that limits removal of state-court diversity actions, 28
1153 U.S.C. § 1441(b)(2).

1154 Section 1441(b)(2) allows removal of an action that rests only on diversity jurisdiction,
1155 but not “if any of the parties in interest properly *joined and served* as defendants is a citizen of
1156 the State in which such action is brought.” It is common to explain the “and served” element by
1157 observing that a plaintiff might be tempted to defeat removal by naming a local defendant
1158 without any intention of actually proceeding against that defendant. Joined, not served, and then
1159 ignored.

1160 The practice addressed by the proposal, referred to as “snap removal,” arises when
1161 defendants remove before any local defendant has been served. This practice is facilitated by
1162 rules in some states that force a delay between filing the action and making service — a non-
1163 local defendant who learns of the action can remove before anyone is served. And, it is said,
1164 entities that are frequently sued have begun to monitor state court dockets to facilitate removal
1165 before the removing defendant or anyone else has been served. At least two circuit courts of
1166 appeals have concluded that such removal is authorized by the plain language of the statute, and
1167 that the result is not so untoward as to justify departure from the plain language.

1168 The proposed remedy would add a complex new paragraph to the waiver-of-service
1169 provisions of Rule 4(d). The proposal relies on fictitious “deemed” elements to allow a plaintiff
1170 to force remand after a “snap” removal by serving a local defendant within 30 days of removal.
1171 Or at least that seems to be the intended reading; the proposed language is not easy to track.

1172 The committee concluded that the proposal is essentially aimed at amending
1173 § 1441(b)(2). That is not suitable work for the Civil Rules. The committee was informed that the
1174 Federal-State Jurisdiction Committee has this proposal on its agenda. It will be removed from the
1175 Civil Rules agenda.

TAB 5B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
OCTOBER 29, 2019

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts in Washington, D.C., on October
1 29, 2019. Participants included Judge John D. Bates, Committee
2 Chair, and Committee members Judge Jennifer C. Boal; Judge Robert
3 Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt;
4 Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge
5 Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.;
6 Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J.
7 Tadler, Esq.; and Helen E. Witt, Esq.. Professor Edward H. Cooper
8 participated as Reporter, and Professor Richard L. Marcus
9 participated as Associate Reporter. Judge David G. Campbell, Chair;
10 Professor Catherine T. Struve, Reporter; Professor Daniel R.
11 Coquillet, Consultant; and Peter D. Keisler, Esq., represented
12 the Standing Committee. Judge A. Benjamin Goldgar participated as
13 liaison from the Bankruptcy Rules Committee. Laura A. Briggs,
14 Esq., the court-clerk representative, also participated. The
15 Department of Justice was further represented by Joshua Gardner,
16 Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Allison
17 A. Bruff, Esq., represented the Administrative Office. Dr. Emery G.
18 Lee attended for the Federal Judicial Center. Observers included
19 John Beisner, Esq.; Fred Buck, Esq. (American College of Trial
20 Lawyers); Andrew Cohen (Burford Capital); Alexander Dahl, Esq., and
21 Andrea Looney, Esq. (Lawyers for Civil Justice); David Foster,
22 Esq., and David Mervis, Esq. (SSA); Joseph Garrison, Esq. (NELA);
23 William T. Hangle, Esq. (ABA Litigation Section liaison); Max
24 Heerman, Esq. (Medtronic); Robert Levy, Esq. (Exxon Mobil);
25 Jonathan Redgrave, Esq.; Benjamin Robinson, Esq. (Federal Bar
26 Assn.); John Rosenthal, Esq.; Jerome Scanlan, Esq. (EEOC); and
27 Susan H. Steinman, Esq. (AAJ).

28 Judge Bates announced that Laura Briggs, who has served for
29 many years as the Clerk of Court Representative, is retiring from
30 the judiciary and from her work with the Committee. She has been an
31 essential member, offering conceptual and practical insights on the
32 working of the Civil Rules and providing countless examples of how
33 she has addressed and resolved issues in implementing the rules
34 that influence the shape of new rules. The Committee acknowledged
35 her work with warm applause.

36 Judge Bates reported that the Standing Committee and the
37 Judicial Conference had approved and recommended for adoption the
38 proposed amendments of Rule 30(b)(6). The rule is in the Supreme
39 Court, on track to take effect on December 1, 2020.

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40 *Hearing, Rule 7.1 amendments*

41 Judge Bates noted that the proposed amendment of Rule 7.1 was
42 published for comment last August. Only one person asked to testify
43 at the October hearing. The hearing will begin today's meeting.

44 GianCarlo Canaparo began by stating that the proposal to amend
45 Rule 7.1 is good. It is important to identify the parties'
46 citizenships early in every action. Early identification avoids the
47 waste occasioned by tardy discovery of a diversity-destroying
48 citizenship. But the amendment should be expanded to reach beyond
49 attributed citizenships to include disclosure of the parties' own
50 citizenships. Imagine a simple action in which three co-owners,
51 each a citizen of a different state, sue a single trespasser who
52 might be a cocitizen of one plaintiff. This should be found out
53 early in the action.

54 Mr. Canaparo noted that other comments have expressed concerns
55 about the working of the proposed amendment when an action is
56 removed from state court, but suggested that the proposed language
57 reaches removed cases. At the same time, he suggested that Rule
58 7.1(b) should be revised to require that the disclosure be filed
59 within 21 days after service of the first filing.

60 Mr. Canaparo answered a question by saying that the need to
61 disclose the parties' citizenships arises from the prospect that
62 the complaint may not comply with the Rule 8(a)(1) requirement to
63 state the grounds for the court's jurisdiction.

64 *April 2019 Minutes*

65 The draft Minutes for the April 2-3, 2019 Committee meeting
66 were approved without dissent, subject to correction of
67 typographical and similar errors.

68 *Legislative Report*

69 Rebecca Womeldorf presented the legislative report.

70 The Rules Support Office is tracking several bills that would
71 amend the Civil Rules. None of them has yet gained traction.

72 There was a hearing on transparency in the courts, addressing
73 PACER fees, cameras in the courtroom, and sealed court filings. The
74 Administrative Office helped to arrange for testimony by judges.
75 There is not yet anything further to report.

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76

Social Security Review

77 Judge Bates introduced the report of the Social Security
78 Review Subcommittee by noting that it has been at work for more
79 than two years. It has received repeated input from many sources
80 including the Administrative Conference, the Social Security
81 Administration, the National Organization of Social Security
82 Claimants Representatives, the American Association for Justice,
83 district and magistrate judges, academics, and still others. Its
84 work has been very productive. Successive drafts have advanced to
85 a point that makes it appropriate to confront the next step: is it
86 appropriate to adopt an Enabling Act rule that is this far
87 substance-specific, either as a Civil Rule or as a Supplemental
88 Rule?

89 Judge Lioi, Chair of the Subcommittee, began the presentation
90 by a brief outline of the most recent draft Rule 71.2. It addresses
91 only § 405(g) review actions that present only an individual claim.
92 Successive subdivisions provide for simplified pleading by a brief
93 complaint and an answer that need be no more than the
94 administrative record and any affirmative defenses; for the court
95 to transmit a Notice of Electronic Filing to SSA and the local
96 United States Attorney that displaces any need to serve summons and
97 complaint under Rule 4; timing requirements for answer and motions;
98 and presentation of the case for decision by briefs. This procedure
99 is calculated to reflect the character of these cases as appeals,
100 quite unlike actions that involve initial litigation and original
101 decision by a district court.

102 The draft rule has been continually revised in response to
103 comments by the many organizations and people that have contributed
104 to Subcommittee deliberations. The Subcommittee brings to the
105 Committee three questions about alternatives for the next steps:
106 The Subcommittee might continue to seek further assistance from
107 others with the goal of further refining the draft. Or it might
108 rely on the extensive work already done to move toward preparing a
109 proposal for publication with the help of the Committee and the
110 Standing Committee. Or it might conclude, with the advice of the
111 Committee and Standing Committee, that however good a proposed rule
112 might be, it is unwise to adopt an Enabling Act rule that is
113 limited to a single area of substantive law. If the project is to
114 continue, the Subcommittee will welcome Committee contributions to
115 further refine the proposal.

116 Several reasons can be found for carrying the work forward.
117 The project was brought to the Judicial Conference as a proposal by
118 the Administrative Conference of the United States, based on a deep
119 study of widely divergent practices across different district
120 courts. SSA strongly supports the proposal, even though it has been
121 pared back from the much more elaborate draft that SSA provided at

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122 the outset. SSA is in a good position to evaluate the effects of
123 local rules – and there are many and quite different local rules –
124 and less formal local practices.

125 Every effort has been made to ensure that Rule 71.2 is neutral
126 as between claimants and SSA. It reflects what some courts are
127 doing by explicit local practices, and what some others are doing
128 at least de facto.

129 NOSSCR representatives have expressed concerns that it is
130 important to keep judges happy by submitting these review actions
131 by the familiar procedures they have shaped and to which they have
132 become accustomed. That concern, however, has been significantly
133 reduced by the reactions of magistrate judges and district judges
134 that have reviewed Rule 71.2 drafts. Some now use procedures
135 closely similar to draft Rule 71.2. Others attempt to use general
136 Civil Rules procedures, such as summary judgment, but report that
137 they do not work well. The Subcommittee may seek reactions from a
138 greater number of judges. Judge Boal added that the magistrate
139 judges who met with the Subcommittee on October 3 generally
140 accepted the rule draft, and did not object to it. Indeed, those
141 who now use Rule 56 work around it, and welcomed the Rule 71.2
142 approach.

143 The Department of Justice has created a model local rule that
144 closely resembles the Rule 71.2 draft, and has recommended adoption
145 by district courts.

146 A central reason for the Rule 71.2 approach is that the §
147 405(g) cases it reaches are appeals on an administrative record.
148 They are quite unlike original actions in the district courts. As
149 one example, there is no need for discovery in the vast majority of
150 § 405(g) actions, and the rare action that may entail discovery is
151 taken outside Rule 71.2 and governed by the full sweep of the Civil
152 Rules.

153 Every year brings some 17,000 to 18,000 § 405(g) actions to
154 the district courts. Many districts adopt local rules, or less
155 formal local practices, because they have found that the general
156 Civil Rules do not work for these actions. Draft Rule 71.2 brings
157 them into an appeal process that reflects the actual character of
158 the proceedings.

159 Finally, concerns about transsubstantivity may be deflected by
160 recognition that many local rules have been adopted specifically
161 for § 405(g) actions. If local rules can do it, why not a national
162 rule?

163 Judge Lioi turned to the argument that the transsubstantivity
164 principle must defeat any attempt to craft a rule specifically

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165 limited to social security review actions.

166 One concern is that, because the Subcommittee wished to ensure
167 that it crafted a rule that was neutral, the draft rule is modest.
168 And even if the rule in fact is neutral, some parties to § 405(g)
169 review actions – even all parties – may perceive that the rule
170 favors their adversaries.

171 Another concern is the familiar “slippery slope” problem. Once
172 even a single rule sets a precedent, interest groups will begin to
173 agitate for other substance-specific rules, arguing that this rule
174 shows there is no principle that requires transsubstantivity.

175 The first reaction to this presentation was that the modest
176 character of the draft rule will encourage supplemental local
177 rules. One obvious example is provided by the deliberate choice to
178 avoid setting page limits for briefs in a national rule. Local
179 rules will set limits, and in the process may supplement the
180 national rule in ways that impair its operation. More generally,
181 the existing body of local rules have an inertia that will carry
182 beyond adoption of a national rule.

183 Discussion continued with a set of reflections on these themes
184 expressed in parallel terms.

185 Draft Rule 71.2 seeks to establish an appeal framework that
186 adapts the Civil Rules to § 405(g) review actions. The introduction
187 that sets the scope of the rule is critically important. It seeks
188 to limit the rule to the vast majority of actions that require
189 review and decision on the administrative record. The appellate
190 character of the proceedings is not altered by the practice of
191 remanding for further administrative proceedings. The underlying
192 study by Professors Gelbach and Marcus shows that the rates of
193 remand for further administrative proceedings range from a low of
194 about 20% in some districts to a high of about 70%. But when the
195 action is ready for decision in the district court, it acts on the
196 administrative record and award. It does not make an independent
197 determination, but reviews only for substantial evidence. These are
198 appeals.

199 A very few § 405(g) actions do call for discovery in a
200 district court. One example is provided by claims of ex parte
201 contacts with the administrative law judge. An even more rare
202 example is a claim of illegality not reflected in the
203 administrative record. Whatever the reasons may be, such actions
204 are taken outside draft Rule 71.2 and are governed by all of the
205 Civil Rules.

206 Section 405(g) itself requires that district courts provide
207 review in the framework of the Civil Rules. It provides for review

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208 by a civil action. It includes some provisions to govern the civil-
209 action proceeding, including three distinct provisions for remand
210 to SSA. Filling out an appropriate appeal procedure by a Civil
211 Rule seems an appropriate accommodation of the Rules Enabling Act
212 to the Social Security Act.

213 The origins of the transsubstantivity concern are reflected in
214 the earlier discussion. Section 2072(a) authorizes "general rules
215 of practice and procedure," and § 2072(b) exacts that they "shall
216 not abridge, enlarge or modify any substantive right." Honoring
217 those limits calls for more than ingenious speculations about the
218 meanings of words or attempts to be sure about what the framers of
219 the Enabling Act would have intended for circumstances difficult to
220 foresee when the statutory words were crafted. A rule that applies
221 to a defined set of § 405(g) actions across all districts can be
222 seen as a general rule. The goal of adapting the procedures of
223 courts that ordinarily exercise original jurisdiction to the needs
224 of an appeal jurisdiction mandated by statute need not of itself
225 abridge, enlarge, or modify the substantive rights governed by the
226 statute.

227 The modest character of the Rule 71.2 draft may bear on the
228 transsubstantivity concern. A plaintiff need plead only enough to
229 identify the SSA decision and invoke § 405(g) review jurisdiction.
230 That is enough to satisfy Rule 8(a)(1), (2), and (3) in an appeal
231 setting. At the same time, the plaintiff is left free to plead
232 more, an opportunity that may be seized to educate SSA lawyers
233 about the nature of the claims and the opportunities to meet them.
234 SSA can answer with nothing more than the administrative record and
235 any affirmative defenses; the Rule 8(b) obligation to respond to
236 each allegation in the complaint is excused. Notification by the
237 court's transmitting a Notice of Electronic filing has worked well
238 in the districts that do this now, and has been accepted on all
239 sides. The provisions that integrate motions practice with pleading
240 deadlines are simple. And the heart of the rule provides for
241 presentation of what is in fact an appeal by the briefing procedure
242 used for appeals. These are procedures designed to advance the
243 interests of both parties and the court. The facts and the law are
244 focused through the governing standard of review in a way that does
245 not favor any party or alter underlying substantive rights.

246 The Subcommittee considered the alternative of proposing a
247 rule that would govern all "administrative review" proceedings in
248 the district courts. Such a rule would unarguably be
249 transsubstantive. But it soon became apparent that drafting any
250 such rule would be enormously difficult. A wide range of actions by
251 quite distinctive executive offices and more nearly independent
252 regulatory agencies may become the subject of civil actions in the
253 district courts. Some are familiar, such as actions under the
254 Freedom of Information Act. Many invoke the Administrative

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255 Procedure Act. The elements that resemble appellate review are
256 mixed in quite different proportions with elements that clearly
257 involve original decision and action by the district court. Many
258 years of effort would be required to produce a workable rule, if
259 the task could be managed at all. The clearly appellate character
260 of the § 405(g) proceedings brought within draft Rule 71.2 is much
261 different. And, as compared to the full range of administrative
262 "review" actions in the district courts, § 405(g) actions present
263 a clearly identified opportunity to establish a good and uniform
264 national rule.

265 General discussion began with a theme that emerged in earlier
266 Committee meetings. There are several examples of Rules Enabling
267 Act rules that are substance-specific. Looking only to the Civil
268 Rules, Rule 5.2(c) establishes distinctive limits on remote access
269 to court dockets in social security and immigration actions. Rule
270 71.1 provides distinctive procedures for condemnation actions. The
271 Supplemental Rules for Admiralty and Maritime Claims were focused
272 on that particular substantive area until they were expanded to
273 include Asset Forfeiture Actions. The separate sets of Supplemental
274 Rules for § 2254 and § 2255 cases invoke the Civil Rules for many
275 matters. These very examples, however, pose the question whether
276 any § 405(g) rule or rules should be lodged in the body of the
277 general Civil Rules or should instead be framed as another set of
278 supplemental rules.

279 Experience suggests that various groups are eager to get
280 special sets of procedures for their own special interests. A
281 recent example focused on legislation that would require adoption
282 of specific rules to address "patent troll" litigation. Powerful
283 arguments are made that one or another substantive area requires
284 special procedures. Adhering to the model of supplemental rules may
285 make it easier to resist these pressures. And the supplemental
286 rules model may facilitate drafting more detailed provisions that
287 might be more difficult to frame as part of new provisions inserted
288 into the general body of the Civil Rules. More detailed
289 supplemental rules also might prove more effective in discouraging
290 local rules that deflect uniform national practices. This "is not
291 academic, but political reality."

292 This reference to focused substantive interests prompted the
293 observation that this project had its origins in SSA concerns about
294 the workload imposed by § 405(g) actions on its understaffed legal
295 resources. The work springs from what may be seen as specific
296 interests.

297 Another early observation was that the Appellate Rules include
298 several provisions that do not seem transsubstantive. The
299 circumstances of appeal procedure may be better suited to such
300 rules, but then proposed Rule 71.2 provides an appeal procedure

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301 lodged in the Civil Rules to honor the mandate of § 405(g) that
302 these appeals come to the district courts.

303 Department of Justice views were sought by observing that SSA
304 favors the proposed rule, even though the proposal does not include
305 everything initially suggested by SSA, and that claimants groups
306 seem neutral or opposed. Department representatives responded that
307 "the executive branch is not unanimous." The Department is worried
308 that one specialized set of rules will lead to pressure for other
309 sets of specialized rules. A § 405(g) review rule does not seem
310 necessary. Although the draft rule is neutral between claimants and
311 SSA, the concern about pressure for other specialized rules
312 remains. The Department has generated a model local rule to guide
313 districts that may want a local rule, but guidance is not a mandate
314 and is not likely to lead to uniform adoption across all districts.
315 The Department is not now prepared to support a new national rule.

316 This observation spurred a comment that a similar choice may
317 confront the MDL Subcommittee, asking whether to draft model local
318 rules or instead to propose new national rules.

319 The concern that a § 405(g) rule might become the thin edge of
320 the wedge that pries open a path for other specialized rules was
321 addressed by suggesting that § 405(g) review presents a distinctive
322 circumstance. The sheer volume of actions outstrips any other set
323 of administrative review actions in the district courts, and quite
324 possibly all other administrative review actions taken together.
325 And the cases present uniform procedural issues. These strong
326 differences can thwart efforts to claim that other specialized
327 settings present equally strong claims for distinctive rules.

328 The number of habeas corpus cases governed by supplemental
329 rules was offered as a comparison. Without knowing exact numbers,
330 it may be that the number of actions is similar to the number of §
331 405(g) proceedings. They too are governed by specialized statutes.
332 But the comparison to § 405(g) actions remains uncertain.

333 Comparisons continued. Section 405(g) cases are a "different
334 subset" of the civil docket. "Appellate cases in the district
335 courts do not fit the rules for trial cases." It might be said that
336 the current Civil Rules are not truly transsubstantive, since they
337 do not include separate provisions for appeal-like actions. A set
338 of rules to govern all administrative-review actions in the
339 district courts would be truly transsubstantive.

340 A judge suggested that following the general Civil Rules in
341 social security cases imposes delay on claimants. And that is a bad
342 thing. Any rule that increases efficiency would be desirable.

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343 Another judge observed that the sheer number of social-
344 security review cases is important. It will be important to figure
345 out what is going on. Many district courts have pro se law clerks
346 to help pro se parties. Section 405(g) records are lengthy, and
347 often are not clear. More work is lavished on an individual case in
348 the district court than the case got in SSA proceedings.
349 "Something has to be done." The problem is inefficiency and delay.
350 Any new rule, however, should focus on the administrative record,
351 without much energy devoted to pleading.

352 A lawyer member said that uniformity has great value. Present
353 circumstances show a great deal of disuniformity.

354 Freedom of Information Act cases were offered as a distinctive
355 subset of administrative-review actions. They could easily become
356 a source of pressure to adopt distinctive rules.

357 Transsubstantivity returned with a suggestion that § 405(g)
358 review actions should be addressed by a supplemental rule or rules,
359 not placed within the Civil Rules. One potential advantage would be
360 that supplemental rules could provide greater particularity. But do
361 we want that much particularity, or is the simplicity of the
362 present draft better? Whichever form, however, the project is worth
363 pursuing.

364 A different twist on the choice between supplemental rules and
365 a general civil rule was provided with the observation that
366 "different courts handle these cases differently." Some rely on
367 magistrate judges to enter judgment. Others rely on magistrate
368 judges to make a report and recommendation, leading to review and
369 judgment by a district judge. Still others act only through a
370 district judge. If the supplemental-rule approach is adopted,
371 should it address these variations?

372 A related question asked whether supplemental rules might be
373 written in a form that pro se litigants can understand more readily
374 than the conventional drafting of the Civil Rules? That approach
375 might even lend itself more readily to creating a separate pamphlet
376 explaining the rules to pro se plaintiffs.

377 A different question asked whether adopting supplemental rules
378 for § 405(g) cases would prompt more or less pressure to adopt
379 rules for other administrative-review actions in the district
380 courts. A judge answered that whatever form is chosen for § 405(g)
381 rules, it is answer enough that these cases account for something
382 like 8% of the civil docket and present uniform procedural issues.
383 Section 405(g) cases are different from other administrative-review
384 actions, but not from each other. But "pitching it toward a large
385 audience in a way that only supplemental rules can do may be worth
386 exploring."

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387 Another member thought the idea of a general administrative-
388 review rule "is interesting." These cases appear frequently.
389 Further discussion suggested that some districts may have local
390 rules for them. But they are different from § 405(g) cases, and
391 from each other. ERISA cases, for example may have discovery.

392 Following these lines, a participant suggested that it would
393 be difficult to define the scope of a rule for "administrative
394 review." Actions framed by specific statutory provisions, like §
395 405(g), are one thing, at least if they relate to the work of an
396 independently defined agency. But the range and variety of
397 government entities that are not part of Article I or Article II is
398 great. And the variety of appropriate procedures may be equally
399 great. Discovery is often required. Indeed there is a growing and
400 active body of law about discovery in ERISA and FOIA actions.
401 Summary judgment may be useful.

402 The core of the supplemental rules discussion returned with
403 the observation that in some ways we have already started down the
404 slippery slope. The Supplemental Rules for Admiralty and Maritime
405 Claims and Asset Forfeiture Actions is an undeniable beginning,
406 authorized by the Rules Enabling Act and joined to the Civil Rules.
407 But transsubstantivity "is a presumption, no more." Non-
408 transsubstantive rules can be adopted for weighty reasons. The
409 presumption would hold if litigants on all sides of a given subject
410 area see no need for substance-specific rules. But the objections
411 here seem less weighty. The Department of Justice fears that future
412 committees will give way to pressure. Claimants' representatives
413 fear to discomfort judges accustomed to present ways. But the draft
414 rule is a modest, incremental improvement that should work well for
415 cases that share unique but uniform procedural characteristics.
416 There are a significant number of these cases. Although a general
417 administrative-review rule would be nice, "it's a thicket."

418 A Department of Justice representative responded that "if we
419 look to the Committee's ability to weigh these considerations, we
420 will be adding to the precedent for the next" set of substance-
421 specific rules. "We have seen incredible, increasing discovery in
422 APA cases." This discovery "changes the nature of practice," and is
423 a big problem for the executive branch. Matters are further
424 complicated by joining other claims to APA claims "as a hook into
425 discovery."

426 The central question was repeated: What advice should the
427 Committee give to the Subcommittee? There seems to be enough
428 support to continue to study the possibility of recommending a new
429 rule or rules, while reconsidering the question whether any new
430 rules should be adopted directly into the Civil Rules or instead
431 should be framed as supplemental rules integrated with the Civil
432 Rules.

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433 One question is whether adopting the supplemental rules format
434 would encourage recommendation of more detailed provisions. Some
435 expansion might be considered. Examples of matters considered in
436 earlier drafts and abandoned include uniform page limits for
437 briefs, provisions recognizing the various occasions for remanding
438 to SSA, and explicit procedures for awarding attorney fees for work
439 done on review in the district court. These drafts were abandoned
440 on their own merits, but it may be that they would seem more
441 attractive as part of a more elaborate set of supplemental rules.
442 Adopting just a single supplemental rule might seem rather odd.

443 The case for doing nothing was advanced. The October 3
444 conversation with some magistrate judges seemed to at least one
445 participant to provoke an underwhelmed response. They seemed to say
446 that the proposed rule would make little difference in what they
447 are doing now. "There will be local practices." Claimants are
448 opposed. SSA will not get all it wants. "This proposal is not
449 reason enough to venture into the transsubstantivity debates." A
450 more general administrative review rule might make sense, but not
451 a limited § 405(g) review rule. The work that has been done could
452 be put to good use by framing a model local rule. A model rule
453 could include very detailed provisions, at a level that would not
454 be attempted even in supplemental rules. "It is good to let local
455 courts do their own thing."

456 One response was to ask whether a model local rule could
457 provide for relying on a Notice of Electronic Filing to displace
458 formal Rule 4 service of summons and complaint on SSA and the local
459 United States Attorney. That practice has been enthusiastically
460 received on all sides, but would be hard to square as a local rule
461 consistent with Rule 4. It might be adopted as a new provision in
462 Rule 4.

463 Another response asked whether it is necessary to keep open
464 the possibility of discovery. Discovery is used now in rare
465 circumstances, and indeed may be useful, as noted in the earlier
466 discussion.

467 The Committee concluded that the Subcommittee should continue
468 its work, keeping in mind the views of those who doubt that any
469 rule should ultimately be proposed. The work should include
470 consideration of the supplemental rules alternative.

471 Discussion turned for a moment to what the Committee might say
472 to direct further Subcommittee work on the details of rule
473 provisions. Is it time for comments on details of the draft rule?

474 Some specific questions were raised.

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475 The first addressed the provision in draft Rule 71.2(a)(2)(B)
476 that calls for the "last four digits of the social security number
477 of the person on whose wage record benefits are claimed." SSA says
478 that this information is important to enable it to identify the
479 correct administrative proceeding and record.

480 Draft Rule 71.2(c)(1)(A) says that the answer "must include"
481 a certified copy of the administrative record. Perhaps this should
482 be "may be limited to" the record and any affirmative defenses, the
483 better to reflect the proposition that Rule 8(b) does not apply,
484 freeing SSA from the obligation to respond to allegations in the
485 complaint.

486 Draft subdivision (c)(2)(B) begins "Unless the court sets a
487 different time * * *." Is this needed, given the general Rule 6(b)
488 authority to extend time limits for good cause?

489 The subdivision (c)(2)(B) time provisions also tie back to
490 (c)(1)(B). This part of (c)(2)(B) suggests that a motion under Rule
491 71.2(c)(2)(A) may be made and decided in less than 60 days after
492 notice of the action is served on SSA and the United States
493 Attorney. Is that prospect so plausible as to warrant a separate
494 rule provision? Perhaps so, as a matter of foreseeing what is
495 possible, even if not particularly likely.

496 Draft subdivision (d)(1) sets the time for the claimant's
497 brief at 30 days after the answer is filed or 30 days after the
498 court disposes of all motions filed under Rule 71.2(c)(1)(A),
499 "whichever is later." Is it likely that the answer will be filed
500 before all motions are disposed of? Serving the motion defers the
501 time to answer as provided by Rule 12(a)(4). The time for making a
502 motion is set at the same 60-day period as the time for serving the
503 answer, which includes the administrative record. But the
504 administrative record may prove useful to support a Rule 12(b)
505 motion, for example by showing the date of the event that starts
506 the time allowed to file the action.

507 Draft subdivision (d)(1) also directs that the plaintiff file
508 a motion for the relief requested along with the plaintiff's brief.
509 What does the motion add to the request for relief that is made in
510 the brief? The judge who asked this question noted that his clerk's
511 office reports that a motion is not needed to track the case for
512 case-management purposes. Another judge noted that in her district
513 the time for 6-month reports is triggered by filing the
514 administrative record, and some judges fear that adding a motion
515 requirement to (d)(1) may confuse matters. Clerk Briggs suggested
516 that "the motion easily could serve no purpose." The judge who
517 first raised the question added that if a motion is required,
518 symmetry might seem to suggest that a cross-motion should be
519 required, and that "makes even less sense."

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520 Discussion concluded with the observation that the
521 Subcommittee had been provided some guidance, even if the guidance
522 "is not always clear."

523 *MDL Subcommittee*

524 Judge Bates introduced the MDL Subcommittee report by noting
525 that the Subcommittee has gathered a great deal of information. The
526 issues on its agenda are evolving. Some of the questions they are
527 finding may be difficult to address by court rules. The Judicial
528 Panel on Multidistrict Litigation has been actively engaged in the
529 Subcommittee's inquiries, as have some MDL judges and some
530 academics.

531 Judge Dow delivered the report, framing it as a "high-level
532 summary." The Subcommittee has whittled its recent list of six
533 subjects down to four, and will propose that the Committee approve
534 deferral of one of the four. Three will remain for continuing
535 active study.

536 Third-Party Litigation Funding: The Subcommittee has done extensive
537 work on third-party funding, including attendance at a one-day
538 conference arranged by George Washington University Law School last
539 November. Third-party funding is extensive, and seems to be still
540 growing. Financing is used for a wide variety of litigation, and in
541 forms that tie more or less directly to particular litigation.
542 Individual arrangements can be complicated, and there are many
543 varieties of arrangements. Plaintiffs as well as defendants arrange
544 financing. As a potential Civil Rules matter, the focus has been on
545 disclosure. Some district local rules and some circuit local rules
546 are written in terms that at times explicitly look to disclosure of
547 third-party financing, but that more often seem to reach third-
548 party financing by requiring disclosure of anyone who has a
549 financial interest in the litigation.

550 While third-party financing is thriving and seems to be
551 expanding, there are no signs that it is peculiarly involved in MDL
552 proceedings. MDL judges, at least, commonly report that they are
553 not aware of third-party financing in the proceedings they have
554 managed. But there have been prominent signs of interest, including
555 an order for in camera disclosure of any third-party financing
556 arrangements in the pending opioid MDL.

557 It has been suggested that third-party funding could be useful
558 to expand the universe of lawyers who can participate in leadership
559 roles in MDL proceedings. Participation can require costly
560 investments that will be repaid only after protracted proceedings.
561 Not all lawyers or firms have the required resources.

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562 Professor Marcus added that the Committee first received
563 proposals calling for disclosure of third-party funding some five
564 years ago. Those proposals were general, not focused on MDL
565 proceedings alone. "We've learned a lot. It is not an MDL-specific
566 issue."

567 The Subcommittee will continue to monitor third-party funding
568 developments, but does not plan to work toward possible rules
569 proposals. A judge asked what does "monitoring" mean? Possibilities
570 include further "mail box" suggestions from outside observers;
571 attention to JPML annual survey answers to the question whether MDL
572 judges are aware of third-party funding in their proceedings;
573 attention to developments in local court rules; keeping informed
574 about any action in Congress (S. 471 in Congress now addresses
575 disclosure in MDLs and class actions); and sending a few
576 Subcommittee members to programs arranged by others. The
577 Subcommittee Chair and Reporter, consulting with the Committee
578 Chair, will determine how best to survey local rules.

579 Early "Vetting" and Initial Census: Efforts have long been made to
580 get behind or beyond individual complaints in the individual
581 actions consolidated in an MDL. The purpose can be to advance
582 management by finding out more about the topics the cases present.
583 It can be to advance discovery, and with that to weed out unfounded
584 claims. There is an apparent consensus that there are problems with
585 unfounded claims in the truly large-scale, "mega" MDLs. The common
586 problems involve plaintiffs who were not even exposed to the
587 challenged product, or have no evidence that exposure caused any
588 injury.

589 Plaintiff fact sheets have been used to gather information
590 from individual plaintiffs, and have come to be used in almost all
591 of the largest MDL proceedings. Defendant fact sheets also are
592 common in those cases. They are a subject of discussion at the JPML
593 program for MDL judges being held today. Wide use might suggest
594 that there is little need to consider a rule regulating the
595 practice.

596 But wide use of plaintiff fact sheets has shown some
597 dissatisfaction. They are tailored to the circumstances of each
598 particular MDL, and months may be needed to develop the form. This
599 delay can impede the next steps in managing the proceeding. And
600 there have been at least some complaints that fact sheets impose an
601 undue burden.

602 A recent development in efforts to gather information about
603 individual cases in an MDL without imposing undue delay or effort
604 has been called an "initial census." This approach is on track to
605 be used soon in two pending MDLs. The information may be used not
606 only to guide ongoing management, but also to determine whether it

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607 is feasible to certify a class action, a class action with
608 subclasses, or perhaps more than one class action.

609 This is an important subject. There is general agreement that
610 some efforts to gather information about individual actions in an
611 MDL is a good thing. Rather than indicate that no rule is needed,
612 agreement might suggest the value of a rule to ensure that the
613 effort is made in all appropriate MDLs, and is made in the best
614 form.

615 Discussion began with an echo of the initial observations:
616 fact sheets, initial censuses, or something of the sort meet broad
617 acceptance. But it is not so clear that a new rule is appropriate.

618 Another observation was that agreement on the value of these
619 approaches is often accompanied by disagreement about the time
620 needed to develop plaintiff fact sheets. An initial census might be
621 simpler.

622 Another Committee member observed that MDLs come in all kinds
623 of shapes, leaving the question whether an "initial census" should
624 be used in all cases.

625 Professor Marcus suggested that a rule would have to say when
626 the rule applies. Is it for all MDLs? Only "mega" MDLs? Only
627 personal-injury MDLs, and if so what counts as personal injury? And
628 something is likely to depend on the purpose, whether it is to
629 screen out unfounded claims or to get a jump-start on managing the
630 MDL. Apart from that, there are forms of mass litigation outside
631 the MDL world: should a rule apply to them?

632 Further discussion noted the view of one prominent MDL judge
633 that it takes too long to finish the plaintiff fact sheet process
634 to gain much help in managing an MDL. An initial census might be
635 faster in generating a sense whether there are categories of
636 dubious claims, which might then be explored by plaintiff fact
637 sheets. H.R. 985 in the last Congress took an approach to initial
638 plaintiff statements that was extremely demanding as to content,
639 time to complete the fact sheet, and time for judicial
640 consideration of each fact sheet. The initial census may prove
641 effective, and at much lower cost.

642 A judge described an MDL that grew to 8,500 cases. A plaintiff
643 was required to file a fact sheet within 60 days of filing a
644 complaint, providing under oath such information as when the
645 plaintiff got the implant and what the injuries were. Defendants
646 were allowed to challenge the sufficiency of individual fact
647 sheets, and if not satisfied by the plaintiff's response could take
648 the question to the judge. No defendant took any fact sheet to the
649 judge. Then settlement came on. At that point the defendants

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650 brought up 120 cases in which they never got a fact sheet, an event
651 suggesting that the defendants had not thought it important to get
652 the information early in the proceedings.

653 The Subcommittee will continue to consider these topics,
654 paying close attention to the proceedings that will use the initial
655 census approach. Much may be learned from them. The Subcommittee
656 may develop a rule proposal. Or it may conclude that the best
657 approach is to leave these practices for continuing evolution in
658 the overall MDL world.

659 The Committee was comfortable with this approach.

660 Settlement Review: Judge Dow suggested that the MDL judge's role in
661 the settlement process is perhaps the toughest question the
662 Subcommittee faces. Rule 23 provides protection for class members
663 through the judge. Some MDL proceedings approach dimensions that
664 look much like class actions in the sense that individual
665 plaintiffs who are represented by attorneys not included in the MDL
666 leadership are not effectively represented by the lead attorneys.
667 Attorneys who represent plaintiffs and those who represent
668 defendants join in asking that settlement not become a subject for
669 rules. The pressure for judicial involvement comes mostly from
670 academics.

671 That sets the question: Should there be a rule addressing
672 settlement of MDL proceedings, perhaps one designed to ensure that
673 the lawyers who lead and control an MDL proceeding are responsible
674 for representing all plaintiffs in the MDL, particularly for
675 settlement? One illustration is the certification of a settlement-
676 negotiating class in the opioid MDL. Another illustration is an MDL
677 in which the defendants retained a separate team of lawyers charged
678 with negotiating settlements with individual-case plaintiffs.

679 Judges commonly agree that they have no role to play with
680 respect to individual settlements. If a plaintiff and defendant
681 settle and seek to dismiss, the judge cannot intrude.

682 Many MDL judges, on the other hand, view global settlement as
683 their primary responsibility. And there is no rule structure for
684 this.

685 The Subcommittee is exploring questions as to present sources
686 of a judge's authority with respect to MDL settlements. Is there
687 inherent power, drawing not only from the nature of judicial office
688 but from the very structure and purpose of MDL consolidation? Can
689 authority be found in the duty to police the professional
690 responsibility of the lawyers who appear in an MDL and act in ways
691 that reach beyond their own clients? Would it help judges to
692 provide a clear basis of authority in a rule? And would the clear

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693 authority protect individual plaintiffs? The Subcommittee realizes
694 that proposing a rule on settlement would be "swimming against the
695 tide," but will continue to explore the waters.

696 Professor Marcus offered a perspective on the issues that
697 trouble academic commentators on this question. On most issues of
698 MDL procedures, such as interlocutory appeals, clear and opposing
699 positions can be found for plaintiffs and defendants. That they
700 join in agreeing that rules should not be developed for settlement
701 is one of the things that worries academic observers. They worry
702 that individually represented plaintiffs are confronted with
703 backroom deals negotiated by lead lawyers who do not represent
704 them. This concern may explain why judges often become involved.
705 Rule 23 protections are provided if class certification becomes the
706 means of implementing settlement. Many observers believe that
707 judges become involved in large-scale MDL settlements in ways that
708 parallel their role in class-action settlements. "It is difficult
709 to say who is being injured." Any effort to frame a rule must
710 confront the "perimeter" question that defines the circumstances
711 that authorize judicial involvement.

712 These questions were approached from a somewhat different
713 slant by the observation that it may be possible to frame a rule
714 around the common tendency in the Civil Rules to rely on case-
715 specific exercises of discretion by the judge. MDL proceedings, as
716 constantly emphasized, come in myriad sizes and shapes. They may
717 involve as few as four, or perhaps even fewer, individual actions.
718 They span the entire range of subject matters. The individual
719 plaintiffs may be unsophisticated real persons, or highly
720 sophisticated persons and businesses. There may not be any
721 officially recognized lead lawyer or leadership structure. There
722 may be an elaborate structure of lead counsel, executive committee,
723 steering committee, discovery committee, liaison counsel or
724 committee for actions outside the MDL, and settlement committee.
725 Lawyers who are not members of any of the leadership committees may
726 have significant influence on them, or little or no voice. The
727 question is very much an MDL-specific question of identifying the
728 point at which the proceedings inflect away from effective
729 individual representation of all plaintiffs toward de facto
730 representation by the leadership. Attempting to define that point
731 by formula would indeed be difficult. Leaving it to judicial
732 discretion could provide ample authority for judicial involvement
733 without requiring involvement in most proceedings.

734 A participant elaborated on this subject. One possible
735 approach would be to turn the judge's role in settlement on the
736 judge's responsibility for recognizing a formal lead-counsel
737 structure. Some MDLs will enjoy coordinated work by plaintiffs'
738 counsel without any need for court direction or formal recognition.
739 But when the court undertakes to define leadership roles and

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740 responsibilities, it can address many topics that surround the
741 defined roles. Rule 23 provides a ready model, all the more fit
742 because the concern in MDL proceedings is often expressed by judges
743 by referring to a quasi-class action. Not only is lead counsel
744 recognized, but attorney fees are addressed. In MDL proceedings,
745 common-benefit funds to compensate lead counsel are typical and
746 important. The role of lead counsel in settlement is equally
747 important. The MDL structure, moreover, may provide reason for
748 judicial involvement in the fees charged by counsel who are not
749 appointed to the leadership structure – they may seem more engaged
750 in the proceeding when they settle through it than are lawyers who
751 may represent class members who are not class representatives.

752 A judge observed that many judges believe they have ample
753 inherent authority, and also feel responsible to protect the
754 interests of plaintiffs represented by individually retained
755 lawyers. At least one judge who has issued opinions justifying
756 inherent authority, however, has said that it would be helpful and
757 reassuring to have a solid foundation in a court rule.

758 Subcommittee work will continue.

759 Interlocutory Appeals: Judge Dow said that “interlocutory appeals
760 are the hottest topic for the Subcommittee.”

761 The Subcommittee report provides a summary of several research
762 projects that have been undertaken by plaintiffs’ groups, defense
763 groups, and for the Committee. The research shows there are not
764 many § 1292(b) appeals in MDL proceedings. The low reversal rate on
765 the appeals that are taken seems to parallel the rate for all §
766 1292(b) appeals or appeals generally. There may be indications that
767 courts of appeals take a practical approach – leave to appeal is
768 somewhat more likely to be granted in an MDL that includes many
769 individual actions than in smaller-scale MDLs. There may be some
770 issues with the statutory criteria for § 1292(b) appeals,
771 particularly with the requirement that there be a controlling
772 question of law as to which there is substantial ground for
773 difference of opinion. A case may involve a vitally important
774 application of well-settled law to the specific circumstances of
775 the MDL, and deserve interlocutory review accordingly. Defendants,
776 moreover, frequently say that getting important questions settled
777 is almost as important as getting them settled the right way.
778 Continuing proceedings will go more smoothly, particularly toward
779 settlement, when uncertainty is removed.

780 The research, however, also shows that the median time to
781 decision of a § 1292(b) appeal is nearly two years. Some circuits
782 are considerably faster, while others are considerably slower.
783 Plaintiffs assert that any increased opportunity for interlocutory
784 appeals will tempt defendants to seek appeals for the purpose of

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785 delay. Whatever the purpose, the MDL court may be left in a
786 quandary over continuing management even though the appeal does not
787 of itself stay proceedings. The Subcommittee believes that the
788 problem of delay will persist, and is not likely to be controlled
789 by proposing an appeal rule that mandates disposition by the court
790 of appeals within a defined time limit.

791 The model being considered at the moment relies on discretion
792 in the court of appeals to decide whether to grant permission to
793 appeal. The MDL judge could not veto the appeal, as can be done by
794 simply refusing to make the findings that enable application to the
795 court of appeals for permission to appeal under § 1292(b). But the
796 MDL judge would be responsible for stating reasons why an
797 interlocutory appeal might, or might not, best serve the interests
798 of the MDL proceeding.

799 The possibility of an interlocutory appeal rule has been
800 discussed at several conferences organized by outside groups. The
801 evolution of the defense proposals has been remarkable. Proposals
802 to establish appeals as a matter of right from some more or less
803 loosely described categories of orders have been abandoned. The
804 question instead has become whether to adopt a rule that eliminates
805 any MDL-judge veto and relies on criteria that look to advancing
806 the purposes of the MDL proceeding.

807 Initial discussion asked whether a rule would be confined to
808 some category of MDL proceedings – for example those that include
809 more than a threshold of individual actions – or would reach all?
810 A rule available in every MDL proceeding would generate far more
811 opportunities for interlocutory appeals. Judge Dow responded that
812 discussion at the October 1 meeting sponsored by Emory Law School
813 suggested that it would be difficult to draft a rule that excludes
814 some MDLs. The standard might look to something borrowed from 28
815 U.S.C. § 158(d) for bypass appeals in bankruptcy: “may materially
816 advance the progress of the case or proceeding in which the appeal
817 is taken.”

818 The suggestion that a rule might apply to all MDLs prompted a
819 further question: why, then, not adopt a similar rule for class
820 actions, which may involve similar opportunities for useful
821 interlocutory appeals? Or, extending it, for other large
822 aggregations of cases that are in the same district?

823 One response suggested that setting a number-of-cases
824 threshold might prove tricky when the number of cases in the MDL
825 continues to grow with tag-along transfers and original filings.

826 A Committee member suggested that “this seems to be working
827 into a broader scope than we have data for.” It is important to
828 recognize the problem of delay in getting an appellate decision. We

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829 need more information to support consideration of a rule that would
830 apply to all MDL proceedings, much less to class actions as well.

831 Another member suggested that the first question is whether
832 the criteria of § 1292(b) in fact constrain district judges who
833 believe that an interlocutory appeal is desirable. Research for the
834 Committee failed to find any case in which a judge said that an
835 appeal would be desirable, but § 1292(b) does not authorize it. On
836 the other hand, some defense counsel say that they get signals from
837 the judge that they should not ask for certification. "There is
838 some concern about denial of access to appellate review."

839 A related defense concern is that there is asymmetric access
840 to review under the final judgment rule, as is true in all civil
841 cases. If a plaintiff loses a ruling that disposes of even a single
842 case in the MDL, the plaintiff can appeal. If a defendant loses a
843 ruling that allows many cases to continue, the defendant cannot
844 appeal.

845 Another member remarked again on the evolution of the
846 proposals. The initial proposal was for appeal as of right, with no
847 input from the MDL judge and a mandatory stay of proceedings.
848 "Protections have been added," with contractions as well as
849 expansions.

850 Yet another member agreed that the kinds of issues and rulings
851 being offered as reasons for interlocutory appeal may not meet §
852 1292(b) criteria. And there may be judicial signalling that deters
853 requests for certification. But certifications do happen in MDLs,
854 and may be followed by the appellate court's denial of permission
855 to appeal.

856 The problem of delay recurred. A judge described an MDL that
857 reached a ruling on a preemption issue just a few months before the
858 schedule to hold Daubert hearings and to begin bellwether trials.
859 If an appeal were certified and accepted, a decision could not be
860 had from the court of appeals before the MDL would otherwise have
861 been resolved. So an appeal was not certified. If a rule is to be
862 recommended, it should in some way address the problem of delay.

863 The problem of delay was further addressed by a reminder that
864 a single MDL might involve a series of orders that seem likely
865 subjects for interlocutory appeal. Successive delays could be a
866 truly serious problem.

867 One approach to delay was suggested: a rule that calls for the
868 MDL judge's views on the value and risks of an interlocutory appeal
869 could recognize advice that an appeal would be useful if it can be
870 resolved within a stated period, but not otherwise. Different
871 circuits seem to vary in their ability to produce prompt decisions,

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872 but a circuit court that grants permission to appeal with this
873 advice from the MDL judge might respond by moving faster than its
874 general § 1292(b) pace.

875 The last question raised asked whether any rule should be
876 located in the Civil Rules. There was no response.

877 Judge Bates thanked the Subcommittee for its continuing work.

878 *Final Judgment Appeals after Rule 42(a) Consolidation*

879 Judge Rosenberg delivered the report of the joint Appellate-
880 Civil Rules Subcommittee appointed to study the effects of the
881 decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018). She reminded the
882 Committee of the basic ruling: no matter how complete the Rule
883 42(a) consolidation of cases that were initially filed as separate
884 actions, an order that disposes of all claims among all parties to
885 any component that began life as a separate action is a final
886 judgment. Appeal may be taken under § 1291. Failure to take a
887 timely appeal forfeits the right to appeal when the remaining
888 components of the consolidated proceeding are later resolved by a
889 final judgment. This rule had been anticipated by some circuits,
890 but a majority of the circuits took one of three other approaches
891 – the disposition is never final, or it is sometimes final
892 depending on the circumstances, or it is presumed not final but may
893 be final in special circumstances. She also noted that the Court
894 suggested that if this rule has untoward consequences, the cure
895 should be found in the Rules Enabling Act process.

896 The Subcommittee has met by two conference calls. Some of its
897 members have had additional exchanges with Emery Lee to help design
898 Federal Judicial Center research. Dr. Lee has begun a docket search
899 of all cases filed in 2015, 2016, and 2017 in twelve districts. The
900 work will continue, and may be concluded as to those years by next
901 spring. It may be useful, however, to expand the project to include
902 cases filed in 2018, 2019, and 2020.

903 The reason for pursuing this work is the prospect that
904 allowing and forcing immediate appeals in consolidated proceedings
905 may not be efficient. If new rules provisions are proposed, the
906 likely starting points will be Rule 42(a) and Rule 54(b).

907 Dr. Lee described his work. The first task is to determine how
908 many consolidations occur, and how many cases are included in the
909 consolidations. The 12 districts examined so far have been selected
910 to represent circuits that include each of the four different
911 approaches identified before *Hall v. Hall*. It appears that between
912 1% and 2% of all cases on the docket are consolidated. The meaning
913 of that number depends in part on what is selected as the
914 denominator. If actions of types not likely to be consolidated

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915 could be identified and taken out of the count, the fraction would
916 be higher. But it appears that consolidations "show up in a lot of
917 places." There are a lot of prisoner cases, bankruptcy appeals,
918 even administrative review cases. FOIA cases often show up in the
919 District of Columbia District. Cases involving complex subject
920 matter also show up.

921 Another step is to determine the purposes of consolidation,
922 particularly whether it is intended to be "for all purposes." This
923 will be a tricky inquiry, because judges do not always describe the
924 nature of the consolidation, and often will justifiably not be
925 thinking ahead to the many possible paths to decision that might
926 lead to complete disposition of one originally separate action
927 before others are decided. And it may be difficult to "code" docket
928 entries, which often may not say "this is a final judgment."

929 Work so far suggests that more than 5,000 cases are
930 consolidated annually. If that number holds, it will be necessary
931 to proceed by sampling the cases.

932 *E-Filing Deadline*

933 Judge Bates reported that the Appellate, Bankruptcy, Civil,
934 and Criminal Rules Committees are represented on a joint committee
935 to study a suggestion by Judge Chagares that the deadline for
936 electronic filing be changed from midnight in the court's time zone
937 to "when the clerk's office is scheduled to close." The relevant
938 rule for this Committee is Civil Rule 6(a)(4)(A). Civil Rules
939 Committee members Ericksen and Seitz are working on the
940 subcommittee. Member Seitz observed that the proposal was prompted
941 by a similar local rule in the District of Delaware setting the
942 time at 6:00 p.m., and a later rule by the Supreme Court of
943 Delaware that set the time at 5:00 p.m..

944 The Subcommittee has launched elaborate studies of practices
945 around the country, not only as to other local rules that may
946 change the deadline but also as to actual filing patterns – when
947 are filings actually made; can differences be identified by type of
948 action, firm size, or like factors; what times do clerk's offices
949 actually close, and are means provided to file paper copies on the
950 same day after closing; and what percentage of cases have at least
951 one pro se filing. Work will be taken up as information is
952 developed.

953 *Rule 4(c)(3): Marshals Service in Forma Pauperis Actions*

954 Section 1915(d) of the Judicial Code directs that when a
955 plaintiff is authorized to proceed in forma pauperis "[t]he
956 officers of the court shall issue and serve all process, and
957 perform all duties in such cases."

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958 The statute is reflected in Rule 4(c)(3), but at least some
959 observers believe the rule is ambiguous. The first sentence
960 provides that, at the plaintiff's request, the court may order
961 service by a marshal. The second sentence reads: "The court *must so*
962 *order* if the plaintiff is authorized to proceed in forma pauperis
963 * * * or as seaman * * *." Does "so order" mean always must order
964 service by the marshal in i.f.p. or seaman cases? Or does it mean
965 that the court must make the order only if the plaintiff requests
966 it? This subject was launched by a suggestion of Judge Furman at
967 the January 2019 Standing Committee meeting. Opinions in the Second
968 Circuit have divided on the question whether the court must order
969 marshal service only if the plaintiff requests it.

970 Those who find the text ambiguous might resort to the pre-
971 style version, which might more easily be read to mandate an order
972 for marshal service whether or not the plaintiff requests the
973 order.

974 One possible approach is to do nothing. Rules amendments are
975 not proposed every time an ambiguity appears, nor every time some
976 court somewhere seems to get an issue wrong, nor every time
977 conflicting interpretations appear.

978 Three basic alternatives can be evaluated if something is to
979 be done. One is to resolve the ambiguity by requiring an order for
980 marshal service in every case that recognizes i.f.p. status or
981 involves a seaman. That might seem to fit better with the broad
982 command of § 1915(d).

983 The second approach would be to confirm that the court must
984 order marshal service only if an i.f.p. plaintiff makes a request.

985 A third approach, perhaps closer still to the spirit of the
986 statute, would dispense with the need for a court order: the
987 marshal would automatically be required to make service in every
988 i.f.p. action.

989 The choice among competing approaches should be informed by
990 information from the Marshals Service. The Marshals Service has
991 reached out to the districts for advice but got only a low response
992 rate. Responses were mixed. One district automatically issues
993 service orders. There is a general belief that clarity would be
994 helpful, but it is not certain whether there is a real need.

995 Clerk Briggs observed that "marshals despise making service."
996 The Bureau of Prisons "gives us a waiver."

997 A judge noted that service is a big burden on marshals,
998 especially when it must be made in remote areas. "If the plaintiff
999 doesn't ask, don't jump."

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1000 Another judge said that his district routinely appoints
1001 marshals. But it is a "huge imposition." When lawyers are
1002 appointed, the lawyers agree to make service, in part because they
1003 will do it faster than the marshals can do it. Pro se litigants
1004 have difficulties, but sometimes they make service and then fail to
1005 note service on the docket.

1006 Two other possibilities were noted. One is that service by
1007 marshals might be a good place to begin experimenting with
1008 electronic service of the summons and complaint. The marshals could
1009 set up a reliable system and provide good information on the likely
1010 advantages of efficiency and any likely difficulties and
1011 disadvantages. Another is that marshals might be encouraged to
1012 appoint persons not marshals to make service for the marshals. That
1013 might well satisfy both § 1915(d) and Rule 4(c)(3).

1014 Other possible questions about marshals service were noted in
1015 the agenda materials but not discussed.

1016 Discussion concluded by suggesting that it may be useful to
1017 find some means of providing further advice to the Reporter.

1018 *Rules 4, 5: 19-CV-N*

1019 These suggestions for Rules 4 and 5 come from Dennis R. Brock,
1020 a prisoner plaintiff who encountered some uncertainties in pursuing
1021 a pro se action. He paid the filing fee, and he says that in some
1022 unspecified way he requested service by a marshal. (The docket does
1023 not reflect the request.) The clerk notified him that he should
1024 make service, and mailed him copies of the summons and complaint.
1025 He made service by mail. He suggests that "the applicable statutes"
1026 should be included in Rule 4.

1027 A second suggestion for Rule 4 arises from a local practice
1028 that defers the time to answer until after an Initial Phone Status
1029 Conference. Apparently relying on the times specified in Rule 12,
1030 Mr. Brock believed the defendant had not timely answered and was
1031 preparing to write a motion for default that he did not file
1032 because a fellow inmate told him the motion would make the judge
1033 mad. He suggests that notice of the local practice should be
1034 included in the Civil Rules.

1035 The Rule 5 suggestion arises from the amendments that address
1036 electronic filing. Mr. Brock did not use e-filing, and suggests
1037 that the court should have sent him a copy of his own filings with
1038 the CM/ECF header added by the court. He believes that not having
1039 the number will cause confusion when another party refers to a
1040 document only by number.

1041 Discussion focused on the high and perhaps growing number of

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1042 actions that include at least one pro se party. It was noted that
1043 in forma pauperis plaintiffs usually appear pro se. Official
1044 statistics on the numbers of pro se parties were thought to be
1045 skewed. As an extreme example, there may be a single pro se party
1046 in a large-scale MDL proceeding.

1047 Discussion concluded by a vote to remove these suggestions
1048 from the agenda.

1049 *Rule 12(a)(2): Statute Times*

1050 Judge Bates led the discussion of 19-CV-0, which proposes that
1051 Rule 12(a)(2) should be amended to include an exception for times
1052 set by statute to parallel the exception in Rule 12(a)(1).

1053 Rule 12(a) sets the times for responsive pleadings. Rule 12(a)
1054 is the general rule. It begins:

1055 Unless another time is specified by this rule or a
1056 federal statute, the time for serving a responsive
1057 pleading is as follows: * * *

1058 There is no similar exception for statute-set times in Rule
1059 12(a)(2), which sets a 60-day time to respond in actions against
1060 the United States or a United States agency or officer or employee
1061 sued in an official capacity. The suggestion made by Daniel T.
1062 Hartnett, however, notes that the Freedom of Information Act sets
1063 a 30-day period to respond in some actions. He further notes that
1064 in a recent action the clerk's office initially refused to issue a
1065 summons with the 30-day deadline, relying on the 60-day time set by
1066 Rule 12(a)(2) and a computer programmed to set either 21- or 60-day
1067 response times. The clerk's office was cooperative, however, and
1068 was persuaded to issue a summons with the 30-day period.

1069 Rule 12(a)(3) sets a 60-day response time in an action against
1070 a United States officer or employee sued in an individual capacity
1071 for an act or omission occurring in connection with duties
1072 performed on the United States' behalf. Like Rule 12(a)(2), it says
1073 nothing of another time specified by a federal statute. No statute
1074 specifying a different time has been identified.

1075 There is a strong case for recognizing the exception for
1076 statutory times in Rule 12(a)(2), now that specific statutory
1077 provisions have been identified. The question whether to amend Rule
1078 12(a)(3) in parallel is more difficult. If the exception occurs in
1079 both subdivisions (a)(1) and (a)(2), difficulties will arise if
1080 there is – or in the future will be – a statute that sets a
1081 different time for an action covered by (a)(3). The lack of
1082 parallelism might be taken to imply a deliberate choice. The
1083 outcome, however, would likely turn on the "latest-in-time" rule:

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1084 a statute enacted after (a)(3) would supersede the rule, while a
1085 statute enacted before (a)(3) would be superseded by the rule.
1086 There is no reason to wish to supersede an earlier statute by rule
1087 without even knowing of the statute, nor reason to court the
1088 difficulty of possible future statutes.

1089 Still, it may seem awkward to imply the existence of statutory
1090 time periods in an amended Rule 12(a)(3) when no such period is
1091 known.

1092 General discussion began with the observation that the
1093 Department of Justice complies with the 30-day periods set by FOIA.
1094 When an action combines a FOIA claim governed by the 30-day period
1095 with claims under other statutes, the Department asks for an
1096 extension of time to provide a single answer under the general 60-
1097 day period of Rule 12(a)(2). This does not seem to be a problem.
1098 The Department has not encountered a statute setting a different
1099 period than Rule 12(a)(3).

1100 A question about the interpretation of current Rule 12(a) was
1101 raised. Rule 12(a)(1), quoted above, recognizes "another time
1102 specified by this rule or a federal statute." It would be possible
1103 to interpret that as a provision that recognizes statutory time
1104 periods and reaches subdivisions (a)(2) and (a)(3). But the more
1105 apparent meaning may be that Rule 12(a)(2) is "another time
1106 specified by this rule" without an exception for different
1107 statutory periods. Clearly enough 12(a)(2) substitutes a 60-day
1108 period for the 21-day period set by Rule 12(a)(1). So for Rule
1109 12(a)(3). It is not clear that the (a)(1) reference to a time
1110 specified by a federal statute extends beyond the 21-day periods
1111 set by (a)(1), or the 60- and 90-day periods set after waiver of
1112 service.

1113 The pre-Style Rule 12(a) was noted. Former 12(a)(1) did not
1114 refer to a different time provided by Rule 12(a). It said only:
1115 "Unless a different time is prescribed in a statute of the United
1116 States * * *." Subdivisions (a)(2) and (3) did not say anything
1117 about statutes, or for that matter other rules. It is not clear how
1118 this history bears on the possible ambiguity in the present rule –
1119 perhaps it was intended to extend the statutory exception to (a)(2)
1120 and (3), or perhaps referring to times set in this rule meant only
1121 to clarify the role of (a)(2) and (a)(3) as exceptions to (a)(1).

1122 Discussion finished by concluding that language should be
1123 drafted by make Rule 12(a)(2) parallel to Rule 12(a)(1). It may be
1124 unnecessary, possibly even dangerous, to do the same for Rule
1125 12(a)(3).

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1126 *In Forma Pauperis Practices: 19-CV-Q*

1127 Sai, who participated actively and constructively in the
1128 consideration of amendments to the electronic-filing rules, has
1129 made two sets of suggestions that point to serious questions. The
1130 first, addressed to the Appellate Rules and Criminal Rules as well
1131 as the Civil Rules, relates to in forma pauperis practices.

1132 The first issue goes to the standards used to qualify a
1133 litigant for i.f.p. status. The argument that quite different
1134 standards are used by different courts, even by different judges on
1135 the same court, finds support in a recent law review article that
1136 thoroughly researched current practices. The governing statute, 28
1137 U.S.C. § 1915(a), offers no real guidance. Rather than attempt to
1138 incorporate specific standards into Rule text, Sai suggests
1139 adoption of Legal Service Corporation regulations. Apparently the
1140 LSC regulations delegate many determinations to local
1141 organizations, a feature that could undercut uniformity. In
1142 addition, Sai suggests reliance on government benefit programs –
1143 any litigant who receives SSI, SNAP, TANF, or Medicaid would
1144 automatically qualify for i.f.p. status. These proposals would
1145 incorporate standards developed for other purposes, and
1146 administered in different ways. Even rules to qualify for LSC
1147 services serve different purposes than determining i.f.p. status.
1148 Additional difficulties appear. Giving specific content by way of
1149 income and asset ceilings for i.f.p. status comes close to the line
1150 of substantive rules. And wherever that line is drawn, the
1151 proposals delegate the actual standards to nonjudicial actors.
1152 Delegation may be convenient, but it may not be wise or authorized
1153 by the Rules Enabling Act.

1154 The second suggestion is for clear rules on the responsibility
1155 to update information about financial status as circumstances
1156 change.

1157 The third set of suggestions addresses a host of ambiguities
1158 found in the Administrative Office forms for requesting i.f.p.
1159 status. Many of the concepts are found inherently ambiguous: What
1160 is "income"? What are "assets"? Who counts as a "spouse"? Even,
1161 what is "cash" – a blockchain "currency"? Here too, the suggestion
1162 is to incorporate standards developed for other purposes. The
1163 Internal Revenue Code and Regulations could be incorporated. Here
1164 too, the problems of substantive meaning and delegation appear.

1165 The fourth set of suggestions argues that much of the
1166 information requested by the current Administrative Office forms is
1167 irrelevant, intrusive, and at times so intrusive as to violate the
1168 Constitution. An applicant, for example, cannot constitutionally be
1169 directed to provide financial information about a nonparty, such as
1170 a spouse.

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1171 Discussion began by noting that the Northern District of
1172 Illinois i.f.p. forms have been twice revised in the last two
1173 years. One reason was that staff attorneys were "aggressive" in
1174 dealing with prisoner plaintiffs who got donations to their
1175 commissary accounts from family and friends. Sai is right that
1176 there are real problems. But it may be better to struggle with the
1177 problems on a local level. As one example, it is important to know
1178 what the Illinois prison system does.

1179 A judge noted that many factors enter a determination whether
1180 to recognize i.f.p. status. Income, assets, number of dependents,
1181 financial obligations, ability to earn, and other circumstances may
1182 combine in myriad ways. Attempting to capture the calculation in a
1183 formula is not likely to be wise. Nor are alternative approaches to
1184 increasing uniformity among courts likely to work. As an easy
1185 example, a given level of income and assets may be barely adequate
1186 for survival in one part of the country, but provide some margin of
1187 discretionary expenditure in another part.

1188 The difficulty with uniform standards was approached from a
1189 different angle. Courts of appeals may see the question differently
1190 than a district court sees it. The problems "touch on the
1191 thoughtful discretion of judges all over the country. They might
1192 not welcome constraints."

1193 A judge noted that similar problems arise in Criminal Justice
1194 Act cases, but that does not provide a foundation for considering
1195 a civil rule that sets i.f.p. standards.

1196 Other participants agreed that these are big problems. But the
1197 rules committees are constrained in their ability to address them.
1198 Are there other groups that might provide some relief?

1199 The Department of Justice will inquire into the possibility
1200 that some groups might be found to address some of these questions.

1201 The Court Administration and Case Management Committee is
1202 another likely place for considering these questions. They have
1203 received Sai's proposal, and appear interested in working on it.
1204 Given this information, the Committee concluded that the proposal
1205 should be removed from the Civil Rules agenda. It can be left for
1206 such consideration as the Court Administration and Case Management
1207 Committee chooses to give it.

1208 *Calculating Filing Deadlines: 19-VC-R*

1209 Sai observes that parties frequently run into difficulties
1210 with filing deadlines. The difficulties may arise from inattention,
1211 miscalculation, lack of clarity in the rules or events that trigger
1212 deadlines, or even misinformation by the court clerk. These

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1213 problems may be particularly pronounced for pro se litigants, but
1214 attorneys encounter them as well. Much time and no little agony are
1215 devoted to calculating and recalculating deadlines. Mistakes still
1216 happen. Sai's proposal is addressed to the Appellate, Bankruptcy,
1217 Civil, and Criminal Rules Committees.

1218 Sai's proposal rests on twin propositions: courts know what
1219 the deadlines are, and have authority to calculate them
1220 conclusively. Court clerks regularly have to calculate deadlines.
1221 So Sai proposes that courts be directed by rule to perform time
1222 calculations for all possible responses to every court or party
1223 action, and to give notice by order to all parties that have
1224 appeared. The rule would provide that all filers may rely on the
1225 court's calculation. And it is "deliberately cumulative": "The most
1226 recent calculation order should be the full calendar of a case
1227 listing all available, pending, or issued events, and their
1228 respective deadlines."

1229 Missed deadlines can lead to forfeiture of important rights.
1230 Assistance for all parties, and particularly for pro se parties, is
1231 welcome. Court clerks frequently offer advice now.

1232 But time deadlines are necessary to achieve the Rule 1 goal
1233 that every action and proceeding be determined, and be determined
1234 with some measure of speed. All of the deadlines in all sets of
1235 court rules were examined and many were amended ten years ago. One
1236 of the goals was to simplify the rules, reducing the risks of
1237 inadvertence and miscalculation. If a particular deadline proves
1238 undesirable in practice, it can be considered and modified. There
1239 may not be sufficient reason to undertake a sweeping review now,
1240 particularly in response to a proposal that does not aim at any
1241 particular time period in any particular rule.

1242 The premise that courts know what the times are is not
1243 compelling. Some deadlines run from events the court does not learn
1244 of. Discovery responses under Rules 33, 34, and 36, for example,
1245 are due 30 after the party is served, but the requests are not
1246 filed with the court until they are used in the proceeding or the
1247 court orders filing. Some time periods are set before an event. A
1248 written motion and notice of hearing, for example, must be served
1249 at least 14 days before the time specified for the hearing.

1250 Directing courts to continually calculate specific end-of-
1251 deadline days for every event in an action, in short, would impose
1252 a heavy burden. Mistakes would be made. And as the law stands now,
1253 a rule cannot protect a party who relies on a mistaken court
1254 calculation if the relevant time period is not only mandatory, but
1255 "jurisdictional" as well.

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1256 One alternative to alleviate forfeitures would be to relax the
1257 provision of Rule 6(b) that allows a court to extend the time to
1258 act "for good cause." One model of generosity is provided by Rule
1259 15(a)(2), which directs a court to "freely give leave" to amend a
1260 pleading "when justice so requires." But the good cause standard
1261 was adopted for good reason. Relaxing it could discourage the
1262 impulse to honor deadlines, and create added work for courts.

1263 Discussion began with the observation that the Bankruptcy
1264 Rules Committee quickly rejected this proposal. It is a "nice idea,
1265 but thoroughly impracticable." There are too many deadlines.
1266 Clerks' offices spend too much time advising on deadlines even now.
1267 And it is hard to be confident the court knows the deadlines.

1268 It was reported that the Criminal Rules Committee also had
1269 rejected the proposal. It did ask whether the CM/ECF system
1270 automatically calculates some deadlines, but found real problems
1271 with the prospect of sharing even those calculations with
1272 litigants.

1273 Discussion turned to the possibility of relaxing Rule 6(b).
1274 The good-cause standard might be relaxed, at least for pro se
1275 litigants, even borrowing the "freely grant" approach of Rule
1276 15(a). A judge observed that pro se status is part of the good-
1277 cause assessment under Rule 6(b). Three other judges agreed, with
1278 the note that the Seventh Circuit strongly encourages this
1279 practice. Another judge noted that Bankruptcy Rule 9006(b) is not
1280 the same as Civil Rule 6(b); if Rule 6(b) is to be taken up, the
1281 Bankruptcy Rules Committee will need to consider Rule 9006(b).

1282 The conclusion was that the practice of considering pro se
1283 status in administering Rule 6(b) provides good reason to bypass
1284 any consideration of Rule 6(b). The problems with the proposal to
1285 require courts to provide notice of all deadlines are too great to
1286 justify pursuing the proposal further. It will be removed from the
1287 agenda.

1288 *Rule 68 Offers of Judgment: 19-CV-S*

1289 Retired Judge Mark W. Bennett submitted as a recommendation a
1290 twelve-year-old article by Danielle M. Shelton, *Rewriting Rule 68:
1291 Realizing the Benefits of the Federal Settlement Rule by Injecting
1292 Certainty into Offers of Judgment*, 91 Minn. L. Rev. 865-937 (2007).

1293 Professor Shelton's article accepts Rule 68 pretty much as it
1294 has been interpreted in the courts. Her proposal focuses on
1295 increasing the clarity of Rule 68 offers. Clear offers will better
1296 enable the plaintiff to determine whether to accept the offer, and
1297 provide a better basis for comparing a rejected offer to a
1298 judgment. The offeror is better protected against unintended

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1299 interpretations that add court awards of costs and perhaps fees to
1300 an offer that has been accepted. The plaintiff is better protected
1301 against a ruling that a judgment that seems to exceed a rejected
1302 offer actually falls below it after including the costs and perhaps
1303 fees the court would have added if the offer had been accepted.

1304 The proposal would permit only two types of Rule 68 offers for
1305 money judgments. One is a "damage only" offer. The offer does not
1306 include any costs or fees, matters left to the court. Both parties
1307 know this is what the offer means, and the court knows when it
1308 comes time to compare offer and judgment. The other permitted offer
1309 is a "lump sum" offer that must be made in exact language provided
1310 by an amended Rule 68. The offer includes any prejudgment interest,
1311 costs, and attorney fees accrued at the time of the offer.

1312 The concept is clear enough, although inevitable drafting
1313 issues would arise in undertaking to frame a rule that as far as
1314 possible reduces uncertainties about the impact of a Rule 68 offer.

1315 The Committee's history with Rule 68 raises the question
1316 whether this relatively modest proposal could be taken up without
1317 going further into Rule 68. Rule 68 has been the subject of perhaps
1318 more spontaneously generated proposals than any subject other than
1319 discovery. Most of the proposals seek to "put teeth" into the rule
1320 by increasing the consequences for failing to win a judgment better
1321 than a rejected offer. The most common element would be to add
1322 attorney fees incurred by the offeror after the time of the offer.

1323 More complex proposals for expanding Rule 68 often include
1324 provisions that enable a claimant to make offers, not only a party
1325 defending against a claim. Because a plaintiff who wins a judgment
1326 better than an offer rejected by the defendant will almost always
1327 recover costs, the proposals contemplate an award of post-offer
1328 attorney fees to the plaintiff, a substantial incentive in cases
1329 that do not include a statutory fee award. A variation on this
1330 theme would reduce the Rule 68 award by the "benefit of the
1331 judgment." As a simple illustration, a defendant rejects a \$50,000
1332 offer, the plaintiff incurs post-offer fees of \$20,000, and wins a
1333 judgment for \$60,000. The \$10,000 part of the judgment that exceeds
1334 the rejected offer is deducted from the \$20,000 fees, leaving a fee
1335 award of \$10,000. The plaintiff would then be in as good a position
1336 as if the offer had been accepted.

1337 A fundamental question asks whether a Rule 68 award should be
1338 made even when it was reasonable to reject the offer. Precise
1339 calculations of relief are often difficult, if not impossible, in
1340 many settings of factual or legal uncertainty. There may be
1341 excellent reasons to reject an offer, even when the final judgment
1342 is not more favorable. State offer-of-judgment rules often allow a
1343 margin of error. Perhaps Rule 68 should recognize some similar
1344 margin.

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1345 Many other issues have demanded attention in addressing Rule
1346 68. One involves offers for specific relief: what tests should be
1347 used to compare an injunction against the terms of an injunction
1348 included in a Rule 68 offer? Is it possible or desirable to measure
1349 the overall value of a judgment that includes both damages and an
1350 injunction against an offer that included a different measure of
1351 damages and injunction terms?

1352 Another set of questions arises from uses of Rule 68 offers in
1353 class actions. Attempts to use Rule 68 offers to moot class actions
1354 have been addressed by many recent decisions, and these issues may
1355 be coming under control. And there may be no practical problem with
1356 attempts to use Rule 68 offers to bind a class when the class
1357 judgment fails to provide greater relief than the offer. But if
1358 Rule 68 is taken up, it might be appropriate to exclude aggregate
1359 party representative actions from its scope.

1360 Two questions arise from two Supreme Court decisions that rely
1361 on the "plain meaning" of Rule 68 text. One ruled that failure to
1362 win a judgment better than a rejected offer cuts off a statutory
1363 right to post-offer attorney fees under any statute that provides
1364 for recovery of fees as "costs," but not under a statute that
1365 provides for recovery of fees without characterizing them as
1366 "costs." Some proposals suggest that the happenstance of
1367 legislative language should not have this effect. And many
1368 proposals, siding with the dissent, urge that Rule 68 should not
1369 operate to cut off attorney fees for plaintiffs that have been the
1370 subject of special legislative solicitude and protection.
1371 Occasional suggestions have been made that cutting off statutory
1372 fee rights by rule forfeiture digs too deep into substantive
1373 rights.

1374 The other decision is that a judgment for the defendant
1375 defeats any Rule 68 cost award because the award is available only
1376 "[i]f the judgment that the offeree finally obtains is not more
1377 favorable than the unaccepted offer." The plaintiff does not
1378 "obtain" a "judgment" when the judgment is for the defendant. A
1379 judgment for the defendant, however, may seem to show that the
1380 plaintiff's failure to accept was all the less reasonable, and the
1381 defendant's post-offer costs all the more an appropriate subject
1382 for reimbursement.

1383 Uncertainty also surrounds the debate whether Rule 68 is
1384 valuable because it promotes settlement. A common response is that
1385 so many cases in federal court settle that actual trials are near
1386 the vanishing point. The reply is that Rule 68 offers can encourage
1387 cases to settle earlier than they would settle otherwise. And the
1388 retort is that it may not be desirable to pressure plaintiffs to
1389 settle before the opportunity for discovery that will provide
1390 better information about the value of the claim.

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1391 A still more fundamental objection asks why there should be a
1392 duty to accept an offer to settle. Why impose any forfeiture, even
1393 as modest as post-offer costs are likely to be, when a claimant
1394 seeks to recover, and may urgently need to recover, the full value
1395 of a claim? Even an award for less money than the offer may provide
1396 invaluable vindication.

1397 The Committee has repeatedly struggled with Rule 68. Proposals
1398 to amend Rule 68 were published in 1982, then in much revised form
1399 in 1983, and eventually abandoned. Extensive work was done 25 years
1400 ago, this time to be abandoned without publishing any proposal. The
1401 subject has been explored repeatedly since then, at times in depth
1402 and more frequently with reminders of earlier work, in response to
1403 suggestions from the bar and bar groups.

1404 This history suggests that it would be difficult to take up
1405 any part of Rule 68 without facing strong pressures, both from
1406 without and from within Committee deliberations, to repeat the
1407 fundamental reexaminations of the past.

1408 Discussion began with a suggestion that indeed taking up
1409 Professor Shelton's article as a proposal would generate strong
1410 pressures to explore "far greater" potential revisions.

1411 A Committee member asked how often Rule 68 is used. Careful
1412 studies have been done in the past, but nothing recent has come to
1413 committee attention. The general assumption is that Rule 68 is not
1414 much used. One explanation is that defeating an award of post-offer
1415 costs does not provide much of an incentive. Cases that involve
1416 statutory fee shifting as costs are commonly thought to provide
1417 strong motives to make offers, and there are many such cases. But
1418 there too practice is uneven. Some institutional defendants have a
1419 routine practice of making Rule 68 offers, for example in police
1420 conduct cases. There is some sign of concern, however, that a
1421 routine practice may encourage ill-founded claims brought solely
1422 for the purpose of accepting the routine offer.

1423 General discussion recognized that Rule 68 presents a
1424 complicated set of questions. Rule 68 offers often are ambiguous.
1425 But it would be difficult to confine any project to attempts to
1426 encourage clear offers, and even those attempts would require
1427 appointment of a subcommittee.

1428 The Committee concluded that the time has not yet come to
1429 embark on a Rule 68 study.

1430 *Rule 26(b)(4)(E)(i): 19-CV-T*

1431 Judge Bennett submitted another article by Professor Shelton
1432 as a subject for Committee study. This article is Shelton,

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1433 *Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit*
1434 *Expert Fee Shifting and Reduce Litigation Abuses*, 49 Seton Hall L.
1435 Rev. 475 (2019).

1436 Rule 26(b)(4)(E)(i) says that the court must require that a
1437 party seeking discovery must pay an expert witness a reasonable fee
1438 for the time spent in responding to discovery under Rule
1439 26(b)(4)(A). Rule 26(b)(4)(A) establishes a right to depose any
1440 person who has been identified as an expert whose opinions may be
1441 presented at trial. Professor Shelton identifies a large number of
1442 discrete questions that have divided courts that undertake to
1443 determine what is a reasonable fee.

1444 Judge Bates introduced the topic by asking whether judges on
1445 the Committee have seen these problems.

1446 Professor Marcus developed the topic by noting that the
1447 Committee heard nothing of these issues when it undertook the
1448 thorough study that led to Rule 26(b)(4) amendments ten years ago.
1449 He also noted that calculating "a reasonable fee for time spent in
1450 responding to discovery" raises questions similar to questions
1451 raised in calculating attorney fees. Experience shows that many
1452 details need to be addressed on a case-by-case basis.

1453 The proposal does not address Rule 26(b)(4)(E)(ii), which
1454 provides that a party seeking discovery from an expert employed
1455 only for trial preparation must pay "a fair portion of the fees and
1456 expenses" incurred in obtaining the expert's facts and opinion.

1457 One possible complication can be put aside at the outset. This
1458 proposal does not open up more general questions whether a party
1459 requesting discovery should pay the expenses incurred in
1460 responding. The expert's opinions will be described either in a
1461 detailed report under Rule 26(a)(2)(B) or in a Rule 26(a)(2)(C)
1462 disclosure that identifies the subject matter on which the expert
1463 will provide evidence and provides a summary of the facts and
1464 opinions to which the expert is expected to testify. Early hopes
1465 were that the Rule 26(a) disclosures would dispense with the need
1466 to depose experts. That does not seem to have happened in any
1467 general way. But the deposition is primarily for the purpose of
1468 preparing to examine the expert at trial. It is for the benefit of
1469 the deposing party. The expert's proponent has paid for developing
1470 the opinion – why should the proponent also have to pay the
1471 expert's fees and expenses for the deposition?

1472 A partial list of the issues that may arise includes these:

1473 How should preparation time be measured? Can preparation for
1474 the deposition be separated from preparation for trial, or should
1475 an attempt be made to determine what parts of time preparing for

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1476 the deposition may reduce time to prepare for trial? What about
1477 time spent conferring with counsel? And how can a court decide how
1478 much time is reasonable in preparing for a deposition? Can an
1479 hourly rate be increased for time in deposition, as it may be for
1480 time in trial, as compared to time to undertake the initial study
1481 and prepare a report? Can an expert charge a daily fee, even for a
1482 deposition that lasts only a few hours or even less than an hour?
1483 What about fees to prepare for a canceled deposition?

1484 Expenses also stir debate. What should be expected for travel
1485 – spartan, luxurious, or simply comfortable means? Who should be
1486 responsible for travel time if the deposition is not taken where
1487 the expert works?

1488 When should bills be submitted, when paid? Should interest be
1489 awarded after some period of delay? (An order in CVLO MDL 875
1490 Proceeding offered as an example of various award provisions
1491 includes interest “at a rate of 3.5% per month for the length of
1492 time the invoice remains unpaid.”)

1493 All these questions and others are likely to be approached
1494 differently if the expert witness was not required to provide a
1495 written report under Rule 26(a)(2)(B). The most common examples are
1496 treating physicians.

1497 These and many other questions would be subject to flat
1498 answers in the draft rule proposed by Professor Shelton. For
1499 example the draft provides that “‘Time spent responding to
1500 discovery’ includes only (1) the actual time the expert spends in
1501 a deposition, including any breaks during the day, and does not
1502 include time or fees spent preparing for a deposition, traveling to
1503 or from a deposition, reviewing a deposition transcript, or time
1504 otherwise relating to being deposed.”

1505 Discussion began with a lawyer’s observation that “I’ve always
1506 worked this out with the other parties.” We should leave it there.

1507 Another lawyer fully agreed. “We always work this out. We
1508 never have to litigate” these issues.

1509 Yet another lawyer agreed that “it is always worked out.” Two
1510 more lawyers joined in.

1511 A judge said that she had never seen these issues.

1512 The Committee removed this proposal from the agenda.

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1513 *19-CV-V: ESI Production, Cost-Shifting*

1514 These two related proposals were made by Judge Michael
1515 Baylson, a former Committee member. They relate to the 2015
1516 proportionality amendments of the discovery rules.

1517 The first proposal would authorize the court to require a
1518 party to "disclose details of its application of these Rules to its
1519 production of electronically stored information." It does not seem
1520 to venture into the contentious issues that arise when a party
1521 relies on computer searches or computer-aided intelligence to
1522 respond to discovery requests. A requesting party, for example, may
1523 wish to know how the producing party taught its system to identify
1524 relevant and responsive information. Privilege, work-product, and
1525 confidentiality issues all arise. Instead, the proposal seems to
1526 aim more at the level of research undertaken by a responding party
1527 as affected by the responding party's views of proportionality. A
1528 responding party may limit its search short of surveying all
1529 possible sources, concluding that proportionality justifies a more
1530 targeted search. The proposal seems aimed at allowing discovery of
1531 how the proportionality principle was implemented.

1532 Professor Marcus observed that this proposal relates to issues
1533 that were thoroughly explored in proposing the 2015 amendments. The
1534 Rule 26 Committee Note explains that it is not feasible to assign
1535 a burden on proportionality, either to require the inquiring party
1536 to show that its requests are proportional to the needs of the
1537 action or to require the responding party to show that the requests
1538 are not proportional or that its efforts to respond are
1539 proportional. Instead, the requesting party is in the best position
1540 to explain why requested information is relevant, while the
1541 responding party is in the best position to explain the burdens
1542 that would be imposed by searching for it.

1543 A judge suggested that it will be important to have another
1544 four or five years of experience with the 2015 amendments before
1545 attempting to deal with this proposal. Experience may show that
1546 courts find authority to resolve these issues, including disclosure
1547 of the burdens involved in producing electronically stored
1548 information. This proposal will be removed from the agenda.

1549 The second proposal is to authorize the court to shift the
1550 cost of discovery from one party to another to ensure
1551 proportionality. This topic was addressed by the 2015 amendment of
1552 Rule 26(c)(1)(B), which allows entry of a protective order
1553 specifying terms for the allocation of discovery expenses. The
1554 Committee Note cautions that cost-shifting should not become a
1555 common practice.

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1556 The Committee agreed that explicit recognition of cost-
1557 shifting authority in Rule 26(c)(1)(B) suffices for the present.
1558 Time may show a need for more frequent or extensive exercise of
1559 this authority, but here too it seems better to await the lessons
1560 of time. This proposal will be removed from the agenda.

1561 *Rule 4(d): "Snap Removal": 19-CV-W*

1562 This proposal addresses dissatisfaction with a removal
1563 practice that many courts allow under the wording of 28 U.S.C. §
1564 1441(b)(2). The statute allows removal of an action that rests only
1565 on diversity jurisdiction, but not "if any of the parties in
1566 interest properly *joined and served* as defendants is a citizen of
1567 the State in which such action is brought."

1568 The proposal decries decisions ruling that the language of the
1569 statute clearly allows removal by non-local defendants if they act
1570 before the local defendant is served. It asserts that some
1571 defendants that are frequently sued in state courts have adopted a
1572 practice of searching court dockets to identify new actions and to
1573 remove before the local defendant, indeed before any defendant, is
1574 served. This is said to defeat the statutory purpose to defeat
1575 removal whenever the presence of a local defendant shows that the
1576 purposes that justify diversity jurisdiction are not involved.

1577 Rather than propose a statutory amendment, clearly something
1578 beyond the reach of the Rules Enabling Act, the proposal is to
1579 adopt a new Rule 4(d)(6) that would expand the provisions for
1580 waiving service. The proposal is complicated, and rests on clear
1581 fictions. It is not quite clear just how it is intended to operate.
1582 But it seems an indirect way to provide that a plaintiff can defeat
1583 early removal by non-local defendants by serving a forum defendant
1584 within 30 days of a notice of removal. Service would show that the
1585 plaintiff actually means to proceed against the local defendant,
1586 and that the local defendant was not named solely to defeat
1587 removal. A rule that clearly and directly states that result would
1588 almost certainly run afoul of the Rules Enabling Act. Attempting to
1589 accomplish the same result by fictitious deemed waivers and
1590 relation back seems no better.

1591 The Committee has learned that this proposal is already on the
1592 agenda of the Federal-State Jurisdiction Committee. It agreed that
1593 it is properly a matter for the State-Federal Jurisdiction
1594 Committee. It will be removed from the Committee's agenda.

1595 *Mandatory Initial Discovery Pilot Projects*

1596 Judge Bates noted that mandatory initial discovery pilot
1597 projects are well under way in the District of Arizona and the
1598 Northern District of Illinois. The Federal Judicial Center is

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1599 engaged in a continuing study of the effects.

1600 Emery Lee began his description of the FJC Report on the pilot
1601 project surveys from Fall 2017 through Spring 2019 by saying that
1602 "it's going pretty well."

1603 The Report describes closed-case surveys of cases that
1604 included a pilot project discovery order. "These are early-
1605 terminating cases." The first of them were filed in May, 2017. So
1606 far there are perhaps one or two trial cases in the mix. "These are
1607 early results."

1608 The response rate to the surveys is better than 30%. "That's
1609 good."

1610 Almost half of the respondents report making the required
1611 disclosures. That number is more impressive than it may seem, since
1612 many cases resolve early.

1613 The executive summary reports:

1614 Survey respondents generally agreed that the MIDP
1615 resulted in relevant information being provided to the
1616 other side earlier in the case. Additionally, most survey
1617 respondents either disagreed with or were neutral to the
1618 concern that the required MIDP exchanges would result in
1619 disclosures that would not otherwise have occurred in the
1620 discovery process. They were more or less evenly divided
1621 on whether the MIDP focused discovery on important
1622 issues, reduced the volume of discovery requests, or
1623 reduced the number of discovery disputes in the closed
1624 cases. Plaintiff attorney respondents were more likely
1625 than defendant attorney respondents to agree that the
1626 MIDP enhanced the effectiveness of settlement
1627 negotiations, expedited settlement negotiation
1628 discussions among the parties, and reduced the number of
1629 subsequent discovery requests. In general, survey
1630 respondents tended not to agree that the MIDP reduced
1631 discovery costs or overall costs in the closed cases, nor
1632 did they agree that the disclosures reduced disposition
1633 times in the closed cases.

1634 Judge Bates described these as pretty positive results.

1635 Judge Campbell said that this is good FJC work. This report
1636 does not include statistics. Statistics may prove more reliable
1637 than impressionistic survey responses.

1638 Overall, results in the District of Arizona were similar to
1639 results in the Northern District of Illinois. That may be a bit

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1640 surprising, since lawyers in Arizona have had many years of
1641 experience with sweeping initial disclosure in Arizona state
1642 courts. It is not surprising that defense lawyers in Illinois are
1643 more negative about MID than Arizona defense lawyers or Arizona
1644 defendants.

1645 Separate note was taken of charts showing substantial
1646 agreement with the propositions that in MIDP cases less discovery
1647 was needed to resolve the case and reduced discovery costs.

1648 Judge Dow found it reassuring that the results in the Northern
1649 District of Illinois are similar to the results in Arizona. "Most
1650 Northern District lawyers are fine with it." Half-way through the
1651 program the rules were altered to give judges more discretion to
1652 pause MID pending disposition of a motion to dismiss. Many lawyers
1653 objected to the need to make initial discovery responses in actions
1654 that might well be dismissed on the pleadings. The change "was very
1655 welcome." And there are cases where MID is followed by little or no
1656 added discovery. That is one goal of the program. Here too,
1657 statistics may tell more than the survey responses. Some lawyers
1658 resisted the program fiercely, and have been hard to reconcile to
1659 it.

1660 Dr. Lee noted that the FJC collected docket information this
1661 summer. The study remains in its early stages.

1662 Judge Bates noted that it has been difficult to get courts to
1663 participate in pilot projects. He expressed the Committee's thanks
1664 to Judges Campbell, Dow, and St. Eve for their help in enlisting
1665 their courts in the MIDP, and to Dr. Lee for bringing the FJC study
1666 along.

1667 *New Business*

1668 No new business was suggested by any Committee member.

1669 *Next Meeting*

1670 The next Committee meeting will be on April 1, 2020, in West
1671 Palm Beach.

1672 Respectfully Submitted,

1673 Edward H. Cooper
1674 Reporter

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TAB 6

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TAB 6A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 16, 2019

I. Introduction

The Advisory Committee on Criminal Rules met on September 24, 2019, in Philadelphia, Pennsylvania. The draft minutes of that meeting are attached at Tab B. This report discusses several information items. There are no action items.

This report focuses principally on the committee's draft of amendments to Rule 16 to expand the scope of expert discovery. It also briefly describes several other information items: (1) the implementation of recommendations by the Task Force on Protecting Cooperators; (2) the response of the Committee on Court Administration and Case Management (the CACM Committee) to the committee's transmittal of a suggestion concerning delays in the resolution of petitions and motions under Sections 2254 and 2255; and (3) the committee's discussion of several cross-committee suggestions.

II. Rule 16; Discovery Concerning Expert Reports and Testimony

At its September meeting, the Criminal Rules Committee approved unanimously the text of draft amendments to Rule 16, as well as much of the note to accompany those amendments. The committee asked the Rule 16 Subcommittee to develop for the note additional language that would incorporate several points made during the meeting. The draft amendment and note, attached as an appendix to this report, include the additional note language later approved by the subcommittee. The committee plans to incorporate any comments from the Standing Committee into a revised draft for discussion at its April meeting. The goal is to present a proposal to the Standing Committee in June 2020 with a recommendation to publish in August.

This report begins with a brief description of the origins of the project and the committee's process, and then turns to a description and discussion of the draft proposal.

A. The background of this proposal

The committee received three suggestions to amend Rule 16 so that it would more closely follow Civil Rule 26 in the disclosures regarding expert witnesses. *See* 17-CR-B (Judge Jed Rakoff); 19-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). To help the committee evaluate the proposals, two informational sessions were arranged.

At the committee's fall 2018 meeting in Nashville, the Department of Justice provided several speakers¹ whose presentations covered the Department's development and implementation of new policies governing disclosure of forensic evidence, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic expert evidence. The presentations allowed the committee to compare discovery in criminal cases with discovery provided under Civil Rule 26(a). The meeting materials also included a report by Ms. Elm of expert discovery issues noted by federal defenders.

In April 2019 the Rule 16 Subcommittee hosted a miniconference to learn more about the experiences of practitioners. The participants were experienced practitioners from both the prosecution and defense, selected to provide perspectives from different districts and different kinds of cases.² Participants were invited to discuss several issues: (1) what problems (if any)

¹The speakers were: Andrew Goldsmith, National Criminal Discovery Coordinator; Zachary Hafer, Chief of the Criminal Division, District of Massachusetts; Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General; Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory; and Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York.

²The participants were: Marilyn Bernardski, private practice, CDCA (by telephone); Marlo Cadeddu, private practice, ND TX; Michael Donohoe, Deputy Federal Defender, D MT; Andrew Goldsmith, Associate Deputy AG & National Discovery Coordinator; John Ellis, CJA, SDCA; Zachary Hafer, Criminal Chief, U.S. Attorney's Office, D MA; Robert Hur, U.S. Attorney, D MD; Tracy McCormick, U.S. Attorney's Office, ED VA; Mark Schamel, private practice, Washington, D.C.; Elizabeth Shapiro, DOJ Representative to Evidence & Standing Committees; John Siffert, private practice, SDNY; Douglas Squires, Special Litigation Counsel, U.S. Attorney's Office, SD OH; and Lori

they had encountered with pretrial disclosure of forensic evidence before trial; (2) what problems (if any) they had encountered with pretrial disclosure of non-forensic evidence before trial; (3) what changes or practices would prevent any problems they had identified; and (4) whether the requirements should be the same, or different, for government and defense disclosure.

The defense practitioners identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received expert witness summaries a week or even the night before trial, which significantly impaired their ability to prepare for trial. Second, they said they do not receive disclosures in sufficient detail to prepare for cross-examination. They recounted several examples of this problem. Department of Justice representatives, for their part, stated that they were unaware of any problems with the rule. Based on the experiences reported by the defense participants, the judges who provided the suggestions for amendments, and the members of the committee, it appeared that practices varied between districts and, in some districts, from prosecutor to prosecutor.

Department of Justice representatives said that framing the problem in terms of timing and sufficiency of the notice was very helpful. It was useful to know that defense practitioners were not primarily concerned about forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. Department personnel who focused on these other issues were not aware of the timing and sufficiency problems with expert disclosures identified by the defense participants. The Department's representatives expressed willingness to work with the committee to develop language that would address the timing and sufficiency of disclosures regarding expert testimony and be acceptable to the broad community of federal prosecutors. The current proposal is the result of those collaborative efforts.

B. The Committee's proposal

The proposed amendment addresses two shortcomings of the current provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment would clarify the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

The draft amendment makes no change in the reciprocal structure of the current rule, which provides that the government's obligation to disclose information about its experts is triggered only if the defendant requests that disclosure under (a)(1)(G). The defense is required to disclose information about its experts under (b)(1)(C) only if it has made that request and the government has complied. This sequencing remains unchanged by the committee's draft amendment. Once triggered, the disclosure obligations of the prosecution and defense under (a)(1)(G) and (b)(1)(C) are generally parallel under the current rule, and the expanded discovery

Ulrich, Chief of the Trial Unit, Federal Defender, MD PA. Professor Dan Capra, Reporter to the Evidence Rules Committee, also attended.

obligations required of the prosecution and defense under the committee's draft proposed amendment also mirror one another.

The draft amendment achieved unanimous support because members agreed that there are serious problems that could be addressed by amending the current rule; that the amendment constitutes a fair and workable compromise reflecting the needs of both the prosecution and the defense; and that the changes effectively address the problems the committee identified. The committee believes that adding these additional provisions would be a significant improvement over the current rule.

1. The timing of disclosures

The committee concluded that the amendment should include specific and enforceable provisions on the timing of disclosure. Although many members initially supported the inclusion of a default deadline for the disclosures (*e.g.*, 45 days before trial for the government's disclosures), the committee ultimately concluded that approach was unworkable. Given the enormous variation in the caseloads of different districts, as well as the circumstances in individual cases, a default deadline would inevitably generate a large number of requests for extensions of time, burdening both the parties and the courts. Members also noted that default deadlines might prove problematic—rather than helpful—to the defense, because there are structural reasons that might delay its determination whether to use expert testimony. The committee therefore chose to adopt a functional approach, focusing on the goal of providing specific and enforceable deadlines that would allow each party to prepare adequately for trial.

To ensure there are in fact enforceable deadlines in each case, subparagraphs (G)(ii) and (C)(ii) provide that the court “must” set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. These disclosure times, the amendment mandates, must be “sufficiently before trial to provide a fair opportunity for each party to meet” the other side's expert evidence. The committee note provides additional guidance on the appropriate considerations for the deadlines. This portion of the committee note reflects information developed at the miniconference as well as the experience of committee members. For example, the note states that a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. The note also reminds counsel and the courts that deadlines for disclosure must be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases.

At the September 2019 meeting, members debated how best to word the requirement that the court set a date for these disclosures. They recognized that this might be accomplished in a variety of ways: local rules, standing orders, or orders in individual cases. Although in some sense all of these are orders of the court, the committee thought it desirable to draw attention to the possibility of setting a default deadline by local rulemaking. Accordingly, proposed

(a)(1)(G)(ii) provides that “[t]he court, by local rule or order, must set a time for the government to make the disclosure.” Subsection (b)(1)(C)(ii) contains a parallel provision for setting the time for the defendant’s disclosures.

These parallel provisions do not specify *when* the court must enter the order setting the deadline, leaving that decision to the court. To respond to concerns that courts (or parties) might mistakenly assume that these deadlines must be set very early in the prosecution, perhaps before the parties and the court had a sufficient understanding of the individual case, the committee added language to the note emphasizing the court’s discretion in deciding when to set—and if necessary alter—the deadlines for disclosure. It states:

Subparagraphs (G)(ii) and (C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leaves to the court’s discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) and the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to “confer and try to agree on a timetable” for pretrial disclosures under Rule 16.1.

This portion of the note is also helpful because it draws attention to the connection between the timetable for disclosure and the new requirement under Rule 16.1 (which went into effect December 1, 2019), that the parties meet to “confer and try to agree on a timetable” for pretrial disclosures no later than 14 days after arraignment.

2. The Contents of the Disclosure

The current rule states that the parties have a duty to provide “a written summary.” The Committee concluded that the word “summary” was responsible, at least in part, for the very cursory and incomplete information sometimes provided about expert testimony. To ensure that parties receive adequate information about the content of expert witness testimony and potential impeachment, the amendments delete from (G)(i) and (C)(i) the phrase “written summary” and substitute an itemized list of what must be disclosed.

Subsections (a)(1)(G)(iii) and (b)(1)(C)(iii) require that the parties provide “a complete statement” of the witness’s opinions, the basis and reasons for those opinions, the witness’s qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate practice in civil cases, which of course differ in many ways from criminal cases. And, indeed, the draft amendment departs in important respects from Civil Rule 26. As noted above, the discovery obligations regarding expert witnesses may be triggered only by a defense request. Like current Rule 16 and unlike Civil Rule 26, it does not distinguish between different types of experts, or require more complete disclosures from only

one class of expert witnesses. (Indeed, Mr. Goldsmith, the Department’s National Criminal Discovery Coordinator, cautioned against any attempt to bifurcate experts in criminal cases into two distinct categories, citing concerns about the Department’s ability to control certain government experts.)

To address the concern that the use of language drawn from Civil Rule 26 might suggest, erroneously, that the amendment incorporates civil practice concerning expert discovery, the note states (emphasis added):

To ensure that parties receive adequate information about the content of the witness’s testimony and potential impeachment, subparagraphs (G)(i) and (iii)—and the parallel provisions in (C)(i) and (iii)—delete the phrase “written summary” and substitute specific requirements that the parties provide “a complete statement” of the witness’s opinions, the basis and reasons for those opinions, the witness’s qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. *Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to transplant practice under the civil rule to criminal cases, which differ in many significant ways from civil cases.*

The committee note also addresses the Department’s concern about the feasibility of obtaining the required list of cases in which its experts provided prior testimony for those expert witnesses who testify very frequently (such as local police or state forensic experts who may testify virtually every week in state court). Speaking to this issue, the note draws attention to Rule 16(d), which allows the court “for good cause,” to “deny, restrict, or defer discovery.” At the Department’s suggestion, it also states that a request for relief under (d) may be made at scheduling conferences or by other means. It provides

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d).

By anticipating and addressing possible concerns from prosecutors, this portion of the note may assist in securing broad acceptance of the proposal and be helpful in implementing it smoothly.

3. Exempting information previously disclosed

The proposal recognizes that in some situations information required by the amended provisions may have been disclosed to the opposing party already in a report of an examination or test under (a)(1)(F) or (b)(1)(B), or in supporting materials that accompany those reports. To avoid a costly duplication of effort, the draft amendment states that information already provided in one of these reports need not be provided again in the expert disclosure. This exemption is particularly important when the reports and disclosures are provided by forensic experts whose

professional standards would require time consuming procedures to be repeated whenever a new report is prepared.

Accordingly, (a)(G)(1)(iv) and (b)(1)(C)(iv) state that if the party has previously provided a report under (a)(1)(F) or (b)(1)(B) that contained information required by (iii), “that information may be referred to, rather than repeated, in the expert witness disclosure.” The reference to the prior report in this disclosure is important because the opposing party might otherwise be unaware that the prior report contained this information, particularly where voluminous discovery has been provided under (a)(1)(F) or (b)(1)(B).

4. Preparing, approving, and signing the report

The proposal distinguishes between the preparation, approval, and signing of expert witness disclosures. Unlike Civil Rule 26(a)(2)(B), the amendment does not require the witness to prepare the disclosure. The committee concluded that in some circumstances it may be appropriate for the prosecutor or defense counsel to draft the disclosure. Disclosures drafted by counsel must, however, accurately portray the witness’s testimony. Accordingly, with two exceptions, (a)(1)(G)(v) and (b)(1)(C)(v) of the proposal require the disclosure to be “approved and signed” by the expert.

The first exception to the requirement that the expert sign grew out of the committee’s recognition that in criminal cases (as in civil cases) some experts are not under the control of the party who will present the evidence. Examples could include a member of a local police department, a treating physician, or an accountant employed by a defendant. Although these individuals can be subpoenaed to testify, it may not always be possible for the party who will introduce the testimony to obtain the witness’s signature on the pretrial disclosure. The proposal deals with this possibility, providing an exception to the approval and signature requirement. The first bullet in subsections (a)(1)(G)(v) and (b)(1)(C)(v) requires the disclosure to be approved and signed by the witness unless the party who will call the witness states in the disclosure “why [the government or the defendant] could not obtain the witness’s signature through reasonable efforts.” The committee note explains:

First, the rule recognizes the possibility that a party may not be able to obtain a witness’s approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness’s approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert’s signature following reasonable efforts.

The second exception to the requirement that the expert sign the disclosure dovetails with the provisions allowing information previously provided in an expert report to be referenced rather than repeated in a disclosure under (G)(i) and (C)(i). The second bullet in subsections (a)(1)(G)(v) and (b)(1)(C)(v) provides an exception from the signature requirement when the

party “has previously provided [under the rule] a report, signed by the witness, that contains all of the opinions and the bases and reasons for them required by (iii).” The committee note explains:

Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant’s disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney’s representation of the expert’s qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

5. Supplementing and correcting disclosures

To deal with the possibility that a party might decide to have the expert testify on additional, different, or fewer issues than those covered in the first disclosure, subsections (G)(vi) and (C)(vi) require a party promptly supplement or correct each disclosure to the other party in accordance with Rule 16(c), the rule that sets forth the parties’ continuing duty to disclose. This provision is meant to ensure that if there is any modification, expansion, or contraction of a party’s expert testimony after the initial disclosure, the other party receives prompt notice of that correction or modification.

6. Clarifying that the scope of the defendant’s disclosure obligation is no broader than the government’s obligation.

The proposal makes one additional change to the current rule to ensure that the defendant’s disclosure obligations under the rule remain no broader than those of the government. A close comparison of current (a)(1)(G) and (b)(1)(C) revealed one difference in the two provisions that the committee proposal eliminates. Subsection (a)(1)(G) now restricts the government’s disclosure obligation to testimony it intends to use in its “case-in-chief.” That limiting phrase is not presently included in the defense provision, (b)(1)(C), which requires disclosure of expert testimony the defendant intends to use under Evidence Rules 702, 703, or 705 “as evidence at trial.” The reporters and the Rules Committee Staff were unable to find any explanation for this difference in the committee’s archives, and members were unable to identify any explanation. The committee concluded that the defendant’s disclosure obligation should be no broader than the government’s. Accordingly, it added the limiting phrase “case-in-chief” to (b)(1)(C)(i), making it fully parallel to (a)(1)(G)(i). The addition of this phrase makes clear that the amendment does not require the defendant to provide information about evidence intended for use only on cross-examination. As explained in the draft committee note, this is not intended to be a change from current practice. It appears that practitioners have not focused on the difference between the wording of (a)(1)(G) and (b)(1)(C).

III. Update on implementing the recommendations of the Task Force on Protecting Cooperators

The Committee received an update from Judge Kaplan, chair of the Task Force on Protecting Cooperators and the Criminal Rules Committee's Cooperators Subcommittee, as well as from representatives of the Department of Justice.

Although there have been some delays, the Department is going forward with the Task Force's recommendations concerning the Bureau of Prisons (BOP), and Judge Amy St. Eve is continuing to work with the Department on these issues. The most difficult problem for the BOP is providing prisoners access to their own sentencing-related material in a secure area with no copies permitted out into the population. At present, the BOP does not have the space or money to create all of these secure areas. Because the estimated cost to build secure areas for viewing was \$500 million, the BOP is exploring the use of electronic kiosks where these materials can be viewed.

The second part of the Task Force recommendations involved changes to Case Management/Electronic Case Files (CM/ECF) that would make less readily available any information from which individuals could infer who was cooperating with the government. Ms. Womeldorf reported that the CACM Committee is working on the implementation of this portion of the Task Force's recommendations, trying to coordinate it with "Next Gen." That is proving to be very complicated.

IV. The CACM Committee's Response to Suggestion 18-CR-D Concerning Delays in §§ 2254 and 2255 Proceedings

Suggestion 18-CR-D expressed concern about delays in ruling on petitions under 28 U.S.C. § 2254 and motions under 28 U.S.C. § 2255. The committee transmitted the suggestion to CACM, noting that the current exemption of habeas cases from the list of motions that must be reported as pending might be contributing to the delays.

Judge Molloy reported that the chair of the CACM Committee, Judge Fleissig, had written to say that the CACM Committee had studied the issue and concluded that the current approach was appropriate given the unique issues associated with Section 2254 petitions and Section 2255 motions. Judge Fleissig also stated, however, that the CACM Committee has asked its case management subcommittee to look into other steps that might address the problem of long delays, including additional staffing.

V. Cross-Committee Proposals

A. 19-CR-A, calculation of IFP and CJA status.

A suggestion addressed to the Civil, Criminal, and Appellate Committees seeks changes in the process of determining IFP (in forma pauperis) status. In a footnote, the proposal states that IFP includes CJA status in criminal cases.

As an initial matter, the proposal errs in equating IFP status with CJA status. Those statuses are governed by different statutes and have different processes and different standards. And CJA status is very different from IFP status. Thus, to the extent the suggestion is focused only on IFP status, the members of the committee saw no reason for it to play a major role in pursuing the suggestion.

That said, the Criminal Rules Committee does have an interest in IFP status for filings under 28 U.S.C. §§ 2254 and 2241. Although those proceedings are technically civil, they fall under the jurisdiction of the Criminal Rules Committee. Accordingly, if the other committees take up the issue of redefining IFP status, it would be appropriate for the Criminal Rules Committee to participate.

B. 19-CR-B; court calculation and notice of all deadlines.

A second cross-committee suggestion went to the Criminal, Appellate, Bankruptcy, and Civil Rules Committees. The proposal sought to require that courts give immediate notice to all filers of (1) the applicable date and time (including time zone) for future events, (2) whether and how the time could be modified, and (3) whether the event was optional or required. The notices would be cumulative, continuously updated, and user friendly, not requiring users to look up applicable rules or do calculations. It also proposed that the rule specify that filers could rely on the court's computed times.

Although members expressed sympathy with the difficulties that pro se parties (and often counsel as well) sometimes have in calculating the time limits, they were strongly opposed to this proposal. The clerks' offices are already overburdened and simply do not have the resources to take on this responsibility. As one member put it, the clerk's office in his district was already "running as fast as they can." Some members expressed an interest in determining whether there were computer applications that could provide this information to the parties, as well as to the court itself, but others expressed concern that even this approach would require resources that are not available. Moreover, filings are sometimes given the wrong description, which would then lead to the wrong date if calculated automatically. Finally, members recalled the Supreme Court's ruling that a habeas petition was out of time even though the filer had relied on the district court's erroneous calculation of when it was due.

One judicial member stated that he sought, when possible, to specify a date certain in his own orders. Although that approach is far easier for pro se parties to understand, other members noted it has other downsides. Dates specified in an order may be affected by later events. If the court has specified dates certain, then they must all be adjusted. That is not the case if one specifies that an action must be taken within a certain period before or after a given event.

C. 19-CR-C, E-filing Deadline Joint Subcommittee.

The committee received a short briefing on the E-filing Deadline Joint Subcommittee. The subcommittee is considering a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office

closes in the court's respective time zone. The subcommittee's membership is comprised of members of all of the rules committees. This committee's reporters and Ms. Recker, a member of the committee, are representing the Criminal Rules Committee.

A representative from the Department of Justice asked whether the subcommittee had a member from the Department. Judge Campbell and Ms. Womeldorf stated that a Department of Justice representative should be added to the subcommittee.

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APPENDIX

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**DISCUSSION DRAFT
AMENDMENT TO RULE 16(a)(1)(G) OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 16. Discovery and Inspection**

2 * * * * *

3 **(a) Government’s Disclosure.**

4 **(1) Information Subject to Disclosure.**

5 * * * * *

6 **(G) Expert witnesses.**

7 **(i) Duty to Disclose.** At the defendant’s
8 request, the government must ~~give~~
9 ~~disclose~~ to the defendant, ~~in writing, the~~
10 ~~information required by (iii) for a written~~
11 ~~summary of~~ any testimony that the
12 government intends to use under Rules
13 702, 703, or 705 of the Federal Rules of
14 Evidence during its case-in-chief at trial.

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

15 If the government requests discovery
16 under ~~subdivision~~ (b)(1)(C)(ii) and the
17 defendant complies, the government
18 must, at the defendant's request, ~~give~~
19 disclose to the defendant, in writing, the
20 information required by (iii) for —a
21 ~~written summary of~~ testimony that the
22 government intends to use under Rules
23 702, 703, or 705 of the Federal Rules of
24 Evidence as evidence at trial on the issue
25 of the defendant's mental condition.

26 **(ii) Time to Provide the Disclosure. The**
27 court, by order or local rule, must set a
28 time for the government to make the
29 disclosure. The time must be
30 sufficiently before trial to provide a fair

31 opportunity for the defendant to meet
32 the government’s evidence.

33 (iii) Contents of the Disclosure. The
34 disclosure summary provided under
35 this subparagraph must contain:

36 • a complete statement of all describe
37 the witness’s opinions, that the
38 government will elicit from the
39 witness in its case-in-chief;

40 • the bases and reasons for those
41 opinions them; and

42 • the witness’s qualifications,
43 including a list of all publications
44 authored in the previous 10 years;
45 and

46 • a list of all other cases in which,
47 during the previous 4 years, the

48 witness has testified as an expert at
49 trial or by deposition.

50 **(iv) Information Previously Disclosed.** If
51 the government previously provided a
52 report under (F) that contained
53 information required by (iii), that
54 information may be referred to, rather
55 than repeated, in the expert-witness
56 disclosure.

57 **(v) Signing the Disclosure.** The witness
58 must approve and sign the disclosure,
59 unless the government:

60 • states in the disclosure why it could
61 not obtain the witness’s signature
62 through reasonable efforts; or

63 • has previously provided under (F) a
64 report, signed by the witness, that
65 contains all the opinions and the
66 bases and reasons for them
67 required by (iii).

68 (vi) Supplementing and Correcting the
69 Disclosure. The government must
70 supplement or correct the disclosure in
71 accordance with (c).

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**DISCUSSION DRAFT
AMENDMENT TO RULE 16(b)(1)(C) OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 16. Discovery and Inspection**

2 * * * * *

3 **(b) Defendant's Disclosure.**

4 **(1) Information Subject to Disclosure.**

5 * * * * *

6 **(C) Expert witnesses.**

7 (i) Duty to Disclose. At the government's
8 request, ~~the~~ defendant must, ~~at the~~
9 ~~government's request,~~ disclose give to
10 the government, in writing, the
11 information required by (iii) for a written
12 ~~summary of~~ any testimony that the
13 defendant intends to use under Rules
14 702, 703, or 705 of the Federal Rules of

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

15 Evidence ~~as—evidence~~ during the
16 defendant’s case-in-chief at trial, if—:
17 ~~(i)~~ • the defendant requests disclosure
18 under ~~subdivision~~ (a)(1)(G) and
19 the government complies; or
20 ~~(ii)~~ • the defendant has given notice
21 under Rule 12.2(b) of an intent to
22 present expert testimony on the
23 defendant’s mental condition.

24 (ii) Time to Provide the Disclosure. The
25 court, by order or local rule, must set a
26 time for the defendant to make the
27 disclosure. The time must be sufficiently
28 before trial to provide a fair opportunity
29 for the government to meet the
30 defendant’s evidence.

- 31 (iii) Contents of the Disclosure. ThisThe
32 summary disclosure must contain:
- 33 ● a complete statement of all describe
34 the witness's opinions; that the
35 defendant will elicit from the
36 witness in the defendant's case-in-
37 chief;
 - 38 ● the bases and reasons for them
39 those opinions; and
40 ● the witness's qualifications,
41 including a list of all publications
42 authored in the previous 10 years;
43 and
 - 44 ● a list of all other cases in which,
45 during the previous 4 years, the
46 witness has testified as an expert at
47 trial or by deposition.

48 **(iv) Information Previously Disclosed.** If
49 the defendant previously provided a
50 report under (B) that contained
51 information required by (iii), that
52 information may be referred to, rather
53 than repeated, in the expert-witness
54 disclosure.

55 **(v) Signing the Disclosure.** The witness
56 must approve and sign the disclosure,
57 unless the defendant:

- 58 • states in the disclosure why the
59 defendant could not obtain the
60 witness's signature through
61 reasonable efforts; or
62 • has previously provided under (F)
63 a report, signed by the witness, that
64 contains all the opinions and the

65 bases and reasons for them
66 required by (iii).

67 (vi) Supplementing and Correcting the
68 Disclosure. The defendant must
69 supplement or correct the disclosure in
70 accordance with (c).

71 * * * * *

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**DISCUSSION DRAFT
AMENDMENT TO RULE 16 OF THE FEDERAL RULES
OF CRIMINAL PROCEDURE**

Committee Note

1 The amendment addresses two shortcomings of the prior provisions on expert witness
2 disclosure: the lack of adequate specificity regarding what information must be disclosed, and
3 the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing
4 of the parties’ obligations to disclose expert testimony they intend to present at trial. It is
5 intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-
6 examine expert witnesses and secure opposing expert testimony if needed.

7 Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and
8 (b)(1)(C) (defense disclosure) mirror one another. The amendment to (b)(1)(C) includes the
9 limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the
10 disclosure obligation to testimony the defendant will use in the defendant’s “case-in-chief.”
11 Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C),
12 this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current
13 practice in this respect is intended.

14 To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (G)(ii)
15 and (C)(ii) provide that the court, by order or local rule, must set a time for the government to
16 make its disclosure of expert testimony to the defendant, and for the defense to make its
17 disclosure of expert testimony to the government. These disclosure times, the amendment
18 mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the
19 other side’s expert evidence. Sometimes a party may need to secure its own expert to respond to
20 expert testimony disclosed by the other party, and deadlines should accommodate the time that
21 may take, including the time an appointed attorney may need to secure funding to hire an expert
22 witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial
23 Act. Because caseloads vary from district to district, the amendment does not itself set a specific
24 time for the disclosures by the government and the defense for every case. Instead, it allows
25 courts to tailor disclosure deadlines to local conditions or specific cases by providing that the
26 time for disclosure must be set either by local rule or court order.

27 Subparagraphs (G)(ii) and (C)(ii) require the court to set a time for disclosure in each
28 case if that time is not already set by local rule or other order, but leaves to the court’s discretion
29 when it is most appropriate to announce those deadlines. The court also retains discretion under
30 Rule 16(d) and the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In
31 setting times for expert disclosures in individual cases, the court should consider the
32 recommendations of the parties, who are required to “confer and try to agree on a timetable” for
33 pretrial disclosures under Rule 16.1.

34 To ensure that parties receive adequate information about the content of the witness’s
35 testimony and potential impeachment, subparagraphs (G)(i) and (iii)—and the parallel provisions

36 in (C)(i) and (iii)—delete the phrase “written summary” and substitute specific requirements that
37 the parties provide “a complete statement” of the witness’s opinions, the basis and reasons for
38 those opinions, the witness’s qualifications (including a list of publications within the past 10
39 years), and a list of other cases in which the witness has testified in the past four years. Although
40 the language of some of these provisions is drawn from Civil Rule 26, the amendment is not
41 intended to transplant practice under the civil rule to criminal cases, which differ in many
42 significant ways from civil cases.

43 On occasion, an expert witness will have testified in a large number of cases, and
44 developing the list of prior testimony may be unduly burdensome. In such circumstances, the
45 party who wishes to call the expert may, at any scheduling conference or by motion, seek an
46 order modifying discovery under Rule 16(d).

47 Subparagraphs (G)(iv) and (C)(iv) also recognize that, in some situations, information
48 that a party must disclose about opinions and the bases and reasons for those opinions may have
49 been provided previously in a report (including accompanying documents) of an examination or
50 test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be
51 repeated in the expert disclosure, if the expert disclosure clearly identifies the information and
52 the prior report in which it was provided.

53 Subparagraphs (G)(v) and (C)(v) of the amended rule require that the expert witness
54 approve and sign the disclosure. However, the amended provisions also recognize two
55 exceptions to this requirement. First, the rule recognizes the possibility that a party may not be
56 able to obtain a witness’s approval and signature despite reasonable efforts to do so. This may
57 occur, for example, when the party has not retained or specially employed the witness to present
58 testimony, such as when a party calls a treating physician to testify. In that situation, the party is
59 responsible for providing the required information, but may be unable to procure a witness’s
60 approval and signature following a request. An unsigned disclosure is acceptable so long as the
61 party states why it was unable to procure the expert’s signature following reasonable efforts.
62 Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as
63 well as the bases and reasons for those opinions, were already set forth in a report, signed by the
64 witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or
65 (b)(1)(B)—for defendant’s disclosures. In that situation, the prior signed report and
66 accompanying documents, combined with the attorney’s representation of the expert’s
67 qualifications, publications, and prior testimony, provide the information and signature needed to
68 prepare to meet the testimony.

69 Subparagraphs (G)(vi) and (C)(vi) require the parties to supplement or correct each
70 disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure
71 that, if there is any modification, expansion, or contraction of a party’s expert testimony after the
72 initial disclosure, the other party will receive prompt notice of that correction or modification.

TAB 6B

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ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
September 24, 2019
Philadelphia, PA

I. Attendance and preliminary matters

Judge Donald W. Molloy, Chair
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq. (by telephone)
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGiverin
Catherine M. Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Consultant, Standing Committee (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order. After thanking the Constitution Center staff for hosting, he recognized Professor Kerr, whose term was ending, and thanked him for his service on the Committee. He also noted his own term was ending and that Judge Ray Kethledge would be taking over in October as Chair.

Turning to the minutes of the last meeting, Judge Molloy asked if there were any changes. Professor Beale stated that the inadvertent omission of a member's name would be corrected. Judge Molloy asked for clarification of a quote, which was confirmed as accurate. A motion to approve the minutes was unanimously approved.

Ms. Womeldorf reported that Judge Molloy had provided a report of the Criminal Rules Committee's actions at the Standing Committee. She noted that the report to the Judicial Conference also

included information about the committee's ongoing work. Regarding new Rule 16.1 and amendments to Rules 5 of the 2254 and 2255 Rules, she said that absent action by Congress, which they do not expect, the amendments should become law in December. The Department of Justice (DOJ) commented that joint training is being conducted with defenders on Rule 16.1.

Ms. Wilson drew attention to the chart in the agenda book showing the pending bills that might affect the Criminal Rules Committee's work, or be of interest to committee members. A bill regarding electronic court records including eliminating costs for PACER had been referred to the Judiciary Committee, and the Rules Committee Staff had been preparing for an upcoming congressional hearing regarding PACER, cameras in the courtroom, and sealed filings. Ms. Womeldorf noted that there was no specific legislation attached to this hearing, except the existing bills on PACER, one to make it free, another to extend it to state courts so they could get their filings on line as well. Judge Fleissig, chair of the Committee on Court Administration and Case Management (the CACM Committee), will address PACER as well as cameras in the courtroom, although the legislative focus on the latter may be the Supreme Court. On the sealing issue, Judge Story will be testifying. The interest appears to be sealing motions in civil cases, not getting into the issues of concern to the Task Force on Protecting Cooperators.

The committee received an update on the Task Force on Protecting Cooperators. Judge St. Eve was meeting with the new Deputy AG to help move the Bureau of Prisons (BOP) along. One problem for the BOP is providing prisoners access to their own sentencing-related material in a secure area with no copies permitted out into the population. Presently, the BOP neither has the space nor the money to create all of these secure areas, so they are exploring with the CACM Committee's staff using kiosks where these materials can be viewed. Mr. Wroblewski reported that most of the many BOP recommendations have been completed or are underway. The big-ticket item was ensuring secure areas for viewing, which they estimated would cost 500 million dollars to build. The BOP would prefer to use electronic kiosks and is investigating that option.

Ms. Womeldorf added that the CACM Committee is working on implementation of the CM/ECF proposal, trying to coordinate with "Next Gen." It is very complicated.

II. Rule 16

Judge Molloy opened the discussion of Rule 16. He noted that this was his eleventh year with the committee, and Rule 16 has been on the agenda for at least eight of those years.

Judge Kethledge, chair of the Rule 16 Subcommittee, reviewed the Subcommittee's work on the amendments. At the miniconference we identified two problems: vagueness in what is disclosed and the lack of a clear deadline. At the spring committee meeting (after the miniconference), there was a consensus that there ought to be some sort of timing requirement. But opinions differed as to whether it should be a numerical standard (*e.g.*, "45 days before trial") or a functional rule (*e.g.*, "reasonably in advance in order to allow adequate preparation for trial"). The committee also agreed that the rule ought to require a complete statement of the expert's opinions, the expert's qualifications, and a list of the expert's testimony for the last four years. And we agreed that the expert should sign the disclosure, but the government did not agree that the expert must prepare it.

The reporters prepared an excellent draft for the subcommittee, which discussed the draft in July and then discussed a revised draft in August. After some further revisions, the subcommittee unanimously approved the proposal that is before the committee now, in the agenda book.

Judge Kethledge summarized the issues the subcommittee had discussed.

Summary. The first issue was what to call this disclosure. The current rule calls it a “summary,” but the subcommittee thought we need a break from that word. Some liked the word “report” but to others that suggested a lot of production, binders, and shiny covers. In the end, the subcommittee restructured the sentence to eliminate the word summary and not to try to replace it with another label that might be divisive. Instead, the proposal simply says each party must “disclose” the following information, and lets those substantive requirements speak for themselves. The disclosure must be provided in writing.

Time for disclosure. The subcommittee chose a functional standard: each party should get the information early enough to have adequate time to prepare for trial, which is the core goal of this project. This is not a great issue for a national one-size-fits-all approach. Different districts have very different caseloads and individual cases are different. The person with the most information to decide when the disclosure should be made in a particular case is the district judge in that case. In addition to the functional standard, the subcommittee added the requirement that the district court or a local rule **MUST** set a deadline. Presumably this will become part of the Rule 16.1 process. The parties will probably talk about it first when they meet and confer, then they will probably go to the court with whatever they worked out. The rule is unequivocal: the court must impose a deadline.

Complete statement. The rule requires “a complete statement” of “all opinions.” That is not redundant, because you could have an incomplete statement of all opinions or a complete statement of some.

Signature. The expert must sign the disclosure. This provides a basis for impeachment of the expert should the expert get crosswise with the disclosure; it is less concerned with providing information to prepare for trial. The expert has to “approve” and “sign” the disclosure. But the expert does not have to “prepare” it, which would be very costly for the party presenting the expert. Requiring the expert to approve and sign gives counsel a basis for cross examination if an expert is veering from the scope of disclosure.

Reciprocity. Judge Kethledge said there has been a concern from the defense side that they want to get these disclosures from the government but to some extent they do not want to give them to the government. There has been a sense that the defense should only have to provide reports for experts who would be responsive to an expert for whom the government has made a disclosure. But if the defense has an expert on an altogether different subject as to which the government has not made a disclosure, then they should not have to provide it.

But, Judge Kethledge emphasized, that is not the way discovery works under the current rule, which provides for full reciprocity. If the defense asks for expert reports, the government has to give all their experts’ information. And then, if the government asks, the defense has to give over all of their expert reports.

The subcommittee chose not to depart from the current rule. Amending Rule 16 is difficult. Adding an unprecedented change in reciprocity would make the project radically harder. In the absence of a very strong showing of the need to do that now, the Subcommittee decided not to pursue any change in reciprocity.

Historical context. There have been several attempts to amend Rule 16 over the past many years. Judge Kethledge urged the committee to be mindful it was walking past a graveyard of failed Rule 16

amendments. Both sides had to make compromises in this process. The defense would have preferred less reciprocity, and wanted the word “report.” They did not get those. The government was fine with the status quo, and did not want any changes in Rule 16; however, it was open minded, heard the problems with the current rule, and has tried to find ways to fix them. The government has worked in good faith, very constructively ever since the miniconference. They made compromises. For example, they did not want a “complete statement” of all opinions.

Judge Kethledge concluded that there have been many failed attempts to amend Rule 16, and those failures happen when the committee is divided. Each member of this committee will have to make a choice. The question is not whether this is a perfect rule and whether you got everything you want. The question, in this very difficult area, is whether the proposal is better than the current rule. That is the choice, and he expressed hope that the committee could be united. This would be a significant improvement for discovery in criminal cases. He urged everyone to look at the big picture and ask if the proposal is a net improvement.

Judge Molloy agreed that DOJ has been remarkably open minded in dealing with proposed changes and said he was encouraged.

The reporters led the committee through the proposed amendment section by section, working off the redlined version.

Eliminating the term “summary.” Professor Beale explained the subcommittee eliminated the word “summary,” which the subcommittee thought had been at least partially responsible for the very cursory information sometimes provided about experts. The specific requirements for the content to be disclosed are listed in the proposed amendment. The current structure of the rule is not changed, nor is the requirement that the government provide information about any expert testimony the government intends to present during its case-in-chief. It is triggered by a defense request; a parallel provision requires disclosure where the defendant’s mental condition is in issue.

Cross references. The reporters noted that there is one correction to the version in the agenda book: the cross reference to romanette (ii) is wrong. The reporters would work with the style consultants to make sure all cross references are correct. In response to a comment by Judge Campbell, the reporters noted that the use of “subparagraph” or “subsection” would be worked out with the style consultants as well.

One rule for all experts. Mr. Wroblewski thanked Judge Kethledge for his leadership. He noted this effort started with concerns about forensic experts. The miniconference revealed that to the extent that there are problems with this rule, it really does not have anything to do with forensic experts. The two major issues that the committee wants to address are timing and completeness. Mostly, the DOJ does not think there is a problem, but it is prepared to do what it can to come to a resolution on those particular issues. The proposal does eliminate the word “summary.” In contrast, the civil rule uses the word summary, and it bifurcates discovery between two types of experts. Mr. Wroblewski noted that the proposal does not bifurcate, and instead tries in one rule to cover both. The civil rule talks about experts retained by a party. For them it requires a signed report and it includes variety of additional requirements. But for other experts the civil rule requires only a “summary,” and it recognizes that those experts are not under the control of either of the litigants. There are a huge variety of experts brought in on criminal cases by the prosecutor or by defendant. Some are retained, some are not. Some are friendly, some are hostile. We should recognize that we are trying to do something very different than the civil rule.

Professor Beale stated that the rule currently takes this approach in having one rule for all types of experts, and the draft does not change that approach going forward.

Time for disclosure. Moving to lines 21-25, Judge Kethledge noted this was one of the crucial compromises. The defense bar really wanted a set time for disclosure. He recalled Judge Campbell's memorable question at the miniconference: "Where are the judges in these cases where someone receives the disclosure on Friday before a Monday trial, or the night before trial?" As the defense participants explained, there is no relief available to them in these types of situations because disclosures made so close to trial do not violate the text of the current rule.

The subcommittee agreed there was a need for a rule that can be enforced. It tried to draft a rule specifying times for disclosure for both prosecution and defense, but could not come up with something that would fit every case and comply with the Speedy Trial Act. After the government persuaded the subcommittee to adopt a more flexible standard, the subcommittee's goal was to drive home the notion that in each case there has to be a deadline. The court or local rule could set a default, and the parties could always come in and ask for a change. Or the date can be set and adjusted, case by case. That is why the proposal says that the court or a local rule must set a date. And the rule states the standard for when that date must be set: sufficiently ahead of trial for the party to prepare for trial. This is a functional standard. As the committee note states, it includes taking account of the need for a CJA lawyer to get approval to hire their own expert. The timing will have to be adjusted based on the complexity of the case and the type of expert involved.

Judge Molloy reminded the committee that Judge Campbell had drawn its attention to similar language in the proposed amendment to Rule 404(b).

Judge Campbell said that judges who manage cases are used to doing this all the time in civil cases. He expected that once this rule is in place those judges will start bringing their civil experience into criminal cases when they are setting schedules. Many judges will not only set a deadline for disclosure in a civil case, but they will also say that the disclosure must be full and complete or set a date for supplementation. He asked whether the proposed rule would affect those practices. Does it mean a judge will set an initial disclosure date and then a later supplementation deadline? Or that there is no supplementation, so get the work done now?

Professor King noted there is a provision in the proposed amendment for supplementation to be made in accordance with the continuing duty to disclose under subsection (c). Rule 16(c) now requires supplementation even into trial. So an attempt to cut off the duty to supplement under a court order or local rule would conflict with existing Rule 16(c), as well as the proposed amendment, which incorporates Rule 16(c). Thus, there could be some tension between the new rule and supplementation practices in civil cases.

No defense request to set a time for disclosure. A member asked whether the court's duty to set the time, like the government's duty to disclose, is conditioned upon the defendant's request. Judge Kethledge responded that the rule as written is a mandate: the court must set a time. But perhaps the court could take into account whether the defendant had asked.

Professor Beale asked how often defense attorneys do not ask for disclosure of the government's experts. The member said he had seen it in practice, and usually it is negligence on the part of the defense attorney. Another member reported that in her district the defense always asks. But she had asked colleagues in other districts and was surprised to learn how common it was in other districts not to ask.

The member (who said she had been through the 2255 process) could not imagine failing to ask, which opens a defense lawyer up to a lot of risk down the road.

Professor King was not sure that the rule as proposed requires the court to set a date unless there is a duty to disclose. She noted that the use of the word “the” may make the court’s duty conditional, because it refers back to (iii), the duty to disclose. Lines 6 -7 begin “at the defendant’s request,” and then the rest of that follows, “the disclosure” is referring to the disclosure required under (iii).

A member stated her view that the obligation of the parties and the obligations of the court are separate. The court could say, for example, disclose any expert 60 days before trial. Then, as the parties go along, suddenly one decides it needs an expert, and it knows disclosure must be made sixty days before trial absent an extension from the court. The court can set appropriate dates without knowing exactly which experts will be required. The member also noted that she had started out this process really wanting a stated date, such as forty-five days before trial. But she talked with many defense colleagues, and they decided this flexible standard was a good idea. In many cases, the government has had months or years of preparation, and with reciprocal discovery the defense needs to have that flexibility—not set times—because it may be trying to play catch up. If there were firm deadlines, the defense might be the ones who would be hamstrung. She noted that many of her colleagues eventually came around to this flexible idea.

Method of announcing the deadline: by court, local rule, standing orders, practices. A member questioned the phrasing of the proposed rule. It seems odd to say “court or local rule,” because a local rule is the court speaking. So it seems odd to distinguish the two. He preferred to refer only to “the court,” omitting “or local rule,” and then just mention local rules in the committee note. The member also asked if the proposed language would affect existing individual practices, which many judges in his district have adopted.

Professor Beale explained that the language was modeled on Rule 5, which says the judge must set a time, unless the time is set by local rule, and that under Rule 1, “court means a federal judge ...” Professor King added that the subcommittee meant to include both district judges and magistrate judges.

A discussion of options for rephrasing this language followed. Judge Campbell suggested it could say “the court, by order or local rule, ...” Judge Kethledge preferred the mandatory nature of the existing proposed language, and agreed that if a local rule is something that only the court does, referring to both would be redundant. The reporters noted that the existing phrase conveyed that either the judge could issue an order or there may be a local rule and that the subcommittee thought it would be a good idea for the text to convey the idea that local rules would work. A member noted that there are individual rules of practice that are not quite standing orders, but the parties must comply with them, so that taking out the reference to “local rule” would provide more flexibility. Judge Kethledge added that the note could talk about the different means for the court to do that.

Judge Campbell said that if it is important to flag the idea of local rules then it should be in the text, because so few people read the committee note.

Two other members endorsed the suggestion that the text read “the court must, by order or local rule,” one stating it would encompass individual judges’ personal standing orders, an order on the judge’s webpage, and the other agreeing it is important for people who do not read the committee notes. After Professor Beale noted that Civil Rule 26 has “by order or local rule, the court may also” and that to preserve the mandate, this rule could read “by order or local rule, the court must,” a motion was made and

seconded to change line 21 on p. 128 and the parallel provision on the defense side to read “By order or local rule, the court must.”

Discussing the motion, Judge Kethledge wondered if putting “by order or local rule” as an introductory clause might cause confusion about whether that introductory clause is a condition of the mandate. Placing this phrase between “court” and “must” will be clear: the court must do it every time. But if you begin the sentence with that phrase, someone somewhere is going to think we do not have a local rule that says we have to do that, so we are cool. Although he did not suggest that would be a reasonable reading, he recalled Judge Campbell’s advice that we have to write rules for the weaker players.

Professor Beale stated she was not aware that the language has caused problems under the civil rule, but that the style consultants may also have a preference. If it were really a matter of style, their preference would govern. Professor King agreed she liked placing the phrase after “the court” and not in the beginning.

Professor Beale suggested this could be a friendly amendment to the motion, so that the motion would be “the court, by order or local rule, must....” The friendly amendment was accepted, and the motion passed.

Department of Justice concerns. After thanking Judge Kethledge for his leadership, Mr. Goldsmith made some preliminary comments before turning to two issues of concern to the DOJ. He noted there were many leadership changes in the DOJ, and as a result it had been unable to come forward with the type of clear approach and clear recommendations that it wanted to provide. He noted that the DOJ’s leadership had been incredibly accommodating. It had been a high wire act, where Mr. Wroblewski participated, but has had to say: “this is not our formal-formal position.” Mr. Goldsmith appreciated that in the effort to reach compromise you adjust one thing and new issues arise. But Judge Kethledge had done a masterful job hitting those sweet spots when the DOJ had a different view of where things should end up.

The court’s action setting the deadlines. Mr. Goldsmith said that the DOJ preferred saying the court “should” set a deadline, instead of “must”—though he recognized that ship may have sailed. But he had some concerns with “must” and no qualifiers. He suggested adding something like, “must, absent good cause.” At the miniconference, he noted, Judge Campbell—one of the handful of people that have straddled both Criminal and Evidence Rules Committees—suggested that the 404(b) solution was arguably the perfect solution. It was an aha moment. That flexibility helps both prosecution and defense. But one part of 404(b) that is missing from this formulation: “unless the court excuses for good cause the lack of prior notice.” He recognized that in the 404(b) context it is the government that would need to establish good cause. Here, it would be the court setting a deadline and the court would not need to give itself a rule on good cause. But a good cause reference is needed because of the one-size-fits-all issue. There are going to be a lot of reactive cases, cases where things are still in play, where maybe there is an arrest, or an indictment, and things are still being formulated, maybe the serology expert is engaged, or perhaps additional forensic works needs to be done, and the concern is that the court may feel compelled to set a time at that point when not every fact is available. This may be forcing deadlines not only for the prosecution but maybe for the defense. The DOJ’s suggestion is to add a qualifier there to signal to the court and to the parties that if there is a legitimate reason to delay setting that time frame, the court should have that option.

Judge Kethledge responded that the proposed rule does not set any deadline for the court to set a deadline. It just says the court must set a deadline. Nor does it say, within some time period of the meet and confer under Rule 16.1 that the court must do this. If the situation is fluid regarding whether there are going to be experts or different experts, there is nothing here that would prevent the court from waiting to set the deadline. But what it does make clear is that the court must set a deadline. So this already has all the flexibility the court would want as to when it may set the deadlines.

Professor Beale agreed. She noted the absence of any language that says for example, ten days after arraignment, the judge must set a date. So if it is clear that the parties are talking under 16.1, and things are fluid, the court can wait to set that deadline until things are clearer. If the deadline is set and it does not work, the court can revise it.

Professor Struve suggested that Rule 45(b) might be of some use here. That is the extension of time provision that provides when an act must or may be done within a specified period. The court on its own may extend the time or may do so on a party's motion. That would provide flexibility.

Professor King responded that there is an even more specific provision that provides that flexibility right in Rule 16. Rule 16(d) says that the court may for good cause restrict or defer discovery or inspection or grant other appropriate relief. This was part of the subcommittee's deliberations about the "must." If there is a need to modify the timetable that has been set, there is an existing mechanism for doing that already in Rule 16. Unlike Rule 404(b), which sets a disclosure time with no overarching instruction about how to change disclosure time, this rule does have that instruction.

Addition to the committee note concerning timing of the court's action setting the deadlines. Mr. Goldsmith noted that there may be an inference that the court must act at a particular time, and he expressed support for adding something to the committee note making it clear that is not the case. Otherwise some district may interpret the new rule as saying this has to happen at the initial appearance, or a certain number of days later.

The committee then discussed what could be done to respond to this concern. Judge Kethledge suggested adding: "this provision leaves the district court discretion as to when the deadlines are entered." Professor King offered that a phrase like that—or "and leaves to the court when to set that deadline"—could be added at the end of the sentence that reads "if that time is not already set by local rule or standing order."

Judge Campbell suggested that even more explanation for judges would be beneficial after the language that says the rule leaves to the court when to set the deadline. The next sentence refers to Rule 16.1, which occurs fourteen days after the arraignment. The parties are going to be coming to the judge within a month of arraignment saying here is our proposed schedule, and it would be natural under this new rule for the judge to say, OK, I am going to set a deadline for experts. It might be helpful to add language explaining that when the need for experts is unclear the judge may wish to defer, so the judge does not feel compelled to set a deadline thirty days after the arraignment. Judge Campbell also suggested adding to the committee note that the disclosure obligation of the government is dependent upon the defendant's request. This would help avoid judges saying, as a blanket statement, the government shall disclose its experts by such a date, which the parties may view as a command, even if the defendant has not made a request.

Judge Campbell suggested limiting the language to complex cases if the Speedy Trial Act is a concern, noting his experience is that cases never go to trial in seventy days. Most are six or seven

months, and the fastest is three or four months. If a case is really in flux, and unclear where it is going, but the party has been arraigned, we should signal to the judge, “You don’t have to set a date on experts yet, just because this rule says ‘must.’ In a complex case you might want to defer that so you’d have a better sense of where that case is going.”

Judge Kethledge suggested we might say something like “the court can exercise its discretion as to when to enter the order depending upon the complexity of the case and whether it is clear that the parties are going to have experts.” The committee note could recite a few things that might affect when the order will be entered, but also make it clear the court on the timing. Judge Kaplan wanted to add “and to alter them,” stating it was worth at least in the committee note alluding to the fact, that once set, the date is not cast forever in granite and can be extended. He noted this was Professor Struve’s point, and it is worth an emphasis.

Speaking against adding to the committee note language on modifying times set or deferring setting the times, one member was concerned that if it is this flexible, then the defendant would have to choose between the right to a speedy trial and the right to have a firm date for expert disclosures. If the government believes it is a complex case and it cannot get the expert report prepared and to the defense within 20-25 days, it should ask for a continuance. Because the default is trial, the DOJ should be able to prepare the report in time for the defense to meet it. If the DOJ cannot do so, then the burden should be on it to establish to the court why not. The member argued that adding language that gives the court the discretion to delay necessarily pushes back the time for the defense to prepare. Functionally that will lead to going beyond the speedy trial time frame, when the defendant may actually want to push the government toward trial and be ready when they indict the case.

Another member noted that in his experience every single defendant waives speedy trial, and the judge sets whatever schedule is appropriate. The genius of this effort is that one size does not fit all in this country.

The committee discussed the following possible language to add to the committee note on p. 143, after the sentence ending “or standing order”:

and leaves to the court when to enter the order setting the deadline. The court also retains discretion to alter the deadlines to ensure adequate trial preparation under Rule 16 and the Speedy Trial Act.

A member asked if the reference to the Speedy Trial Act was needed. Professor King responded that the reference noted the possibility that the court would grant a continuance under the Speedy Trial Act, after finding it is in the interests of justice.

All but one member agreed the language should be added to the committee note. The dissenting member preferred the rule and the committee note as submitted by the subcommittee, and was concerned that what should be an exception would become a default. Essentially this is saying the court must set a deadline, but then it is saying when the court sets a deadline it is just this fluid state.

The contents of the disclosure; committee note language distinguishing Civil Rule 26. The provision on the contents of the disclosure, Professor Beale explained, was drawn largely from Civil Rule 26. The proposed amendment requires disclosure of a “complete statement” of all the expert opinions the government will present in its case. It retains the language from the existing rule about the bases and

reasons for the opinions and qualifications, but adds a requirement for publications over the past ten years, and a list of past cases where the expert provided trial or deposition testimony in the last four years.

Judge Campbell noted that “a complete statement of all opinions” is the same language that is in Rule 26, but in this proposal it is followed by slightly different language that says “that the government will elicit,” whereas Rule 26 says “that the witness will express.” But if district or appellate judges learn that this amendment arose out of suggestions that the criminal rule be more similar to the civil rule, and they see exactly the same phrase (“a complete statement of all opinions”), they may conclude that it means exactly the same thing in Criminal Rule 16 as it means in Civil Rule 26.

The committee note from the 1993 amendment to Civil Rule 26 says that the witness “must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor.” Many trial judges take that to mean that what has to be in the expert report is what the expert is going say on direct examination. Their case management orders say we are going to hold you to that. You cannot go beyond this report on direct. Judge Campbell said that when he is in trial, if a party thinks that what an expert is being asked to say is not in the report they can object, and he turns to the other side and says “show me where it is in the report.” If they cannot point it out to him, he sustains the objection. That is how he avoids an endless problem of additional undisclosed opinions. If “a complete statement of all opinions” is read the same way in Rule 16, there will be judges saying that experts on either side cannot give any testimony in federal court that is not in the disclosure that was made to the opposing side. And that may be fine. It would certainly solve the problem of surprise. But he wanted to flag the point that that this approach might be brought over from the civil side because of the identical language we are using here. Do the disclosures control what the witness can say on direct examination? If so, that was fine, he just wanted the committee to be aware that the civil view which grew out of the committee note to Rule 26 may play a role in interpreting this rule. His civil case management order states your expert cannot say anything that is not in that expert report. In fact, in the committee note to Rule 26, the Civil Rules Committee said that part of the intent was to eliminate the need for expert depositions, because you will know everything the expert is going to say from the report. It is intended to be a very comprehensive disclosure on the civil side.

Judge Campbell described the evolution of Civil Rule 26. In 1993, the Civil Rules Committee adopted this requirement including the language from the committee note that he previously read, which applied only to retained experts and employees of a party whose job it is to give testimony (essentially in-house experts). Civil Rule 26 did not require anything for other experts. In 2010, the Civil Rules Committee added a second requirement for non-retained experts because there were lots of people giving Rule 702 testimony in civil cases about whom there was never any formal disclosure. There were depositions, but no formal disclosure. We added what is now Rule 26(a)(2)(C), which is not a report from the expert. It is a report from the lawyer and it requires a summary of the opinions and the basis for them. The idea was then you put the other side on notice so that they could depose the people who are going to be giving expert testimony but who are not controlled by a party. You cannot proscribe exactly what they are going to say, but you should still let the other side know what is intended, what you are going to elicit. So there are those two distinct categories. Judge Campbell did not intend to upset this careful balance that has been struck for this criminal rule. But he did think that since we are using the exact language from the first category, the report requirement of a complete statement of the opinions, that courts are going to look to that part of Rule 26 and say aha, this means everything the witness is going to say from the witness stand needs to be in the report. And because we have only one standard in this rule, that will apply to the

police officer or the treating physician or whoever gets called, over whom the party does not have control in a criminal case.

Judge Molloy responded that the whole point of amending this rule is to level the playing field. He too followed the practice Judge Campbell described in civil cases. If there is an objection he looks at the report. Even if it is not literally there, if it is fairly there, if fair inferences can be drawn, then he would overrule the objection. If it is not fairly within the disclosure, then he would sustain it.

Judge Kethledge said the rule is saying you have to disclose the opinions you are going to elicit. This will define the scope of direct.

Mr. Wroblewski reminded the committee that the DOJ raised this concern at the earlier stages. The discussion is troubling because it suggests that we were not able to address this. We were concerned number one about the word “report” and again how that could be interpreted in relation to the requirements of Civil Rule 26. We tried to address that by getting rid of the word report and by adding the qualifiers “government’s case-in-chief.” The other concern goes to the point that we are putting all of these expert witnesses in the same basket. The civil rule says if this is your retained witness, you hired this witness, and you have to have a long report to lay it all out. The concern we tried to address when getting rid of the word “report” was that there are going to be many experts that are not retained by the government, who may be hostile to the government, or may be hostile to the defense when the defense calls them. We do not know precisely what they are going to say. He understood you want as much disclosure as possible so the other side can prepare. But the idea that the parties are going to control these witnesses, and specify with precision what they are going to say, is not an accurate perspective for all witnesses. For some witnesses, yes. But not all witnesses. So it is a bit troubling.

A member responded by asking how often someone in the DOJ would call a witness who they did not interview. The member could understand the lack of control over a treating physician. But the member thought it would be a pretty rare situation where the prosecutor would say, “we have no idea what this person is going to say but we are hopeful.” Hope is not a litigation strategy. He agreed with Judge Campbell. People are going to look at the language that way. But the member emphasized the proposal addresses this with the language exempting a party from getting the expert’s signature on the disclosure if the party was unable to do so because the witness was not under the party’s control. So the AUSA would say this is the doctor, here is what I am going to examine him about, here is what I anticipate the testimony is going to be.

Mr. Wroblewski said in most cases the DOJ will be able to provide the required disclosure, but there will be cases where not only will we not have an opportunity to interview an expert witness, but the witness may be hostile. Take a white-collar case where the prosecutor is calling an accountant working for the company that is either charged or whose executives have been charged. The accountant might not want to talk to the government at all. And the prosecution might want the accountant/expert to testify not only about the facts and about how they came up with ledger entries, but also about the meaning of the entries in the ledger. Those people may end up as experts. And yes, the DOJ is going to give notice as much as it can about what those experts will say. In the summary that we provide now, we are required to give as much information as we can. It is troubling if the word “complete” is going to be interpreted as the civil rule context. That will be a problem for some experts. Not all, but for some.

Mr. Goldsmith cautioned against a carve out that says retained employees are on one side and non-retained witnesses are on the other. He commented that federal prosecutors do not have the same

certainty that they will be able to get some forensic analyst from FBI, DEA, ATF or state and local labs, and pin them down as you could with an employee in a civil case. The discussion has repeatedly referred to the retained employee v. hostile person. That is useful, he said, but only up to a point.

Judge Kethledge then observed that the Civil Rules Committee had their rule, and a committee note that said what it means, and we can have a committee note to the criminal rule that says what we want and what we think it means. We do not have the word “report.” There is probably a consensus around the idea that we want the disclosure to provide fair notice to the other party of the opinions. Perhaps we ought to have in our committee note our own statement of what we think it means along those lines.

Judge Campbell agreed that it would be helpful to address this in the committee note, and that the committee might want to say the criminal rule is not intended to incorporate all aspects of the civil rule standard, and note the differences. If this is a disclosure from a lawyer, not a report written by a witness—which is what Civil Rule 26 requires—that may result in less precision. The intent is to give full and fair disclosure of all the opinions that the party intends to elicit, but not necessarily a verbatim transcript of the direct testimony or something to that effect. This would help keep judges from following Rule 26 precedents if they see nothing other than the exact language of Rule 26 in the text of Rule 16.

Judge Kethledge agreed that sounds like a wise approach. We do not want this proposal to become some sort of Trojan horse for making this some sort of de facto Rule 26 when we have made some careful distinctions.

A member suggested revising the text of the amendment to add after “a complete statement of all opinions that the government intends to elicit in its case in chief”:

or, in the event of an expert witness who is not retained or employed by the government, a statement of all opinions the government will attempt to elicit from the witness.

This would essentially carve out those witnesses for whom the government cannot guarantee that the opinions it thinks it is going to get are actually going to be given by the witness.

Another member expressed a preference for the complete statement language as is, and thought many of the concerns are tempered by the language that comes right after—“that the government will elicit”—which distinguishes it from the civil case. If the committee would want to go with what was just said, maybe a way to do that, is to say the government “intends” to elicit, which provides a sense that the government cannot guarantee that this is actually what will be said.

Eight additional members shared their preference for the current language in the text of the proposal. Of these, several thought the committee could clarify this concern in the committee note. Another thought that the new criminal rule will put the civil side of judges on notice that they need to pay attention to where the rule is different. A member noted that you have to get into corporate things, or sometimes medical issues, which are pretty rare, to have a hostile expert. Another member reminded the committee that the government has the grand jury, and could elicit these opinions in the grand jury. Judge Kethledge and Judge Molloy stated they were happy with the current text plus an addition to the committee note indicating the differences with the civil rule.

Note language regarding modification of requirement to disclose list of cases in which an expert testified. Turning to the remaining language in (iii) specifying what must be disclosed, Mr. Goldsmith said that the list of the expert’s publications is something that the government should have an obligation

to find out and disclose. Regarding the required list of testimony in the previous four years, he was appreciative that the committee note language was changed from “on rare occasions” to “on occasion.” He had concerns, however, about the committee note language concerning what the prosecution has to do in seeking an order modifying discovery. If somebody in a New Jersey state forensic lab is going to testify on narcotics or firearms, and is testifying virtually every week in Essex County, the line prosecutor’s ability to get that information and update it accurately is not going to be as simple as it might seem. “On occasion,” is not great, but to avoid that obligation the prosecutor has to seek an order. And that, he said, is more than is necessary.

Judge Kethledge responded that there is a strong consensus that this information should be provided. The only way to get you out of the rule is an order. Rule 16(d) already has this escape valve. Most experts themselves actually keep track of their testimony. It is just a list, not a transcript. Opposing counsel has to go off and find the transcripts. You have no obligation to do that. He was skeptical that this would be such a widespread problem that we need to change the default.

Mr. Goldsmith suggested that instead of a separate stand-alone order, perhaps the better procedural mechanism might be that when that the time for disclosure is set, the prosecution has the ability to say, it is calling two people from the local agency and getting all of the cases might be difficult, so that it is part and parcel of the setting of the underlying deadline.

Professor Beale responded that there is no limitation in (d) about when it is done, or that you have to wait or do it as a separate order. If you want to train your people to alert everybody at the beginning, there should not be any problem. And it should be part of what is coming to the judge under Rule 16.1.

Mr. Goldsmith suggested language to add to the committee note: “which may be part of the initial discussion of the court when the initial date is set.” Judge Campbell offered alternative language, which Mr. Goldsmith accepted: “the party who wishes to call the expert may raise the issue at any scheduling conference or seek an order modifying expert discovery under Rule 16(d).” After some discussion of substituting “and” for “or,” so that the default of establishing good cause under (d) is not modified, Judge Campbell suggested the following language: “In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying an order of discovery under Rule 16(d).”

A member asked whether instead of one statement about the discretion to delay the time, and another about this exception, it would be preferable to have just one reference to 16(d). With a single reference, everyone would know they can resort to 16(d) whether it be at the scheduling conference or a later motion if warranted, if you cannot get a list of prior testimony for a witness. There may be other parts of, for example, the signature, where you want to raise something under 16(d). Just one reference to 16(d) would be simpler.

Professor Beale noted that whether you want multiple references to Rule 16(d) depends upon how much you want to customize. If you really care about the list of prior testimony and you want to make sure you have made clear what is going to happen, talking specifically about when that can be raised allows anybody who has questions about it to find that right there. There is some utility in specifying this. The reporters noted that providing for modification of this particular requirement regarding previous testimony was important for the government’s buy-in. Some prosecutors may oppose the rule because they say we cannot do this, and the answer was to make it clear: you can apply for relief under 16(d). Judge Campbell’s suggested language shows it can be done in an efficient way, and prosecutors can be

trained on that and everybody will know what is going on. When the rule is published, we do not want more people objecting that it is not going to work because they have forgotten about Rule 16(d).

A motion to approve lines 26-39, on pages 128-129 was made and seconded, and passed by voice vote unanimously.

Exception to signature requirement when opinion and bases already disclosed in prior report signed by the expert. Regarding the signature requirement, lines 40-44, Professor Beale noted that the government asked for the language allowing an exception to the disclosure requirement for information previously provided. The parallel provision in (b) benefits the defense. Information provided in reports required under subsection F need not be repeated.

Professor King noted that Professor Struve had raised the concern that without additional language in the text, the defense may lack notice that there is something in a prior report that belongs within this list. Professor King directed the committee's attention to language to insert at the end of line 42 that she and Professor Beale had cleared with the style consultants in order to address this concern. The style consultants' preferred version was replacing the words "need not be" with "that information may be referred to, rather than repeated" in the expert disclosure. So that the text would read: "that information may be referred to rather than repeated in the expert witness disclosure." Professor Beale explained that a case may involve many experts and many reports, and the party may not recognize that there is another report that this expert prepared. There is no reason not to have a reference to incorporating. And the same thing will be in the defense disclosure rule requiring a defendant to cross reference.

Judge Kethledge agreed it was a good point, but suggested that "may be incorporated by reference" was better phrasing. Professor King responded that the "referred to" language was the style consultants' preference.

Mr. Wroblewski said that the language in the agenda book was added at DOJ's request in large part because of forensic science analysts who are required to prepare a report and also the supporting documentation for the bases for the opinions. The DOJ's concern was that the way they want to speak is through a formal report, which is reviewed as part of a regulated system. If this new language requires something in addition to disclosing that report, if they have to prepare something else and sign it too, they have serious questions. This new text suggests something else has to be provided, but we do not know what that is. We provide the report. In addition, our prosecutors write out a summary. We are going to call this expert and he will testify to these opinions. But now we are asking the forensic scientists to sign this new disclosure too.

Judge Kethledge responded that the lawyer is making the disclosure. You have already provided a report about an opinion under subsection F. But if you do not mention in your disclosure under G that the reason for not providing disclosure on one or more experts is that it has already been provided in this document under subsection F, the defendants might not know it is in the other document. All that is required is just a reference, such as one of these:

"We are also going to have the opinions in this report" or "in this section of this report."

"The opinions I'll offer are the ones specified in the report dated whatever."

Professor Beale suggested it could also say "all my opinions are in the Section F report."

Mr. Goldsmith said that it is perfectly fair to add language that information in an F report need not be repeated in the witness disclosure if it is referred to in the disclosure. It puts the opposing party on notice, and it will occur fairly often. But he suggested that some reference to the signature section should be added, or conversely from the signature section to this, so that the information need not be repeated, nor must the expert sign the disclosure as referenced in the subsequent paragraph. Otherwise, the uninitiated will say, when I refer to this, I have to sign it. Mr. Goldsmith commented that he did not believe the DOJ would have the ability to convince the FBI, DEA, ATF, and state and local lab experts to sign even that—something that simple—without the requisite levels of review. And if all we are doing is stating that the report we previously turned over under subsection F contains all the opinions, under those circumstances the disclosure need not be signed by the expert.

When some members said they did not understand the problem, Mr. Goldsmith explained that they needed some language in that paragraph or the signature paragraph that says if you are taking the “see my F report” option, then that suffices for the obligation of the witness to sign the disclosure under G.

Judge Kethledge and Professor Beale asked Mr. Goldsmith to restate and clarify his position. He said if the witness has already signed an F report that itself contains all the opinions, then the witness need not sign this disclosure. If there were both opinions in an F report and new opinions, he was not suggesting the need for a signature section that carves out what to sign. And it was not necessary for the expert to sign the list of publications and prior testimony, which could all come from the prosecutor and not from the expert. It would be hard to get chemists to sign something saying this is how many times I have testified.

Mr. Goldsmith confirmed that the DOJ was “OK” with the language “may be referred to rather than repeated,” so long as this concern about the signature was addressed in the signature section.

A motion to add the language “may be referred to rather than repeated” was made, seconded, and unanimously passed by voice vote.

Expert signature if information is referred to rather than repeated. The committee then turned to the DOJ’s request for a way to frame the language so that if it is all in the signed F report, it obviates the need for the expert’s signature. Mr. Goldsmith said there was no need for the expert to sign what is essentially non substantive information. The prosecutor will state: here are the publications, the cases in which the expert testified, and the opinions to be offered are on pages 61-89 of my disclosure dated March 15. The expert’s signature on this filing is unnecessary. You do not need the cross examination on this and it is adding a step which is going to be time consuming. If the amendment goes out for comment, he thought we would receive some pretty vociferous opposition from entities over which the DOJ has relatively little control.

Judge Kethledge suggested a second paragraph, parallel to the preceding paragraph, such as “the witness need not sign the disclosure for opinions as to which the expert has already signed a report previously disclosed under Section F.” Mr. Goldsmith agreed that would be responsive to his concern.

Judge Campbell summed up the suggestion: the expert must sign the disclosure unless the government states in the disclosure that it could not obtain the signature through reasonable efforts, or the opinion contained in the disclosure was contained in a subparagraph F report signed by the witness.

Professor King noted that what was in the F report could be the opinions, could be the bases and reasons, could be part of those, or could be something else. It is only the information that is already in the

F report that need not be repeated in the disclosure. To say that you do not have to sign the disclosure at all if only some of the information required was referred to and not repeated goes too far. Can we specify those elements in (iii) that must be in the F report for the signature exception to apply?

Mr. Goldsmith responded that the real meat is the opinions and bases in the previously provided and signed lab report. Judge Campbell suggested adding the word “all”: “The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witnesses signature through reasonable efforts, or all of the opinions contained in or referred to in the disclosure were set forth in a subparagraph F report signed by the witness.” Mr. Goldsmith thought that the word “all” eliminates the problem where some of it is in F and some is not.

Professor Beale suggested the language should be both opinions and bases and reasons, so that the only things that do not have to be signed are the publications, list of prior testimony, and qualifications. Judge Kethledge agreed that the expert’s signature on those items would not seem to be very important for impeachment purposes. That approach sounds reasonable if this would otherwise get into compliance with an ethical code briar patch, to have them sign as to anything new in the disclosure and they have already signed as to their opinions. In response to a member’s question, he said that the change still required the government to provide the publications and list of testimony, but the signature of the prosecutor, an officer of the court, as opposed to the witness, would be sufficient.

Requiring disclosure of the reason a party could not obtain witness’s signature. Judge Molloy also proposed a change to the last sentence of the signature provision: “unless the government states in the disclosure *the reason* that it could not obtain the witnesses signature,” as opposed to, “I didn’t have time.” A member said she agreed, and that the reason the government could not obtain a witness signature is sometimes an important piece of information for cross examination.

When Professor Beale asked if the phrase “reasonable efforts” gets at the same thing, the member stated they were different. The member would not cross-examine a witness who was in labor and delivery and could not sign, but would cross the witness who cursed and emphatically refused to cooperate. That is an important piece of information that we need to know.

Another member suggested “makes a showing that it could not obtain,” instead of stating the reason. Judge Kethledge responded that implied you have to go to the court as opposed to reciting in the disclosure.

In response to a question, Mr. Goldsmith said the DOJ had no problem with adding the reason that it could not obtain the signature.

A motion to approve the following language was made, seconded, and passed unanimously:

The witness must approve and sign the disclosure, unless the government states in the disclosure the reason that it could not obtain the witness’s signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness.

When a party intends to use an expert but cannot identify the specific individual. A member raised a concern that in a many cases, such as a gun case, the government makes a disclosure that it plans to call an expert to testify that DNA is rarely found on a gun, and the reasons why, and so forth, but at the time of that disclosure they do not actually know who that expert will be, i.e., which of the ATF

examiners will be available. With Rule 16(d), in those circumstances a disclosure close to trial may be enough for the defense to meet the government evidence. But, the member said, it is a practical concern.

Mr. Wroblewski noted that is one of the DOJ's concerns with the timing provisions. There are many different kinds of cases, not just firearms, but say fingerprint analysis, where you do not know which analyst is going to come, so you cannot get a signature until quite late in the process. You know there is an analyst who is going to come, but you do not know which one, so you cannot get the prior testimony and that may come late. That was one of the concerns we were trying to deal with when discussing the timing provision. If we say we are going to have this kind of witness and this is the disclosure we can make at this point, it was not clear whether that will be allowed by district court.

A member suggested that the "reasonable efforts" and the reason for the lack of a signature are adequate to cover that problem. Judge Kethledge agreed, noting that the defense would say, OK, once you have that person, have them sign. But Judge Campbell pointed out that it is not just the signature. You cannot give a list of prior publications until you know who the witness is either. Mr. Goldsmith wondered if there is some elegant way to address a disclosure for a generic expert but not the specific person. Judge Kethledge suggested it could be another foreseeable circumstance that the committee note could cite as a basis for the court exercising discretion or granting relief 16(b) later than in other similar cases, although he thought that generally the court and the parties are going to work this out.

A member suggested adding to the language about the time to provide disclosure, the phrase "or times." Judge Kethledge responded that that would change the default, which is this must be one shot. The member said that the judge can say you have got to do everything but the publications or whatever for the generic expert by November 1, and as to that you have to do it later. Judge Kethledge said this may be the tail wagging the dog.

The reporters suggested that the supplemental and correcting provision the committee has yet to discuss might address this.

Judge Campbell reminded the committee that it need not come out with the final version of this rule today, because the Standing Committee typically approves in June what is going to be published in August. So a tentative view could be worked through by the Subcommittee again before the spring meeting. A member asked what would happen if the Standing Committee decides not to approve publication in June. Will it not be published? Judge Campbell did not think that would happen because there will be a pretty thorough report to the Standing Committee in January of everything that has happened here, including the current draft. And the Standing Committee will be able to provide thorough feedback at that time before the committee's spring meeting. We typically do not have a problem in the June meeting approving things for publication if the Standing Committee has had a previous chance to look at it in January.

After a lunch break, the committee returned to the proposed amendments to Rule 16, starting with lines 48-51 on p. 129 of the agenda book.

Supplementing and correcting. Professor King explained that initially the subcommittee considered a much more detailed paragraph for supplementing and correcting that was styled more closely to the one in the civil rule. But there was support for something much simpler that would cross reference Rule 16(c), which already creates a duty to supplement this disclosure as well as other disclosures that are ordered or are already in the rule. The subcommittee thought a cross reference to 16(c) would be an easier way to deal with concerns such as when it will be a different agent that testifies,

or a different doctor. The subcommittee included this language “or correction,” because 16(c) discusses only additional material. The proposed amendment lists in the contents a complete statement of all opinions, and one party might decide not to call a particular witness or not to present certain evidence, and that correction should be provided to the other party, and is under Civil Rule 26. The subcommittee thought that was important to retain it because correction is different than supplementation with additional material. Professor Beale added that if the disclosure says the expert is going to say X, and now it is actually Y, that is a pretty important correction. The subcommittee thought it was important to drive that home.

Professor King also noted that the reasoning behind the “for the defendant” language in the brackets is that Rule 16(c) provides that the duty to supplement may be met by disclosure to the other party or the court. The subcommittee felt it would be important to make sure that the supplement or correction go directly to the opposite party, and one way to do that would be to add “for the defendant,” but there was no decision on this language from the subcommittee. Professor Beale added that supplemental disclosures only to the court do not appear to be a problem with Rule 16(c) right now. Prosecutors are not just giving things to the court and not to the defendant. Everybody understands the supplementation would go to the other party so maybe we do not need that.

Mr. Wroblewski stated the DOJ supports this provision. Judge Kethledge said he did not believe the rule needs to say “for the defendant.” (G)(i) now says the government must disclose to the defendant, and that is the disclosure we are talking about; it says “the.”

A motion to approve the supplementation provision, taking out “for the defendant,” was made, seconded, and approved unanimously.

Defendant’s disclosures. Professor Beale explained that the provisions in (b) regarding the defendant’s disclosures were parallel to the provisions in (a) regarding the government’s disclosures, so that all of the changes made to the government’s obligations would be made to these. Professor King reiterated those text changes:

- Line 20 would read “court, by order or local rule, must set a time.”
- Line 39, p. 133 would read “that information may be referred to rather than repeated.”
- Line 39, after the signature, would read “The witness must approve and sign the disclosure, unless the government states in the disclosure the reason that it could not obtain the witness’s signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness.”
- And on line 39, the defendants’ report should be subparagraph (c) so that would change, not paragraph F.

The reporters noted they would work with the style consultants to implement these changes.

Change “defense” to “defendant.” The only objection was from a member who proposed changing “defense” to defendant. Another member agreed, and there was no objection to changing defense to defendant.

Reciprocity. Judge Campbell asked if some might object, even though the current rule requires reciprocal discovery, but see this amendment as going farther, requiring defense to provide details of defense strategy, crossing a line and violating due process rights.

Judge Molloy said this was an issue that was brought up at our miniconference, and was something he put in his notes as a possible addition to the language of Rule 16(b)(1)(c). But in light of Judge Kethledge's comments, he thought this was probably going to be fleshed out in litigation.

A member said she had been struggling with precisely the point just raised. She appreciated the balance between the procedural right of access to the report, the constitutional right to remain silent, and the judicial case management function that is going on here. Her concern is that by requiring the defense to produce a written document as the proposed rules states, we may be going too far. She could envision a situation in which the defense produces a report that the government then meets through supplementation, which has begun to erode the constitutional rights of the defendant. For the sake of mirror obligations, we are losing track of the fact that there are disproportionate obligations on the part of the parties. It is not like the civil case. The government has the burden. This much detail for a mirror obligation is going too far.

Judge Molloy asked if the concern is answered by the option of not asking for disclosure. As a practical matter, it is only when you request discovery under Rule 16 that you have the reciprocal obligations. The member responded that was not an option. Without asking, it is possible the defense would not get anything. The defense must ask. Another member said there are times when the member chose not to ask. And there still is a certain amount that has to be turned over. In principle, level playing fields and level obligations make a judicial process work better. But we do not have a level field here. The resources go to the government. They far out resource the defense. The right not to give out information is one of the few things that we might be able to use to counterbalance the resources and timeframe that so much favors the prosecution.

A member commented that he was not really troubled by this concern. We have a notice of alibi defense under Rule 12.1. If the defendant does not want to present an alibi, then he does not have to say a word. But if he wants to go down that path, he has an obligation of fair process to cough it up and give the prosecution an opportunity to challenge it. The same argument could be made that if a defendant wants to call an expert witness, leveling the playing field would be served by having the defendant not have to qualify the person as an expert, not having to follow *Daubert*, just leave it to whatever the government can do on cross. There are some obligations in other words that are inherent in the process of a fair trial, and it seemed to the member this is one of them. This member also related that some time ago it was the established rule in British defense bar that the defendant did not have to get on the stand, did not have to disclose anything whatsoever about the defense. There was a great deal of pressure from the defense side to expand the allegations of the Crown to make disclosure in criminal cases. The way a committee worked this out in the UK was a proposal that said the defendant may serve a comprehensive statement of the defense before trial. If the defendant does so, the government must reveal everything that it will use to prove the prosecution's case and anything that could possibly undermine the prosecution's case or assist the defendant. One of the fiercest critics of that proposal, who saw it as the end of criminal defense rights in the UK, now a judge, has said he now realizes that this reform ultimately worked to the profound benefit of the defendants. This kind of reciprocal disclosure will have a similar effect. Defendants will get a lot more out of it than they put into it. We believe in the government having the burden of proof beyond a reasonable doubt and a fair trial, but the proposition that anytime you ask a question of a defendant - they have no obligation to answer anything goes a whole lot farther than the Fifth Amendment, and is a counterproductive argument in the fullness of history.

Professor Beale pointed out that the current rule already requires reciprocity. It does say now that the summary must describe the witness's opinion, and the bases and reasons and the witness's

qualification. The amendment takes it further, depending upon on how the summary disclosures have been.

Another member said she had a similar concern about the constitutionality of requiring the defendant to affirmatively disclose the expert report. You do not have turn over the impressions of counsel. Expert reports slide into that a little bit but there can be a balance struck. On the whole the member thought that it would be more beneficial to the defense to have this rule than not have it.

Professor King addressed the member with concerns, asking why the member felt this rule differs and crosses the line. First, the member had referred to the level of detail and also to the duty to supplement. What in this rule changes that situation? Second, the proposed language limits defense disclosure to a complete statement of all witness opinions the defense will elicit on direct. The government's obligation is limited to opinions the government will elicit in its case-in-chief. Professor King said she had been concerned about whether the defendant's disclosure should be limited by a direct examination condition or by a case-in-chief condition, or by no condition. The current rule has no condition, but the defense equivalent of the F report, the B report, is conditioned on the case-in-chief. So what, Professor King asked, did the member think about the description of the defense obligation?

The member responded that she wanted to consider sequencing. She did not see anything relevant in the materials, and was not sure how that can be addressed. Will they both disclose at the same time, and then the government will supplement based on the defense disclosure, and be able to use the defense disclosure to augment and refine its case against the defendant? She was trying to envision, as a practical matter, how this will work. She noted that for the defense it is hard to know until the government rests exactly what the case-in-chief will be. The government may not meet its burden, and the defense will not want to present an expert. So how can the defense determine what it must disclose under the proposed rule?

The reporters noted that the current Rule 16(b)(1)(C) provides that the defendant must provide a written summary of the expert testimony "the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial." This already requires a prediction about the evidence the defendant will need to present, made before the government has presented its case-in-chief. So how is the problem different under the proposed amendment than when you have to give a summary under the current rule? Is the concern that the court does not order simultaneous disclosure?

Professor Struve observed that the defendant's obligations are only triggered when the defense requests and the government complies. So would not that imply that the government first complies and then the defendant discloses? The reporters, who noted that few discovery disputes make it into reported decisions, could suggest only one possible scenario in which the defense might not get disclosures but would have to disclose itself. If the defense requests expert disclosure, and the government responds that it will not put on any expert evidence, some court might conclude that the government had complied with its discovery obligation and the defendant would be required to make "reciprocal" disclosure of expert testimony. But the reporters had not seen such a case and were not sure how courts would rule.

The reporters noted that except for requiring the disclosures to be more complete there were no changes in the rule. The proposal does not change the sequencing. The defendant need not disclose until the government complies. That is not changing. *See* line 15, p. 131. They assumed that means that a district judge would not order simultaneous disclosure.

Mr. Wroblewski said the framework of the rule as it stands right now is that once the defendant requests, then there is reciprocity. He understood why some of his defense colleagues were troubled that this is the framework. But he did not think that we should look at the reciprocity framework in just this particular context. We ought to follow the basic framework of the rule if we make changes to the expert witness rules.

Defendant's case-in-chief. A member noted the difference in the language between intent to use on direct examination and case-in-chief. Was that intended?

Professor King said the existing rule requires pretrial disclosure if the defendant intends to use under FRE 702, 705 “as evidence at trial.” The government’s disclosure duty is limited to opinions it will elicit from the witnesses “in its case-in-chief.” In response to some concerns at the miniconference, it made sense to put a limit on the obligation of the defense and make it fully parallel. So the proposed language refers to “direct examination” and does not require the defendant to provide information about evidence it would use on cross examination.

In response to a member’s question whether there a practical difference between direct examination and case-in-chief, Professor Beale first suggested that it was not clear the defense had a “case-in-chief.” But Professor King responded that the term “case-in-chief” is currently used to refer to the defense obligation in Rule 16(b)(1)(B)(ii).

Another member commented if the defendant testifies and the government has a rebuttal case, where its expert testifies, and then the defendant’s expert comes back in a surrebuttal, as the proposal is now written, the defendant would be required to disclose—in advance—the opinions elicited on direct examination in surrebuttal. That may not be feasible.

Professor Beale suggested “case-in-chief” is better on line 28 on page 132. She thought it would be best to pick the right phrase and have it in both lines 13 and 28. The scope of the preamble should be the same as the scope of the obligation, and it would also parallel lines 11 and 12 of government side.

Judge Kethledge supported using “case-in-chief.” There seemed to be general agreement with this solution.

Committee note regarding of scope of the defendant’s obligation. Professor King asked if there should be something in the committee note explaining that to make the disclosures parallel, the amended rule would limit the defense disclosure further than the existing rule by including the condition that the expert be intended for use in the defendant’s case-in-chief. Judge Campbell thought that would be beneficial because otherwise this clear change in the rule might be lost.

Professor Beale said it would be useful to go back to restyling to determine if it reflects some reason the defense obligation would be broader than the government’s in the existing rule.

Mr. Goldsmith asked if anyone thought the lack of parallelism now results in broader defense disclosures. Probably not, so to the extent that they are being made parallel, is not necessarily to constrict existing practice, but it will help ensure that the rule going forward reflects existing practice. Professor Beale agreed.

Judge Molloy suggested that the reporters have all that input and will incorporate it into the next revision of the text and the committee note.

Noting the likelihood that the defense obligation will be challenged in court, Judge Campbell asked whether the committee note should explain why the committee believes it is appropriate. Professor Beale responded that there is a Supreme Court case on point, *Williams v. Florida*. It holds there is no Fifth Amendment problem with asking a defendant to reveal before trial what he intends to put into evidence at trial, because it just speeds up what he was going to have to do at trial. We could put that into the committee note but it is baked into Rule 16. That is why it is all reciprocal and constitutional. And that is why some states like Florida can go even farther. Defense witnesses can be deposed under Florida law. Under the Constitution, discovery obligations by the defense can go farther if the government reciprocates

A member agreed the proposed rule would be challenged but suggested that as a practical matter at the Rule 16.1 conference the defendant will generally say “we haven’t decided” about expert witnesses. That is the reality that the member sees in requests for funds for a consulting expert. The defense wants to consult with the expert before they decide whether to call him. That expert may give them an opinion they do not want to use. They have a consultation and they may decide not to call that witness. Or in other cases, they have a consultation and then that consulting expert becomes a testifying expert. This is a defense protective reality. Almost every defense lawyer is going to hire a consulting expert, see what that expert’s opinion is, and only then or later in the process decide whether to use an expert witness. If there is not a good witness, they will not have one. The defense has the ability to do that and the government would never know about it.

Professor Beale commented that this uncertainty may occur less frequently for the government, because it is further along in its case preparation at the time of discovery. So it is more likely to know whether it will call an expert (although they may only know it will be one of the ATF experts).

Vote on text for defense disclosures. Judge Kethledge noted that the committee had already approved the language for the government’s disclosure and suggested a vote on the provisions regarding the defendant’s disclosure.

The language for (b)(1)(C) as amended (with changes to parallel the changes made to the government’s disclosure provision, substituting defendant for defense, and substituting case-in-chief for direct examination) was moved, seconded, and approved. Professor Beale complimented the committee, noting the discussion had improved the proposal.

Next steps. Judge Kethledge sketched out the next steps. The committee had approved the text as revised, but still needs to do more work on the committee note language. The committee report for the Standing Committee meeting in January will include the text of the amendments and revised committee note language. The committee may need to consider changes in the text at its spring meeting based on feedback from the Standing Committee.

Judge Campbell requested that the reporters provide a version that redlines the committee note language that changes, and Professor Beale agreed. Judge Furman, the member liaison from the Standing Committee, agreed that it would be helpful to have a working version of the committee note in January.

III. 18-CR-D, time for ruling on habeas motions

Judge Molloy drew the committee’s attention to the letter receive from Judge Fleissig, the chair of the CACM Committee, responding to the committee’s transmittal of 18-CR-D. The committee had written to the CACM Committee, noting that the current exemption of habeas cases from the list of motions that must be reported as pending might be contributing to delays in cases under 2254 and 2255.

Judge Fleissig wrote to say that the CACM Committee had studied the issue and concluded that the current approach was appropriate given the unique issues associated with Section 2254 petitions and Section 2255 motions. Professor Beale commented that although it was discouraging that there would be no change in the reporting of pending cases—since that had seemed to be a promising approach to reducing delays—the CACM Committee had identified another possible option. Judge Fleissig stated that the CACM Committee has asked its case management subcommittee to look into other steps that might address the problem of long delays, including additional staffing.

IV. 19-CR-A, calculation of IFP and CJA status

Professor Beale introduced the first proposal from Sai, which was addressed to the Civil, Criminal, and Appellate Rules Committees, and seeks changes in the process of determining IFP (in forma pauperis) status. In a footnote, Sai states that IFP includes CJA status in criminal cases. Professor Beale described the issues raised by Sai's proposal, including the question whether the rules committees had jurisdiction under the Rules Enabling Act. She emphasized that Sai was incorrect in equating IFP status with CJA status, which is governed by a different statute, and has a different process and different standards than IFP status. Professor Beale acknowledged Ms. Elm's assistance in helping the reporters explain these differences in their agenda book memo.

The committee has been asked to advise the Standing Committee on how this suggestion should be handled. Is this something that should be taken up by individual committees, or by a subcommittee drawn from all of the affected committees? Because CJA status is so different from the IFP status that is the focus of the suggestion, the reporters recommended that the Criminal Rules Committee not take a major role if other committees pursue it. But the Criminal Rules Committee does have an interest in IFP status for filings under 18 U.S.C. § 2254. Although those proceedings are technically civil they fall under the jurisdiction of the Criminal Rules Committee. So if the other committees want to look at changes on IFP status, the reporters thought the Criminal Rules Committee would want to have some input.

In response to Judge Molloy's enquiry, no member expressed an interest in pursuing the proposal at this time.

V. 19-CR-B, court calculation and notice of all deadlines

Professor Beale described briefly the second rules suggestion from Sai, which went not only to the Criminal Rules Committee, but also to the Appellate, Bankruptcy, and Civil Rules Committees. The purpose of the discussion was to get members' views on the merits of the suggestion and whether it should be pursued in a cross-committee inquiry. She explained that the proposal sought to require that courts give immediate notice to all filers of (1) the applicable date and time (including time zone) for future events, (2) whether and how the time could be modified, and (3) whether the event was optional or required. The notices would be cumulative, continuously updated, and user friendly, not requiring users to look up applicable rules or do calculations. Sai also proposed that the rule specify that filers could rely on the court's computed times. Although such information would be helpful to filers, Professor Beale noted it would put a significant burden on the clerks' offices. Also, the proposal that filers be able to rely on the calculations raised special issues. For example, what if the calculation of a jurisdictional time was in error? The question is whether the proposal should be studied, and if so whether it should be handled cross committee.

A judicial member commented that in her court the notices generated by the clerk's office state the date and time of filing, which allows a calculation of when 30 days (or another applicable period) will

run. And the rule tells you the time calculation. Her clerk might say, tell them to read the rule. Why should the court have to do more? Professor Beale responded that Sai was particularly concerned for pro se filers who do not have law degrees and may not know how to look up the rules governing time for pleadings and responses. In Sai's view, these people need more help, which should come from the courts.

Another member commented that determining time limits is difficult, even for lawyers, and much more so for pro se parties. In some cases, pro se parties rush to file a response immediately—which is less complete and well drafted than it otherwise might be—because they are unable to determine when they must file. The member wanted to know whether the clerks' offices have software applications that they use to determine the applicable time limits. If the courts have and are using such applications, why not use them for this purpose?

A judicial member said that his district was trying to provide as much information as possible, and parties receive a notice from the clerks' office of filings that includes the date any opposition is due. But if the clerk's office has made an error because the judge shortened the time, in his court the judge's order trumps the clerk's notice. So at least in his district, the clerk's office has been helpful. The member also noted that in his own orders he tries, as much as possible, to include dates certain in order to make the notice as clear as possible.

Another judicial member noted that pro se cases make up one third of the docket in his district. There are pro se staff members in the clerks' office, and the district has a handbook that provides helpful guidance to pro se filers. The member expressed sympathy for the plight of pro se filers in a system that is very complex. But the member emphasized that the clerk's office in his district was already "running as fast as they can." They are dealing with fewer personnel and smaller budgets and can no longer even guarantee that an order docketed today will be filed even by the next day. CM/ECF has a limited capacity to provide some of the information being sought, but only if the clerk's office has the time and personnel to generate that information—which they do not in the member's district. He called the suggestion a "huge ask," and said it was "not practical."

Another member agreed it was not practical, absent some mechanism like a software application mentioned earlier by a member. The member also drew attention to the risk to parties who would rely on such a calculation. He reminded the committee that the Supreme Court had held that a habeas petitioner was jurisdictionally out of time even though he had relied on the district court's erroneous statement of when his filing was due. So, at least under some circumstances, parties cannot rely on the calculations by the clerk's office or even the district court.

In response to Professor Beale's comment that there had been at least some interest in automation if it could be done easily, a judicial member raised another concern. He noted that many documents entered in the docket are mischaracterized. If a machine read those designations, it might calculate the wrong date.

Ms. Womeldorf noted the suggestion by one of the judicial members that he sought, when possible, to specify a date certain in his own orders. That might be a useful suggestion as a best practice. Another member noted, however, that these dates could be affected by later events. If the court has specified dates certain, then they must all be adjusted. That is not the case if one specifies that an action must be taken within a certain period before or after a given event.

VI. 19-CR-C, E-filing Deadline Joint Subcommittee.

Professor Beale drew the committee's attention to the final item in the agenda book: information about an E-filing Deadline Joint Subcommittee study, chaired by Judge Michael Chagares. The subcommittee is considering a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership is comprised of members of all of the rules committees. The committee's reporters and Ms. Recker, a member of the committee, are representing the Criminal Rules Committee.

The subcommittee is just beginning its work. It was on the committee's agenda to provide notice that the study is underway, and to solicit advice on any information that the subcommittee should gather and consider. The subcommittee will consider the impact on both counsel and the courts. Professor Beale noted Judge Molloy's comment about the impact late filings have on the courts. When a case is on his docket for the next morning, he may review the filings that evening. But he cannot do so if the filing comes in just before midnight.

Mr. Wroblewski asked whether the subcommittee had a member from the DOJ, noting that it would provide an important perspective. Judge Campbell and Ms. Womeldorf expressed interest in being sure that the DOJ's views were represented going forward.

Another member noted it would be nice from a practicing lawyer's standpoint to be able to finish earlier, and that counsel will take all of the time they are allowed. But the member noted different issues arise in mass litigation than criminal cases.

A member questioned how the new timing requirement would work, and Professor Struve stated that the system would still accept later filings, but they would not be timely unless submitted by whatever earlier time might be selected. The member responded this would likely result in motions to accept the late filings nunc pro tunc.

VII. Acknowledgement of members whose terms were ending

Judge Molloy invited Professor Kerr to make remarks since this was his last meeting. Professor Kerr said it had been a wonderful six years, a great personal and professional experience. He thanked the reporters and the staff for their efforts.

Judge Molloy thanked Professor Kerr for his service and Judge Campbell for his input and guidance. He also expressed this gratitude to Ms. Womeldorf, Ms. Wilson, and Ms. Cox for their efforts, noting that the staff's hard work always resulted in meetings going smoothly. He noted that Mr. Wroblewski had served even longer than he had, called him a tremendous asset, and offered Mr. Wroblewski kudos and thanks.

Finally, Judge Molloy expressed gratitude for eleven years of friendship and education on the committee, and he warmly thanked the reporters for their work, presenting them with thoughtful mementoes of their service.

Judge Kethledge summed up the thoughts of all those present, thanking Judge Molloy for his service, and especially his leadership. He called Judge Molloy an exemplary leader and steward who created and enhanced a spirit of good will, and had a great record of accomplishment.

The meeting was adjourned.

Draft

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TAB 7A

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

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CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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DENNIS R. DOW
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JOHN D. BATES
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

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

DATE: November 15, 2019

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 25, 2019 at Vanderbilt University Law School. On the morning of the meeting, the Committee held a miniconference on “Best Practices” for managing *Daubert* issues, which is described below.

The Committee at the meeting discussed ongoing projects involving possible amendments to Rules 106, 615 and 702.

A full description of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Miniconference on Best Practices in Managing *Daubert* Issues.

The miniconference on the morning of the meeting involved an exchange of ideas among the panel and Committee members regarding a number of questions involving *Daubert*, Rule 702, and *Daubert* hearings. The miniconference was designed to further the Committee’s objective to provide education to the bench and bar on proper management of expert testimony as an addition to (or an alternative to) an amendment to Fed. R. Evid. 702. The Committee invited five experienced federal judges and a distinguished professor to share suggestions about “Best Practices” in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions.

Among the questions addressed by the panel were:

1. What are the “red flags” that might lead to the inadmissibility of scientific testimony?
2. How does the court handle experience-based experts under *Daubert*?
3. In figuring out a scientific or other complex issue, is the information supplied by the adversaries usually sufficient, or does the court sometimes need to do independent inquiry?
4. How does the court deal with the fact that *Daubert* instructs on the one hand that the admissibility requirements are to be determined by the preponderance of the evidence, and on the other hand that the solution to concerns about expert testimony is generally to be cross-examination and argument?
5. What best practices can help ensure that expert witnesses use the same level of intellectual rigor in the courtroom that characterizes the standards in the experts’ field?
6. In toxic tort cases, how does the court separate general causation experts from specific causation experts? How does the court handle specific causation experts who say they need to provide a general causation conclusion as a grounding for their specific causation opinion?

7. How much should a judge get involved in questioning experts in a *Daubert* hearing?
8. What does a judge do if the judge does not understand the principles being discussed by the expert?
9. In multidistrict litigation and other cases that follow a pattern, trials to be conducted in different jurisdictions can involve the same expert witnesses, the same lawyers, and the same issues as to admissibility of expert testimony. Does the court take the possibility of uniformity into account and how so?
10. Would an amendment to Rule 702 that prohibits an expert from overstating quantifiable results be helpful to a court at a *Daubert* hearing?
11. Is it ever useful for the court to appoint an expert or a technical advisor? 1.

A transcript of the miniconference will be published in the *Fordham Law Review* and copies will be distributed to federal judges.

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106 - the rule of completeness - should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

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

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 106 for public comment at its next meeting.

B. Possible Amendment to Rule 615

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

At its Spring, 2019 meeting, the Committee resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. At the Fall, 2019 meeting the Committee considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 615 for public comment at its next meeting.

C. Forensic Expert Testimony, Rule 702, and *Daubert*.

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its symposium on forensics and *Daubert* held at Boston College School of Law in October 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a

freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a “best practices manual” for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony - the problem of overstating results (for example, by stating an opinion as having a “zero error rate”, where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions, especially directed toward forensic experts.

The current draft being considered by the Committee provides that “if the expert’s principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results.” The language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded in a numerical probability – such as an electrician testifying that “the house was not properly wired.”

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 702 for public comment at its next meeting.

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

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in

violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration - as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall, 2019 Meeting

The draft of the minutes of the Committee's Fall, 2019 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules
Minutes of the Meeting of October 25, 2019
Vanderbilt University Law School
Nashville, TN

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 25, 2019 at the Vanderbilt University Law School in Nashville, Tennessee.

The following members of the Committee were present:

Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Thomas D. Schroeder
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Catherine T. Struve, Associate Reporter to the Standing Committee (by phone)
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Timothy Lau, Esq., Federal Judicial Center
Ted Hunt, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure

I. Miniconference on Best Practices for Managing *Daubert* Questions; Rule 702

On the morning of the Committee’s Fall 2019 meeting the Committee held a miniconference on “Best Practices” for managing *Daubert* issues. The miniconference was designed to further the Committee’s objective to provide education to the bench and bar on proper management of expert testimony as an addition to (or an alternative to) an amendment to Fed. R. Evid. 702. The Committee invited five experienced federal judges and a distinguished professor to share ideas about “Best Practices” in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions. The miniconference was moderated by the Reporter. A transcript of the miniconference will be published in the Fordham law Review and copies will be distributed to federal judges.

The Chair opened the afternoon Committee meeting by applauding the great discussion that was generated at the miniconference and she invited comments for Committee discussion. Judge Campbell commented that the discussion was extremely helpful in focusing judges on the need to evaluate the admissibility requirements of Rule 702 and *Daubert* through Rule 104(a), using a preponderance of the evidence standard. He suggested that caselaw describing *Daubert* questions as primarily for the jury blurs the inquiry. He noted that lawyers do not focus on the judge's obligation to make a preponderance finding when they brief *Daubert* issues. Judge Campbell stated that there may be no clear answer as to how to improve Rule 702, but that an amendment or Committee Note emphasizing the trial judge's obligation to find all Rule 702 requirements by a preponderance of the evidence before admitting expert opinion testimony could be very beneficial. The Chair noted that the Committee had previously considered adding the Rule 104(a) preponderance standard to the text of Rule 702 but had ultimately rejected that option. The Reporter highlighted the problems caused by adding the Rule 104(a) standard to the text of Rule 702 – namely that the Rule 104(a) standard applies to many admissibility inquiries where it is not stated expressly in rule text – but reminded the Committee that it could emphasize the application of Rule 104(a) to Rule 702 in a Committee Note if it moved forward on any other amendments to the Rule.

Judge Campbell also noted that the miniconference revealed that there can be many different problems with expert opinion testimony that might be characterized as expert “overstatement” – many of which are not the focus of the Committee's recent consideration of an amendment to Rule 702 to prevent “overstatement.” In particular, he noted that an expert might attempt to testify to an opinion beyond his or her qualifications, or that an expert might be qualified and have a reliable foundation for one opinion and then attempt to add an additional opinion not supported by that same foundation. Judge Campbell suggested that these would be examples of expert “overstatement” that the Committee was not trying to address with an amendment. He explained that the Committee's concerns were centered more around an expert's “degree of confidence” for an opinion and suggested that much of expert opinion testimony (such as experience-based testimony) does not raise issues of an expert's “degree of confidence.”

A Committee member responded that any factor that can affect whether a person goes to jail is significant --- for example, that risk arises when a forensic expert overstates the results that can fairly be reported from a feature-comparison. Judge Campbell agreed and the Reporter noted that even narrow rules amendments can be very effective and helpful. Still, Judge Campbell queried whether a “degree of confidence” amendment would be adding complexity to the cases not affected by that factor. The DOJ representative argued that adding a new “degree of confidence” factor to Rule 702 could create a battleground for litigants that could undermine the Rule. Judge Campbell reiterated his concern that a limitation on “overstatement” or a requirement regarding “degree of confidence” could lead to trial judges being asked to wordsmith expert opinions.

The Chair noted the ambiguity in the meaning of the term “overstatement.” If a particular methodology has an error rate and the expert testifies to 100% certainty regarding an opinion, it is easy to recognize that as an “overstatement.” But the Chair noted that it wasn't so clear how to apply an “overstatement” prohibition to experience-based experts, for example. She suggested

that the existing *Daubert* factors all represent standards with plenty of room for a trial judge to exercise judgment within a reasonable range. In contrast, “overstatement” seems to be a more binary factor – testimony either is or is not an “overstatement.” Judge Campbell responded that “degree of confidence” may indeed reflect a standard about which judges may exercise judgment (rather than a binary inquiry). He suggested that a “degree of confidence” factor would have to be limited to types of expertise in which there is some concrete result that the expert attempts to surpass in testifying. One example might be a cell tower expert who overpromises on the precision of cell towers in locating a person’s phone. He opined that it might be optimal to limit an amendment to Rule 702 to opinions with an identifiable data point from which to measure “degree of confidence” --- such as a forensic test, which provides a quantifiable result.

The Chair turned the discussion to judicial education regarding forensic evidence and science generally, querying whether the miniconference had revealed any effective methods for enhanced education. She noted that the Reporter was working with the FJC and Duke and Fordham Law Schools to put together a day-long conference on forensic evidence for federal judges to attend. One Committee member also noted that programs have been presented for judges at conferences of district and circuit courts. Another suggested that trial judges read the DOJ’s uniform language regarding forensic testimony, emphasizing that opposing counsel may not object to expert overstatements and that trial judges would be better equipped to deal with the issue if they have examined the appropriate language. He suggested that trial judges should also learn to tell criminal defense counsel to review the DOJ uniform language so they are prepared to object to offending overstatements in forensic testimony. In sum, these Committee members noted that education for lawyers might be just as important as additional education for judges. Another Committee member suggested that DOJ training of non-DOJ expert witnesses on the appropriate uniform language to be used in testifying about forensic evidence could be very helpful. He noted the many cases in which the testifying experts are not DOJ analysts familiar with and bound by the DOJ policy on uniform language, and suggested that more training of the non-DOJ experts could improve the forensic expert testimony being offered in federal court.

DOJ representative Ted Hunt highlighted numerous training initiatives being undertaken by DOJ with respect to the uniform language. He described upcoming formal training for prosecutors at the National Advocacy Center, as well as engagement with state and local examiners who may be using Standard Operating Procedures not compliant with DOJ standards. He also discussed the efforts to interface with a working group of state and local leaders to educate them about feature comparison methods and to recast some of the outdated verbiage embedded in the state and local standards. Finally, he noted that efforts were underway at DOJ to strengthen some of the existing uniform language to ensure that it remains up to date. He expressed surprise that some of the federal judges participating in the miniconference had observed non-compliant overstatements in recent cases. Mr. Hunt also noted that DOJ was engaged in a working group with federal public defenders to raise awareness of the uniform language and of testimonial requirements for feature comparison experts.

Dr. Lau of the Federal Judicial Center noted that one of the participants in the miniconference had suggested that it would be helpful for judges to have a list of “red flags” that might indicate a reliability problem with expert opinion testimony. He suggested that it might be

fruitful for the FJC to explore a “red flags” list for certain areas of expertise for judges. Beyond that, Dr. Lau suggested that much of the needed education appeared to be directed to the bar rather than the bench and he suggested that much of this lawyer education was beyond the purview of the FJC. .

The Chair noted that judges can certainly help remind lawyers about the DOJ uniform language and the problem of forensic overstatement outside the trial context. Another Committee member offered that it is much easier to give reminders and admonitions in the civil context where there is significant briefing on expert issues and time to discuss and consider them, but that it is much more challenging in criminal cases where the testimony comes in “on the fly.” Judge Campbell emphasized that it is very important to educate defense lawyers, particularly CJA lawyers, about appropriate forensic testimony and the risks of overstatement.

The Chair then asked Judge Dever, the Liaison from the Criminal Rules Committee, to update the Committee regarding a draft proposal to amend Federal Rule of Criminal Procedure 16 to improve advance disclosure of expert opinion evidence in criminal cases. Judge Dever noted that the goal was to have a draft proposal to the Standing Committee for its January meeting and to prepare a final draft at the April meeting of the Criminal Rules Committee. Judge Dever explained that the gist of the proposed amendment was to require a more complete statement of an expert’s opinion in pre-trial disclosures in criminal cases, and to require trial judges in every criminal case to set a time for expert disclosure. Judge Dever noted that the DOJ was instrumental in helping the Committee come up with appropriate language to capture these concepts. He explained that the Criminal Rules Committee considered setting a specific number of days before trial for expert disclosures in the text of Rule 16, but determined that a set number of days would provide inadequate flexibility across districts and types of cases. But he noted that too many trial judges permit expert disclosures to be made in criminal cases right before trial. To correct the unfairness inherent in that practice without setting a rigid number of days, the Criminal Rules Committee compromised with language requiring trial judges to set a specific time for expert disclosures that will provide a “fair opportunity for the defendant to meet the government’s evidence.” (This language was taken from the Federal Rules of Evidence.) He noted that the proposal would require more detailed disclosures about expert opinions as well, such as a complete statement of all opinions that will be offered at trial, expert publications, and past testimony. Finally, the report will have to be signed by the expert, so it can be used to impeach the expert’s trial testimony to the extent it is inconsistent with the report.

The Reporter suggested that the proposed amendment to Criminal Rule 16 might not have much impact in the forensics area, where the Committee has been focused, because the “Yates Memo” regarding disclosure of forensic evidence already required timely disclosure of the information covered by the proposed amendment to Rule 16. Judge Dever suggested that the amendment would be helpful in all cases because it would prevent a prosecutor from making disclosures three days prior to trial, would require a meet & confer between counsel, and would prevent an expert from disclosing two opinions and then testifying to five opinions at trial. The Reporter agreed that transforming a DOJ policy into a binding rule would be beneficial. A Committee member inquired whether the substantive disclosures under an amended Rule 16 would be broader or narrower than the disclosures currently required under the “Yates Memo.”

It was suggested that Rule 16 would add protections, in part, because it would require an expert witness to sign expert disclosures, making it difficult for the expert on cross-examination to avoid or reject portions of the case file that are turned over under the “Yates Memo.” Also, by requiring an expert to state all trial opinions in the disclosure, it will prevent an expert from giving one opinion before trial and tacking on additional opinions during testimony. Another Committee member also pointed out that advance disclosure of an expert opinion will help defense counsel identify and object to any “overstatement” with time for study and reflection.

The Reporter noted that the benefit of an amendment to Rule 16 might be tempered by the fact that some witnesses who might be experts are actually called by the government as lay witnesses, thus avoiding disclosure. He noted the confusion in the case law regarding the distinction between lay opinion testimony offered under Rule 701 of the Evidence Rules and expert opinion testimony offered under Rule 702. He explained that a witness offering an opinion on gang-related behavior, for example, might be offered as an expert under Rule 702 in some jurisdictions, but admitted as a lay witness under Rule 701 in others. The Reporter noted that the Advisory Committee attempted to resolve this issue with the 2000 amendment to Rule 701 that prohibited lay opinion testimony “based on scientific, technical, or other specialized knowledge.” Still the line between expert and lay opinion testimony gets blurred in the courts. The Reporter suggested that the Evidence Rules Committee should explore mechanisms for distinguishing between lay and expert testimony to prevent prosecutors from avoiding obligations under an amended Rule 16.

II. Rule 615

The Reporter opened the discussion of Rule 615 by reminding the Committee of the conflict that exists in the courts about the meaning of a sequestration order. When a court invokes Rule 615, it is unclear whether that means only that testifying witnesses must leave the courtroom or whether such an order includes protections against obtaining information about trial testimony outside the courtroom (such as in the media or by virtue of daily transcripts or conversations). In most circuits, protections beyond the courtroom are *automatically* included in a Rule 615 order. In some circuits, however, courts have held that such an order only demands exclusion from the courtroom and does not include any protections against disclosures outside of it. These latter courts read Rule 615 by its express terms; the rule text provides only for “excluding” witnesses from the courtroom. The Reporter noted that both interpretations of Rule 615 can create notice problems for litigants and witnesses. In the former jurisdictions, a witness might not appreciate that an order excluding him from the courtroom automatically prohibits other access to trial testimony. In the latter jurisdictions, a lawyer might think that “invoking the Rule” is sufficient to extend protection beyond the courtroom and might not appreciate the need to specifically request additional protections.

The Reporter noted that the Committee had considered and rejected the possibility of amending Rule 615 to extend sequestration automatically beyond the courtroom in every case. Instead the Committee opted for a draft that would highlight a trial judge’s authority to expand protections beyond the courtroom and would alert lawyers that they need to request and receive

an explicit order including such expanded protection. He noted that while the Committee supported a discretionary amendment to Rule 615 that would allow for protection outside the courtroom, it had expressed concern about the issue of counsel communicating trial testimony during witness preparation. In particular, the Committee wanted to follow up on the opinion in *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000) (*en banc*), which held that a sequestered witness's testimony could *not* be excluded after defense counsel disclosed trial testimony in the course of preparing the witness to testify.

The Reporter explained that the case law reflected in the agenda materials did not establish that counsel are exempt from prohibitions on disclosures of trial testimony to witnesses. Indeed, he explained that there are many cases that prevent attorneys from disclosing trial testimony to sequestered witnesses, because lawyers can effectively prepare witnesses without disclosing trial testimony and because a lawyer exemption from such protections would create a gap in protection that could swallow the rule entirely.

The Reporter explained that the three drafting alternatives for an amendment to Rule 615 included in the agenda materials varied only with respect to the treatment of counsel. One amendment option would prohibit counsel from conveying trial testimony to sequestered witnesses. Another would exempt counsel from any prohibition on conveying trial testimony to sequestered witnesses outside the courtroom. The third amendment alternative is silent as to the treatment of counsel, leaving courts to determine how to supervise counsel on a case-by-case basis.

The Reporter explained that counsel's preparation of sequestered witnesses presents issues of professional responsibility as well as the Sixth Amendment right to effective counsel --- topics that are typically beyond the ken of the Evidence Rules. An amendment that is silent with respect to counsel was included as an alternative because it would be most hands-off as to the complicated policy issues. The Reporter explained that bracketed material was included in the draft Advisory Committee note to this third option to alert the parties and the court to the issues regarding counsel, but to take no position in the rule on counsel's use of trial testimony to prepare witnesses. He informed the Committee that the plan was to discuss the variations at the fall meeting and to create a draft amendment that could be voted on by the Committee at the Spring 2020 meeting.

The Federal Public Defender suggested that the Sixth Amendment right to confront witnesses should be added to the bracketed language in the draft Advisory Committee note discussing the issues raised by counsel's communication of trial testimony to sequestered witnesses --- and the Reporter agreed to add such language. The Public Defender noted that criminal defense lawyers win and lose cases based on cross-examination and that if one testifying officer has access to the testimony of another officer, the all-important right to cross-examine effectively is seriously hampered. Judge Campbell inquired whether defense counsel would be happy to be bound by a prohibition on revealing trial testimony themselves. The Federal Defender responded that it would not pose any issue with respect to preparation of the defendant because the parties are allowed to remain in the courtroom and so defense lawyers wouldn't likely have any objection.

Most importantly, she opined that trial judges deciding how to manage counsel should consider the right to confront witnesses in the forefront of their analysis.

One Committee member noted that attorney preparation with witness testimony is a proper ground for cross-examination and that such cross-examination about conversations with counsel is common. He suggested that the impeaching effect of these conversations provide a limit on counsel's discussions with witnesses and that he favors the alternative for amending Rule 615 that is silent as to treatment of counsel. Another Committee member expressed reservations about an amendment that would prevent lawyers from talking to witnesses and stated a preference for allowing the issue of counsel conferring with witnesses to be handled on cross-examination.

The Chair agreed that the question of counsel's witness preparation is a can of worms, but queried whether the other problems with Rule 615 are sufficiently significant to justify an amendment. She also noted the increasing difficulty that lawyers will have in controlling witness conduct outside the courtroom, particularly given ubiquitous internet access. She suggested that adding discretionary language to the Rule would encourage judges to enter more orders that extend beyond the courtroom. The Reporter responded that the draft proposals would not encourage or incentivize orders controlling conduct outside the courtroom. Instead, the draft proposals would encourage the trial judge to *consider* the issue and to provide clear and fair notice of the limits of any sequestration order that is entered. More importantly, in most circuits, a basic Rule 615 order *already* extends beyond the courtroom automatically. So in those circuits the amendment would not encourage more orders; and in the other circuits it will result in more orders only if the court in its discretion decides to extend the order outside the courtroom --- something it can already do today.

Judge Campbell suggested that the amendment alternative that is silent as to counsel would address the current concerns about sequestration without getting embroiled in the counsel question. The Chair agreed, as did another Committee member. Another Committee member also suggested that added clarification is advantageous for lawyers – how can lawyers be expected to appreciate the operation of sequestration if the Rule is vague?

The Reporter suggested adding language to the bracketed language contained in the draft Committee note to emphasize that the amendment is neutral with respect to protections beyond the courtroom and is not encouraging extension of sequestration orders. The Chair agreed with this proposal.

The Reporter agreed to prepare a draft amendment for the Spring 2020 meeting in keeping with the Committee's recommendations.

III. Rule 106 Rule of Completeness

The Reporter opened the discussion of Rule 106 by explaining that the Committee's review of the rule of completeness has revealed that it is one of the most complicated rules in the

Federal Rules of Evidence. Because of the complexity of the Rule, the Chair suggested that the Committee try to focus on only a couple of the issues raised by the completeness doctrine at this meeting and have a longer discussion of all issues at the Spring 2020 meeting in the hope of coming up with a proposed amendment.

The Reporter reminded the Committee that the hearsay issue raised by completeness requests is the most significant problem with the existing Rule. While many circuits permit completion with otherwise inadmissible hearsay, some courts, like the Sixth Circuit, have held that a criminal defendant may not introduce a completing remainder necessary to correct a misleading impression created by the government's initial partial presentation of his statement. In essence, these cases acknowledge the unfairness in the presentation that has been made, but find that the hearsay doctrine forecloses any remedy otherwise provided by Rule 106. The most significant question for the Committee is how to fix that serious defect in the interpretation of Rule 106.

The Chair emphasized that Rule 106 was intended to be only a partial codification of the doctrine of completeness, as recognized by the Supreme Court in *Beech Aircraft*, and was adopted to affect the timing of completion by allowing interruption of an opponent's case to complete misleading written and recorded statements. She noted that the common law doctrine of completion was much broader than Rule 106 and expressed concerns about retaining the standard adopted for a partial codification and extending it to a full codification of the doctrine of completeness. In particular, the Chair expressed concerns about an amended rule that would entirely displace the common law of completion. The Reporter queried whether the current draft heading for a proposed amendment to Rule 106 that characterizes the rule as the "Rule of Completeness" was creating that concern about displacing the common law in its entirety. The Chair stated that the heading purporting to capture all of the rule of completeness was a problem and that it would be important not to rewrite the common law of completeness. The Reporter responded that the heading was altered in the restyling process and that it would be very easy to modify to avoid the suggestion that Rule 106 displaces all common law completion rights.

The DOJ representative noted that the right to interrupt one's adversary with a completing statement was the entire purpose of Rule 106 as originally adopted. She questioned whether it made sense to retain Rule 106 if that right to contemporaneous completion were eliminated in favor of flexible timing in an amended Rule. The Reporter explained that the federal courts have interpreted the timing requirement flexibly, notwithstanding the strict language of Rule 106, and that an amendment that made the timing flexible would merely reflect the practice in the federal courts. That said, the Reporter acknowledged that the Committee could leave the timing requirement unchanged in an amended provision and reminded the Committee that the timing issue was the least important of the concerns with the existing Rule.

Judge Campbell inquired whether it would be accurate to say that existing Rule 106 does only one thing, but that an amended provision that added all of these changes would be doing three additional things (flexible timing, oral statements, otherwise inadmissible hearsay permitted). The Reporter agreed with that characterization. The Chair remarked that the Committee would not need to address the timing issue in an amended rule so long as it was

careful to leave the common law untouched. Even if a party did not complete immediately under Rule 106, that party could still attempt to do so later under the common law of completion.

The Reporter again raised the significant hearsay question. The Chair opined that completing hearsay could be admitted for its truth if it independently satisfied a hearsay exception and could be admitted for its non-hearsay value of showing context if it did not fall within an exception. She noted that Wigmore was against reading Rule 106 as a hearsay exception and suggested that completing remainders might be insufficiently reliable to be admitted for their truth. She opined that Judge Grimm, who brought his concerns about Rule 106 to the Committee, would be satisfied with this approach, allowing the completing statement to be used for context only. The Reporter disagreed, noting that Judge Grimm expressed a preference for having the completing remainder admitted for its truth. That said, the Reporter suggested that an amendment that elided the issue of the purpose for which the otherwise inadmissible remainder was offered might be satisfactory to all – as in, the completing statement may be admitted “over a hearsay objection.” This amendment would prevent situations like those seen in the Sixth Circuit where the completing remainder is excluded, but would not necessarily make the completing remainder admissible for its truth.

Another participating judge reminded the Committee of the completeness scenarios trial judges face in court on a routine basis. Because of the increased use of video-recording during interrogations, prosecutors have video recordings of a defendant’s admissions to present at trial, with the government offering one portion and the defendant seeking to complete with another. This judge noted that the increasing availability of video-recorded statements would make these completeness issues more common. The Reporter noted that the right to complete in these scenarios has to be addressed under the fairness standard in existing Rule 106 and that this narrow triggering standard would not be changed in an amended provision.

Another Committee member asked how the judge had handled these scenarios and he explained that the prosecution had abandoned its efforts to use the partial statements due to the defense objection and had, instead, relied on other evidence to prove the points demonstrated in the video interrogations. The Committee member queried whether the judge would have permitted the remainders in for their truth or for context if he had admitted them. He said probably for context only. The Committee member then expressed skepticism that a jury can understand an instruction limiting the use of a completing statement to context only. He suggested that juries are good at following many limiting instructions, but that a limiting instruction in this circumstance would be very difficult for jurors to comprehend and follow.

Another Committee member suggested that the hearsay issue might be addressed only in an Advisory Committee note to minimal amendments to Rule 106. Judge Campbell responded that these completion issues arise in the heat of trial and that trial judges only have time to review rule text before making an instant decision. He suggested that Rule 106 – more than many others – needs to provide clear rule text to aid trial judges. Another Committee member echoed this observation, explaining that Rule 106 issues arise in “real-time” and that there are rarely motions *in limine* with respect to these issues. The Chair suggested that a minimalist amendment would simply add a second sentence to the existing rule that reads: “The court may admit the

completing statement for its truth if it would otherwise be admissible or for context.” Such an amended rule would resolve the hearsay question and leave remaining issues to a common law solution.

One Committee member expressed concern that completion would allow the admission of unreliable hearsay of criminal defendants. The Reporter in response noted that the parts of a defendant’s statement offered by the government are themselves hearsay, and are not admissible because they are reliable --- but rather as party-opponent statements admissible under the adversary theory of litigation. The Chair again expressed reservations about creating a hearsay exception based on a fairness standard. The Reporter reminded the Committee that the fairness standard has been interpreted very narrowly and permits completion in very few circumstances. He stated that an amendment allowing substantive use of completing statements would not open the floodgates to hearsay so long as that narrow fairness trigger was retained.

Based upon the discussion of the hearsay and timing issues, the Reporter promised to present revised drafting alternatives for an amendment to Rule 106 at the Spring 2020 meeting that would:

- Rewrite the heading for the Rule to reflect the narrow scope of the provision and avoid displacing all common law completion;
- Eliminate flexibility with respect to the timing of completion and require completion contemporaneously (consistent with existing Rule 106);
- Provide two alternatives for addressing the hearsay issue: 1) allowing completion “over a hearsay objection” and 2) adding a second sentence to Rule 106 stating that “The court may admit the completing statement for its truth if it would otherwise be admissible or for context.”

The Chair suggested that a completing remainder of a criminal defendant’s statement would have to be presented simultaneously *by the prosecution* if the Rule remained a rule of interruption and that the completing remainder would be “otherwise admissible” as a statement of a party opponent when admitted by the prosecution --- even though it was likely to be unreliable.

The Reporter closed the discussion by noting that the Committee needed to continue its consideration of whether to include oral statements in an amended Rule 106 at the spring meeting. One question was whether to simply add oral statements to Rule 106’s existing paragraph or to create a separate subsection for oral statements. Committee members unanimously disapproved of a separate subsection as unnecessarily complicated.

A Committee member noted that one draft amendment in the agenda materials simply dropped the modifiers “written or recorded” from the existing rule text and questioned whether that change would suffice to cover all written, video-recorded, and oral statements. The Reporter promised to consider that question for the next meeting. The DOJ representative repeated the Department’s opposition to including oral, unrecorded statements in Rule 106. In response the

Reporter referred the Committee to his memo, which indicated that almost all courts are *already* allowing admission of oral statements to complete, usually by citing Rule 611(a). He argued that all that adding oral statements to Rule 106 would do would be to treat all completeness issues under a single rule.

IV. Closing Matters

The Chair thanked Vanderbilt University for hosting the Committee and again praised the high quality of the miniconference on *Daubert* Best Practices. She thanked everyone for their contributions to a productive meeting. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter

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TAB 8

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TAB 8A

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**Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress**

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	H.R. 76 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Bill Text: https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf Summary (authored by CRS): This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. Report: None.	<ul style="list-style-type: none"> 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	H.R. 77 <i>Sponsor:</i> Biggs (R-AZ)	CV	Bill Text: https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. Report: None.	<ul style="list-style-type: none"> 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	S. 471 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	Bill Text: https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf Summary: Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." Report: None.	<ul style="list-style-type: none"> 2/13/19: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress**

<p>Due Process Protections Act</p>	<p>S. 1380 <i>Sponsor:</i> Sullivan (R-AK) <i>Co-Sponsor:</i> Durbin (D-IL)</p>	<p>CR 5</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf</p> <p>Summary: This bill would amend Criminal Rule 5 (Initial Appearance) by:</p> <ol style="list-style-type: none"> 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: “(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.” <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/8/19: Introduced in the Senate; referred to Judiciary Committee
<p>Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)</p>	<p>S. 1411 <i>Sponsor:</i> Whitehouse (D-RI) <i>Co-Sponsors:</i> Blumenthal (D-CT) Hirono (D-HI)</p>	<p>AP 29</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf</p> <p>Summary: In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/9/19: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress**

<p>Back the Blue Act of 2019</p>	<p>S. 1480</p> <p><i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/15/19: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 5395</p> <p><i>Sponsor:</i> Bacon (R-NE)</p> <p><i>Co-Sponsors:</i> Graves (R-LA) Johnson (R-OH) Stivers (R-OH)</p>		<p>Identical to Senate bill (see above).</p>	<ul style="list-style-type: none"> • 12/11/19: introduced in House; referred to Judiciary Committee
<p>Small Business Reorganization Act of 2019</p>	<p>H.R. 3311</p> <p><i>Sponsor:</i> Cline (R-VA)</p> <p><i>Co-Sponsors:</i> 3 (D-2, R-1)</p> <p>S 1091</p> <p><i>Sponsor:</i> Baldwin (D-WI)</p> <p><i>Co-Sponsors:</i> 41 (D-19, R-21, I-1)</p>	<p>Rules 1020, 2007.1, 2009, 2012, 2015, Official Form 201.</p>	<p>Text of Public Law 116-54: https://www.congress.gov/116/plaws/publ54/PLAW-116publ54.pdf</p> <p>Summary: Not posted. The bill introduction states: “A BILL To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes.”</p> <p>Report: https://www.congress.gov/116/crpt/hrpt171/CRP-T-116hrpt171.pdf</p>	<ul style="list-style-type: none"> • 8/26/19: Became P.L. No. 116-54. • 7/23/19: Passed/agreed to in House. • 6/16/19: Introduced in House • 4/09/19: Introduced into the Senate, referred to the Committee on the Judiciary.

Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

N/A	N/A	CV 26	N/A	<ul style="list-style-type: none">• 9/26/19: House Judiciary Committee hearing on the topics of PACER, cameras in the courtroom, and sealing court filings
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TAB 8B

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Action Item: Judiciary Strategic Planning

Judge Carl E. Stewart, Judiciary Planning Coordinator, has requested that the Standing Committee identify any changes it believes should be considered in updating the *Strategic Plan for the Federal Judiciary* (Attachment 1).

Background

At its September 2010 session, the Judicial Conference approved the [*Strategic Plan for the Federal Judiciary*](#) (*Plan*) and an approach to planning for the Judicial Conference and its committees that calls for a review of the plan every five years (JCUS-SEP 10, pp. 5-6). The *Plan* was reviewed and updated in 2015 (JCUS-SEP 15, pp. 5-6), and is being reviewed for a possible update again this year.

The *Plan* expresses the judiciary's mission and core values and provides a framework for national policy deliberations. The judiciary's strategic planning approach asks Judicial Conference committees to integrate the *Plan* into committee planning and policy development activities. In furtherance of this approach, committees have linked specific efforts (strategic initiatives) within their jurisdictions with the broad goals in the *Plan* and have identified desired outcomes that could be measured or assessed. Committees have also used the *Plan* as a framework for the consideration of future agenda topics.

In January 2011, the Standing Committee identified the following eight ongoing rules-related initiatives that supported the *Plan*:

- Implementing the 2010 Civil Litigation Conference
- Evaluating the Rules Governing Prosecutors' Disclosure Obligations
- Evaluating the Impact of Technological Advances
- Bankruptcy Forms Modernization Project
- Examining Amendments to Address Redaction and Sealing of Appellate Filings
- Analyzing and Promoting Recent Rules Amendments
- Improving the Public's Understanding of the Federal Judiciary
- Preserving the Judiciary's Core Values

Assessment of the Implementation of the Current Plan. All Judicial Conference committees have reported on the status of the implementation of strategic initiatives on an annual basis. Reports for the Summer of 2019 included an assessment of the extent to which the desired objective of each initiative has been achieved. The Standing Committee submitted a full report on July 19, 2019 that included an assessment of the status of its strategic initiatives identified above (Attachment 2). The report emphasized that the Rules Enabling Act process is cyclical and iterative in nature. Therefore, most of the work undertaken by the rules committees supports in some way the initiatives identified in 2011. For that reason, an initiative once reported as "complete" can be revisited at a later date (*e.g.*, Evaluating the Rules Governing Prosecutors' Disclosure Obligations).

Consideration and Approval of Update Approach. Committee chairs began reviewing the *Plan* for a possible update at the March 11, 2019 long-range planning meeting. Efforts leading up to the September 2019 Conference session and long-range planning meeting focused on: 1) assessing progress made under the current *Plan*; 2) adopting a *Plan* update approach; and 3) considering issues and trends that may affect the judiciary over the next five years.

At the request of Judge Stewart, the meeting materials for the Standing Committee's June 2019 meeting included a proposed approach to updating the *Plan*. The proposed approach anticipated that an updated plan would preserve the basic framework of the current *Plan*. The approach also proposed a limited research effort to support the planning process; an outreach effort focused on stakeholders within the judiciary, and the formation of an Ad Hoc Strategic Planning Group to help develop an updated *Plan*.

Under the update approach, committees will discuss and propose changes to the *Plan* during their Winter 2019-2020 meetings and review a draft of an updated *Plan* at their Summer 2020 meetings. If recommended by the Executive Committee, a revised *Plan* could be considered by the Judicial Conference at its September 2020 session.

Committee responses to the proposed approach were favorable. At its August 12-13, 2019 meeting, the Executive Committee approved the update approach.

Consideration of Issues and Trends. The consideration of issues and their implications provides an opportunity to consider the context in which goal-setting efforts may take place. At the long-range planning meeting on September 16, 2019, committee chairs, including the chairs of the Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules, considered issues that may affect the judiciary over the next five years and discussed their potential implications for the judiciary. A summary of that discussion is attached (Attachment 3). A 5-Year Data Snapshot, prepared by the AO's Judiciary Data and Analysis Office, was shared with committee chairs in advance of the meeting and helped to inform discussion.

Update to the *Plan*

In considering proposed changes to the *Plan*, Judge Stewart has requested that committees consider: 1) significant policy changes that have occurred since 2015; 2) issues to be addressed; 3) progress that has been achieved; and 4) challenges that remain. The request emphasizes the importance of observations about needed revisions to the existing *Plan*, as well as proposals for change. These observations can help ensure that the draft *Plan* is responsive to committee ideas and concerns.

Committees are to submit any observations and proposed changes to the *Plan* as soon as possible. This will allow time for review by the Ad Hoc Strategic Planning Group, which will likely meet in mid-February 2020. A compilation of all committee comments and proposed changes will be circulated to committee chairs.

Identification of Proposed Changes to the *Plan*

The Standing Committee's July 2019 report raised the issue that the nature of the Standing Committee's work is very specific – evaluating and improving the already-existing rules and procedures for federal courts – and often does not involve the broader issues that concern the Judicial Conference and the strategic planning process. Viewing the *Plan* from the lens of the Rules Enabling Act process, the Standing Committee will discuss whether there are sections of the *Plan* that need revision.

Recommendation: That the Standing Committee identify sections of the *Plan* in need of revision and propose changes to the *Plan* that should be considered for inclusion in the 2020-2025 update.

Attachments:

1. Memorandum from Judge Stewart to Committee Chairs (October 23, 2019)
2. Standing Committee Report (July 19, 2019)
3. Long-Range Planning Meeting – Summary of Issues Discussion

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Chambers of
CARL E. STEWART
Circuit Judge

United States Court of Appeals Fifth Judicial Circuit

Tom Stagg United States Court House
300 Fannin Street, Suite 5226
Shreveport, Louisiana 71101-3074

Telephone: (318) 676-3765
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October 23, 2019

MEMORANDUM

To: Chairs of the Judicial Conference Committees

From: Carl E. Stewart 
Judiciary Planning Coordinator

RE: REQUEST FOR PROPOSED CHANGES TO THE *STRATEGIC PLAN FOR THE FEDERAL JUDICIARY*

As you know, the approach to strategic planning for the Judicial Conference and its committees calls for a review of the *Strategic Plan for the Federal Judiciary (Plan)* every five years (JCUS-SEP 10, pp. 5-6). With your input, the Executive Committee has approved a process for updating the *Plan*. That process calls for committees to propose revisions, updates, and other changes during their Winter 2019-2020 meetings.

As you identify needed changes to the *Plan*, please consider significant policy changes that have occurred since 2015, as well as other issues likely to impact the judiciary over the next several years. We discussed some of these issues at the Long-Range Planning Meeting on September 16, 2019, and a summary of those discussions will be included in the materials for your Winter meetings. In addition, your ideas about changes to the *Plan* may be informed by progress that has been achieved in implementing the current *Plan*, and challenges that remain.

Please provide your ideas about needed changes to the *Plan* to me, with a copy to Lea Swanson, the Administrative Office's Long-Range Planning Officer. As appropriate, I ask that you include in your response the rationale behind proposed changes, or observations about aspects of the *Plan* in need of change. For certain sections of the *Plan*, I anticipate changes will be proposed by multiple committees, and drafting a new plan may require reconciling related ideas from several committees. The more we know about the issues that you and your committee believe are important to address, the more likely we will be able to develop a draft *Plan* that is responsive to those concerns.

Thank you for your time and attention to this matter, and please contact me or Lea Swanson if you have any questions or suggestions.

cc: Executive Committee
Committee Staff

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

July 19, 2019

The Honorable Carl E. Stewart
Chief Judge
United States Court of Appeals
United States Court House
300 Fannin Street, Room 5226
Shreveport, LA 71101

Dear Judge Stewart:

On behalf of the Committee on Rules of Practice and Procedure (“Standing Committee”), I am responding to your request for an update on the initiatives identified by the Standing Committee in support of the *Strategic Plan for the Federal Judiciary*, including an assessment of whether these initiatives have achieved their desired outcomes.

During the Judiciary’s 2011-12 long range planning process, the Standing Committee identified the following eight ongoing rules-related initiatives that supported the *Strategic Plan*:

- Implementing the 2010 Civil Litigation Conference
- Evaluating the Rules Governing Prosecutors’ Disclosure Obligations
- Evaluating the Impact of Technological Advances
- Bankruptcy Forms Modernization Project
- Examining Amendments to Address Redaction and Sealing of Appellate Filings
- Analyzing and Promoting Recent Rules Amendments
- Improving the Public’s Understanding of the Federal Judiciary
- Preserving the Judiciary’s Core Values

As part of the ongoing strategic planning process, the Standing Committee has provided periodic updates to the Judiciary's Planning Coordinator on the status of rules proposals that align with the specific initiatives identified above, most recently in correspondence dated July 24, 2018. Over the intervening year, one of the pilot projects discussed in that update – the Mandatory Initial Discovery Pilot (“MIDP”) – has continued in two participating districts (Arizona and Northern Illinois). The MIDP commenced in 2Q 2017 and is designed to run for three years. The FJC will analyze MIDP data to determine whether the pilot resulted in a measurable reduction of cost, burden, and delay. The outcome of that FJC analysis will inform the Civil Rules Committee's consideration of whether to propose adoption of mandatory initial discovery in civil cases. As to the second pilot program discussed in prior updates – the Expedited Procedures Pilot (“EPP”) – to date the rules committees have been unable to recruit districts to participate.

The Standing Committee's most recent update referenced various then-pending rules amendments related to the coordinated effort among the rules committees to develop “e-rules” for electronic filing, service, and notice. I am pleased to report that the resulting proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49, along with a conforming amendment to Criminal Rule 45(c), took effect on December 1, 2018. Similarly, proposed Criminal Rule 16.1 – which focuses on the process, manner, and timing of pretrial disclosures, particularly with electronically stored information in mind – has progressed through the Rules Enabling Act process and was approved by the Judicial Conference in September 2018 and the Supreme Court early this year. Criminal Rule 16.1 will become effective December 1, 2019 absent contrary action by Congress.

The rules process is a long game, and whether any particular rules initiative achieves its desired outcome can take many years to determine. Our work can oftentimes be cyclical and the process is nearly always iterative. By way of example, I mention two developments related to initiatives previously reported as complete several years ago. First, the Advisory Committee on Criminal Rules is again “Evaluating the Rules Governing Prosecutors' Disclosure Obligations” in connection with suggestions received to broaden expert disclosure obligations under Rule 16. Second, for reasons similar to the initiative to undertake the Bankruptcy Forms Modernization Project years ago, the Advisory Committee on Bankruptcy Rules has undertaken a multi-year project to restyle the Bankruptcy Rules. I could provide other examples because, as mentioned in previous updates, the last three of the identified initiatives – Analyzing and Promoting Recent Rules Amendments, Improving the Public's Understanding of the Federal Judiciary, and Preserving the Judiciary's Core Values – are inherent in the ongoing work of the rules committees and their charge to prescribe rules of practice and procedure through a deliberative, collaborative, and public process established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. In a real sense, all undertakings of the rules committees promote one or more of these initiatives.

The Honorable Carl E. Stewart
July 19, 2019
Page 3

At the Standing Committee meeting in June, we solicited suggestions regarding updating the *Strategic Plan* for 2020. Nothing concrete surfaced during our public meeting, but I encouraged members to contact me directly should they have any ideas to share. I will be sure to pass along any input I receive from my colleagues.

As you know, the focus of the rules committees is very specific – evaluating and, if possible, improving the already-existing rules and procedures for federal courts. While this assignment is important and entails much work, it does not involve many of the broader issues that concern the Judicial Conference and the strategic planning process. As a result, I often feel that we don't contribute much to the strategic planning effort. We will continue to our best, and if you or your staff have ideas on how the rules committees can contribute more meaningfully to the next cycle of strategic planning, please let me know.

Sincerely,



David G. Campbell

cc: Lea Swanson

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**SUMMARY REPORT
LONG-RANGE PLANNING MEETING
SEPTEMBER 16, 2019**

The September 16, 2019 Long-Range Planning Meeting was facilitated by Chief Judge Carl E. Stewart, who serves as the Judiciary Planning Coordinator. Participants included Judicial Conference committee chairs, members of the Executive Committee, the Director of the Administrative Office (AO) and the Director of the Federal Judicial Center. (Appendix 1)

In welcoming participants to the meeting, Judge Stewart noted that this meeting signaled the beginning of the judiciary's planning cycle under the heading "situation analysis" and would kick off the update to the *Strategic Plan for the Federal Judiciary (Plan)*. The update process would conclude when the Executive Committee presents the updated *Plan* to the Judicial Conference, possibly at its session in September 2020.

Approach to Updating the *Strategic Plan for the Federal Judiciary*, including Formation of an Ad Hoc Strategic Planning Group

Judge Stewart confirmed that the proposed approach, including the formation of an Ad Hoc Strategic Planning Group, received broad support from committee chairs and was approved by the Executive Committee at its meeting on August 12-13, 2019.

Conference Committee Assessments of Strategic Initiatives

Judge Stewart informed participants that all Judicial Conference committees had submitted reports assessing the extent to which the strategic initiatives identified by them have achieved their intended outcomes. Given the number of initiatives – 78 initiatives supported by 19 Conference committees – Judge Stewart had shared with committee chairs, in advance of the meeting, an overview of the status of all committee initiatives.

A quick analysis, said Judge Stewart, shows that each of the seven Strategic Issues identified in the current *Plan* is addressed by one or more of the committees' initiatives. Most of the committees have several initiatives, and in many cases the same initiative addresses more than one of the seven Strategic Issues. He also pointed out that most committees designated their initiatives as "on-going." This means that very few of the initiatives are expected to achieve their projected outcomes within a five-year time frame. This speaks, said Judge Stewart, to the cumulative impact and lessons learned that the initiatives continue to generate.

Judge Stewart emphasized that the Conference committees' full reports and the overview of the status of initiatives would be shared with the Ad Hoc Strategic Planning Group, providing substantive input to inform the update of the *Plan*.

Issues and Trends Impacting the Judiciary

Judge Stewart introduced the discussion on issues and trends as the core of the meeting. The purpose of the discussion, he said, is to assist committee chairs in reviewing the 2015 *Plan*

and proposing changes to it during the upcoming Winter meetings. He hoped that the discussion would encourage participants to look beyond more immediate issues, and across jurisdictions, to identify issues that might impact the judiciary as a whole in the next five years.

To provide context for the discussion, Judge Stewart added that a small group, comprised of representatives from the Federal Judicial Center, Financial Liaison and Analysis, Judiciary Data and Analysis Office, Office of Legislative Affairs, Office of Public Affairs and the Deputy Director's Office, had solicited input from committee staffers and AO office representatives to prepare an issues and trends matrix that had been shared with Conference committee chairs in advance of the meeting. The only role of the matrix, Judge Stewart emphasized, was to kindle thoughts and encourage discussion. A 5-Year Data Snapshot, prepared by the AO's Judiciary Data and Analysis Office, provided a second reference document, and also was distributed to Conference committee chairs in advance of the meeting.

To further encourage discussion, participants were divided into four groups. At the request of Judge Stewart, four judges had agreed to serve as facilitators. Judge Stewart thanked Judge Bates, Judge Clifton, Chief Judge Martinez, and Chief Judge Sippel for facilitating discussion at their respective tables.

Discussion Notes (Appendix 2)

Next Steps in the *Plan* Update Process

Very briefly, Judge Stewart outlined next steps in the *Plan* update process as follows:

- i. **October 2019:** Report of this meeting and discussion disseminated to Chairs and shared with the Ad Hoc Strategic Planning Group (once formed).
- ii. **Winter 2019/2020:** Committees propose needed updates and other changes to the *Plan*.
- iii. **March 2020:** Long-Range Planning Meeting: Committees review status of efforts to update the *Plan*.
- iv. **Summer 2020:** Committees review and comment on the updated *Plan* draft.
- v. **August 2020:** Revised draft *Plan* considered by the Executive Committee; final changes made to the updated *Plan* draft.
- vi. **September 2020:** New version of the *Plan* considered at Judicial Conference (on the recommendation of the Executive Committee).

In closing, Judge Stewart thanked all participants, noting in particular their preparation for the meeting and thoughtful engagement in discussions.

Participants in the September 16, 2019 Long-Range Planning Meeting

Executive Committee

Hon. Merrick B. Garland, Chair
 Hon. Carl E. Stewart, Judiciary
 Planning Coordinator
 Hon. Robert J. Conrad, Jr.
 Hon. Federico A. Moreno
 Hon. Sidney R. Thomas
 Hon. Claire Eagan
 Hon. Robert A. Katzmann
 James C. Duff (ex officio, AO Director)

Committee on Audits and Administrative Office Accountability

Hon. Helen E. Burris, Chair

Committee on the Administration of the Bankruptcy System

Hon. Karen E. Schreier, Chair

Committee on the Budget

Hon. John W. Lungstrum, Chair

Committee on Codes of Conduct

Hon. Ralph R. Erickson, Chair

Committee on Court Administration and Case Management

Hon. Audrey G. Fleissig, Chair

Committee on Criminal Law

Hon. Ricardo S. Martinez, Chair

Committee on Defender Services

Hon. Raymond J. Lohier, Jr., Chair

Committee on Federal-State Jurisdiction

Hon. Richard R. Clifton, Chair

Committee on Information Technology

Hon. Thomas M. Hardiman

Committee on Intercircuit Assignments

Hon. Nicholas G. Garaufis, Chair

Committee on International Judicial Relations

Hon. Sidney H. Stein, Chair

Committee on the Judicial Branch

Hon. Rodney W. Sippel, Chair

Committee on Judicial Resources

Hon. Roslynn R. Mauskopf, Chair

Committee on Judicial Security

Hon. David W. McKeague, Chair

Committee on the Administration of the Magistrate Judge System

Hon. Nancy Freudenthal, Chair

Committee on Space and Facilities

Hon. Susan R. Bolton, Chair

Advisory Committee on Appellate Rules

Hon. Michael A. Chagares, Chair

Advisory Committee on Bankruptcy Rules

Hon. Dennis Dow, Chair

Advisory Committee on Criminal Rules

Hon. Donald W. Molloy, Chair

Advisory Committee on Evidence Rules

Hon. Debra Ann Livingston, Chair

Lee Ann Bennett

Deputy Director, Administrative Office

John S. Cooke

Director, Federal Judicial Center

Clara J. Altman

Deputy Director, Federal Judicial Center

Lea E. Swanson

Long-Range Planning Officer,
 Administrative Office

Members of the Small Group, Issues & Trends:

Brian Lynch, Brian Randolph, Clara Altman,
 Edward O'Kane, Gary Yakimov, Jackie
 Koszczuk, Jim Eaglin, Karen Lellock, Lea
 Swanson, Peter Owen, Richard Jaffe.

Administrative Office staff supporting the
 Judicial Conference and its Committees also
 attended the Long-Range Planning Meeting.

**Long-Range Planning Meeting
ISSUES AND TRENDS DISCUSSION NOTES
September 16, 2019**

#1 ROLE AND STRUCTURE OF AN INDEPENDENT JUDICIARY

A number of participants referenced a continuing trend of various threats to the independence of the judiciary, such as foreign efforts to destabilize the justice system and/or negatively impact public confidence in the court system and the rule of law that could undermine the independence of the judiciary. This also included continuing congressional interest in creating an Inspector General (IG) for the judiciary.

The report of the Ad Hoc Committee to Review the Criminal Justice Act was raised by some participants, noting the report's final recommendation related to the increased independence of the Defender Services program.

#2 SECURITY

Security, and cybersecurity in particular, was highlighted by many participants, noting that judges are viewed as high value targets in technology-based and terrorist-based threats, especially when traveling abroad. Some participants commented that compliance with judiciary-wide security policies is essential.

The state courts were identified as potential collaborators on security issues given that state courts deal with many of the same issues that are confronting the federal judiciary. Further cooperative efforts should be explored with the Conference of Chief Judges and the National Center for State Courts. In addition, other federal agencies were identified as important collaborators as the judiciary often depends on them for its security.

#3 FAIR AND IMPARTIAL TREATMENT

Participants noted that federal courts appoint counsel pursuant to the Criminal Justice Act for over 90 percent of all criminal defendants. At the same time, the volume of pro se civil and bankruptcy filings presents a resource challenge in many jurisdictions. Some participants underscored concerns that these workload and cost intensive proceedings may strain the judiciary's resources and at the same time may challenge perceptions of fair and equal treatment within the judicial process.

#4 SCIENCE, TECHNOLOGY, AND SOCIETY

A number of participants raised concerns that the judiciary’s current five-year strategic planning cycle did not track or keep up with fast-paced changes in the judiciary’s operating environment. Technology was provided as an example with changes occurring every six-nine months. Many participants noted that courts increasingly use technologies to support their work, adding that judiciary policy may need to be updated to address the advancement of technologies and the expectations placed on the courts.

Looking outside the courts, some participants drew attention to the practice of litigants hiring companies that use Artificial Intelligence (AI) and other advanced technologies to review judges’ rationales and reasoning in deciding cases, and use data analytics to try to predict what types of arguments an individual judge will find persuasive. Focusing on another aspect of data analytics, some participants were concerned that judiciary policy on the availability of data may need to be revisited so that the judiciary can better leverage data to facilitate decision-making. This also would help the judiciary to tell its own story, rather than allowing third parties to do so. This point was further underlined by some participants who were concerned that the judiciary be able to defend its integrity and refute errors in stories being told by others.

#5 NATIONAL FISCAL ENVIRONMENT

Many participants expressed concern that the current volatile fiscal environment is exacerbated by Congressional actions to mandate new, unfunded, legislative initiatives and/or to raise court filing fees to pay for new mandates.

Different approaches to managing budget uncertainty were noted, including the judiciary’s ability to absorb, to some extent, appropriations shortfalls by falling back on non-appropriated funds, such as revenues from fees and by using intercourt assignments to share critical judicial resources. Some participants noted that caseloads are not the only driver of court work and the impact of these fiscal concerns on the courts requires careful examination, as does the judiciary’s outreach strategy in communicating these concerns to Congress.

#6 ACCOUNTABILITY AND PUBLIC TRUST

Many participants focused on concerns that, in the current partisan political climate, the judiciary is under attack more than ever before. These concerns extend to growing public perceptions of the judiciary as a partisan institution – perceptions that are likely informed by foreign and domestic actors using social media to undermine the integrity of the judiciary and the judicial process. Some participants raised the possibility of developing a judiciary communication

strategy to determine the best way to defend the judiciary and judges against attacks, without compromising the non-partisan nature of the judiciary.

Along the same lines, some participants proposed exploring social media and other non-traditional media platforms as an effective way to broadcast the judiciary’s message to the public, especially to younger generations.

Participants described a range of traditional media relations among courts, with some very engaged, and others much less so. They also noted that the media covering the courts know very little about the judiciary, perhaps suggesting that training is needed for both judges and reporters to help improve the accuracy of court reporting.

Many participants highlighted public education and outreach as a priority activity to help build public trust. Participants also emphasized that public trust can only be built on a foundation of accountability to demonstrate to the public and to Congress that the judiciary is responsibly governing itself. Civics education is another key element identified by participants to raise awareness of the work of the federal courts and at the same time help build public trust.

Other matters potentially impacting public perceptions and public trust that were noted by participants include the sealing of documents and how jurors and other non-litigants experience the courts.

#7 WORKPLACE AND WELLNESS

In the context of workplace and wellness, participant discussions focused on four areas: the importance of diversity in the judiciary; the aging of the workforce; attracting and retaining millennials, and ensuring all judiciary employees are protected from inappropriate workplace conduct.

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